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

Volume 7
January 1, 1977 through December 31, 1977

U.S. Department of Labor
Labor-Management Services Administration

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

Volume 7
January 1, 1977 through December 31, 1977

This Volume Includes Assistant Secretary Decisions Nos. 777-959

U.S. Department of Labor
Ray Marshall, Secretary

Labor-Management Services Administration
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Assistant Secretary of Labor for Labor-Management Relations

Office of Federal Labor-Management Relations
Louis S. Wallerstein, Director

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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, 1977, through December 31, 1977. 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. 777-959); 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 (no Reports on Rulings of Assistant Secretary issued during this period).

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DR	=	Decertification of Exclusive Representative
NCR	=	National Consultation Rights
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Decisions of the Assistant Secretary of Labor for Labor-Management Relations Nos. 777-959

January 5, 1977

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 HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF FIELD OPERATIONS
A/SLMR No. 777

This case involves a petition for clarification of unit (CU) filed by the Social Security Administration, Bureau of Field Operations (Activity-Petitioner), seeking to clarify the status of a bargaining unit described as all nonprofessional employees of the Social Security Administration District Office, Birmingham, Alabama, and its branch offices located in Ensley, West End and Jasper, Alabama. Specifically, the Activity-Petitioner sought to clarify the unit description in accordance with the transfer of the Jasper Branch Office to the Tuscaloosa, Alabama, District and the frequent changes in branch office status and location. The matter was transferred to the Assistant Secretary for decision by the Regional Administrator pursuant to Section 206.5(a) of the Regulations.

Under all the circumstances, the Assistant Secretary concluded that a reorganization had altered the scope and character of the certified bargaining unit to the extent that the Jasper Branch Office employees no longer share a community of interest with employees in the subject certified bargaining unit. He noted that the reorganization resulted in significant changes affecting the employees of the Jasper Branch Office, including changes in overall supervision, administrative direction and control, altered areas of consideration for promotion and reduction in force procedures, and the organizational sphere within which such employees enjoyed integrated operations and experienced interchange and transfer. The Assistant Secretary further found that the continued inclusion of the Jasper Branch Office employees in the subject exclusively recognized unit could not reasonably be expected to promote effective dealings and efficiency of agency operations. The Assistant Secretary also found that the employees assigned to the Five Points West Branch Office and the East Lake Branch Office share a community of interest with the employees in the certified bargaining unit, and that the inclusion of such employees in the bargaining unit would promote effective dealings and efficiency of agency operations. In this regard, the Assistant Secretary noted the apparent agreement of the parties as well as the facts in the record supporting the finding that the employees in the two branch offices shared a community of interest with the other employees in the certified unit. However, as to the proposal by the Activity-Petitioner seeking to clarify the unit as to include employees assigned to all branch offices within its jurisdiction, the Assistant Secretary, noting that the effect of such clarification would be to automatically accrete to the unit employees of any branch office subsequently established in the District in the future, found that it would not effectuate the purposes and policies of the Order to clarify the unit in this regard.

Accordingly, the Assistant Secretary ordered that the unit be clarified so as to exclude employees assigned to the Jasper Branch Office, and to include employees assigned to the Five Points West Branch Office and the East Lake Branch Office.

A/SLMR No. 777

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF FIELD OPERATIONS

Activity-Petitioner

and Case No. 40-6971(CU)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3438, AFL-CIO 1/

Labor Organization

DECISION AND ORDER CLARIFYING UNIT

This matter is before the Assistant Secretary pursuant to Regional Administrator Lem R. Bridges' Order Transferring Case to the Assistant Secretary of Labor, dated June 29, 1976, in accordance with Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in this case, including the parties' stipulation of facts and accompanying exhibits, the Assistant Secretary finds:

The Petitioner filed a petition for clarification of a unit of employees described as "all employees of the Social Security Administration District Office, Birmingham, Alabama, and its Branch Offices located in Ensley, West End and Jasper, Alabama." 2/ Specifically, the Activity-Petitioner seeks to clarify the unit description in accordance with the transfer of the Jasper Branch Office to the Tuscaloosa, Alabama, District Office. In this regard, the Activity-Petitioner seeks to change the unit description to read: "All employees of the Social Security Administration, Birmingham District," with the normal exclusions. The Activity-Petitioner contends that the new unit description would remove the Jasper Branch from the bargaining unit, and accommodate the frequent changes in branch office status and location within the Birmingham District Office. The AFGE took no position with regard to the instant petition.

1/ The American Federation of Government Employees, Local 2206, AFL-CIO, was granted exclusive recognition for the subject unit of employees on July 9, 1971, and on May 28, 1975, the exclusive representative amended its Certification of Representative, changing the name of the certified exclusive representative to the American Federation of Government Employees, Local 3438, AFL-CIO (AFGE).

2/ The unit description appears as described in the Certification of Representative.

The record reveals that at the time of the original certification of the AFGE on July 9, 1971, and thereafter, the employees of the Birmingham District Office and its subordinate branch offices enjoyed a clear and identifiable community of interest separate and distinct from other employees of the Activity-Petitioner. In this regard, the evidence discloses that such employees enjoyed common overall supervision, frequent interchange and transfer, and were subject to common and uniform personnel policies and practices and, generally, similar terms and conditions of employment.

The record further reveals that at an undisclosed time prior to July 1973, the West End Branch Office was physically relocated and renamed the Five Points West Branch Office. Further, in July 1973, a new branch office was established known as the East Lake Branch Office. The evidence further discloses that sometime subsequent to July 1973, the parties, by agreement, and without recourse to the procedures established by the Assistant Secretary, accreted to the certified bargaining unit all eligible employees of both the Five Points West Branch Office and the East Lake Branch Office. Thereafter, the employees of both of these branch offices were treated by both parties as members of the subject certified exclusive bargaining unit and no question has been raised as to their status by the Activity-Petitioner.

Thereafter, on July 1, 1975, pursuant to a reorganization, the Jasper Branch Office was transferred from the Birmingham, Alabama, District Office to the Tuscaloosa, Alabama, District Office. Although the employees of the Jasper Branch Office remained in the same location and continued to perform essentially the same duties under the same immediate supervision, the evidence discloses that, as a consequence of the reorganization, significant changes occurred. Thus, the record reveals that subsequent to the reorganization the employees of the Jasper Branch Office became subject to the overall supervision of the Tuscaloosa, Alabama, District Office. Further, they are subject to the personnel policies and practices established by the Tuscaloosa, Alabama, District Office, such as promotions, transfers, hiring, within-grade increases, training, disciplinary actions, leave policy, grievance processing, performance appraisals and awards, as well as the area of consideration for promotions and reduction in force procedures established by the Tuscaloosa District Office. In addition, the Jasper Branch Office employees are subject to the Tuscaloosa, Alabama, District budgetary policies affecting travel and overtime, as well as operational policies affecting such matters as space and facilities, and numbers and types of positions maintained by the Jasper Branch Office. Further, the employees of the Jasper Branch Office no longer experience interchange and/or transfer with employees of the Birmingham, Alabama, District Office, but do, in fact, interchange and/or transfer with employees of the Tuscaloosa, Alabama, District Office.

Based on the foregoing circumstances, I conclude that the subject certified bargaining unit experienced an alteration of its scope and character as a consequence of the the July 1, 1975, reorganization to

the extent that the employees of the Jasper Branch Office no longer continue to share a community of interest with the employees of the Birmingham, Alabama, District Office. 3/ Thus, as noted above, the reorganization resulted in significant changes affecting the employees of the Jasper Branch Office, including changes in overall supervision, administrative direction and control, altered areas of consideration for promotion and reduction in force procedures, and changed the organizational sphere within which such employees enjoyed integrated operations and experienced interchange and transfer. Moreover, under the circumstances outlined above, I find that the continued inclusion of the Jasper Branch Office employees in the subject exclusively recognized unit could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the subject exclusively recognized bargaining unit be clarified to exclude employees of the Jasper Branch Office.

Further, noting the apparent agreement of the parties and the circumstances set forth above, I find that employees assigned to the Five Points West Branch Office and the East Lake Branch Office share a community of interest with the employees in the certified bargaining unit exclusively represented by the AFGE, and that the inclusion of such employees in the certified unit will promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the subject exclusively certified bargaining unit be clarified to include the employees assigned to the Five Points West Branch Office and the East Lake Branch Office.

With regard to the Activity-Petitioner's request to clarify the unit description so as to include all employees assigned to the Birmingham, Alabama, District, including employees assigned to all branch offices within its jurisdiction, I do not concur. Although the avowed purpose is to accommodate frequent changes in branch office status and location within the District, the effect of such clarification would be to automatically accrete to the certified bargaining unit employees of any branch office which may subsequently be established in the Birmingham District in the future. Since the establishment of such offices in the future, and the circumstances under which employees would be assigned to such offices, are purely speculative at this time, I find that it would not effectuate the purposes and policies of the Order to clarify the unit in this regard where, as here, the effect of such clarification would be to add to the certified unit employees of branch offices which have not, as yet, been established within the Birmingham, Alabama, District. 4/ In my view, the unit placement of new branch offices can best be assessed when they are established upon the filing of an appropriate petition. Accordingly, I shall not clarify the unit to include automatically all employees of all branch offices of the Social Security Administration, Birmingham District.

3/ See United States Coast Guard Air Station, Non-Appropriated Fund Activity, Cape Cod, Massachusetts, A/SLMR No. 561.

4/ Cf. Department of Health, Education and Welfare, Social and Rehabilitation Service, Central Office, Washington, D.C., A/SLMR No. 632.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein be, and it hereby is, clarified by excluding from said unit all employees assigned to the Jasper Branch Office, and by including in said unit all employees assigned to the Five Points West Branch Office and the East Lake Branch Office, and by changing the unit description to:

> All employees of the Social Security Administration, Birmingham, Alabama, District Office, including employees assigned to its branch offices located in Ensley, Five Points West and East Lake, excluding all management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in Executive Order 11491, as amended.

Dated, Washington, D.C.
January 5, 1977

Bernard E. DeLury, Assistant Secretary of Labor for Labor-Management Relations

January 19, 1977

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

INDIAN HEALTH SERVICE AREA OFFICE,
WINDOW ROCK, ARIZONA, AND PUBLIC
HEALTH SERVICE INDIAN HOSPITAL,
FORT DEFIANCE, ARIZONA, DEPARTMENT
OF HEALTH, EDUCATION AND WELFARE
A/SLMR No. 778

The subject case involved a representation petition filed by the Navajo Nation Health Care Employees, Local Union No. 1376, Laborers International Union of North America, AFL-CIO (Laborers) seeking a unit consisting essentially of all General Schedule and Wage Grade professional and nonprofessional employees of the Activity, which unit is currently represented by the National Federation of Federal Employees, Local No. 189 (NFFE), and a petition filed by the Arizona Nurses Association (ANA) seeking a unit consisting essentially of all full-time and regular part-time registered nurses currently within the exclusively recognized unit represented by the NFFE. The Activity and the NFFE contend that the severance sought by the ANA would be inappropriate because it would disturb the established and effective existing bargaining relationship. The Laborers asserts that the existing unit represented exclusively by the NFFE should not be modified or changed.

The Assistant Secretary found no "unusual circumstances" justifying a severance of the registered nurses from the exclusively recognized unit and, in accordance with the policy enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, denied the requested severance and dismissed the ANA's petition. He further found that the employees in the unit petitioned for by the Laborers, which includes all of the employees of the Activity, share a clear and identifiable community of interest and that such unit will continue to promote effective dealings and efficiency of agency operations. Accordingly, he directed an election in such unit. In this regard, he noted that Section 10(b)(4) of the Order, which precludes an election of a mixed unit of professional and nonprofessional employees without affording the professional employees an opportunity of separately expressing their desires, continues to be applicable notwithstanding the fact that the professional employees have already enjoyed the opportunity of such separate expression in a prior election. Consequently, he ordered that the professional employees have the opportunity in the election ordered of a separate expression under Section 10(b)(4) of the Order.

A/SLMR No. 778

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INDIAN HEALTH SERVICE AREA OFFICE,
WINDOW ROCK, ARIZONA, AND PUBLIC
HEALTH SERVICE INDIAN HOSPITAL,
FORT DEFIANCE, ARIZONA, DEPARTMENT
OF HEALTH, EDUCATION AND WELFARE

Activity 1/

and Case No. 72-6062

NAVAJO NATION HEALTH CARE EMPLOYEES,
LOCAL UNION NO. 1376, LABORERS
INTERNATIONAL UNION OF NORTH AMERICA,
AFL-CIO

Petitioner 2/

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL NO. 189

Intervenor

INDIAN HEALTH SERVICE AREA OFFICE,
WINDOW ROCK, ARIZONA, AND PUBLIC
HEALTH SERVICE INDIAN HOSPITAL,
FORT DEFIANCE, ARIZONA, DEPARTMENT
OF HEALTH, EDUCATION AND WELFARE

Activity Case No. 72-6093

and

ARIZONA NURSES ASSOCIATION

Petitioner

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Petitioner, Navajo Health Care Employees, Local Union No. 1376, Laborers International Union of North America, AFL-CIO, hereinafter called Laborers, appears as amended at the hearing.

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL NO. 189

Intervenor

and

NAVAJO NATION HEALTH CARE EMPLOYEES,
LOCAL UNION NO. 1376, LABORERS
INTERNATIONAL UNION OF NORTH AMERICA,
AFL-CIO

Intervenor

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 Hugo S. Rossitter. 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 briefs filed by Arizona Nurses Association, hereinafter called ANA, and National Federation of Federal Employees, Local No. 189, hereinafter called NFFE, the Assistant Secretary finds:

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

2. In Case No. 72-6062, the Laborers seeks an election in a unit consisting essentially of all General Schedule and Wage Grade professional and nonprofessional employees of the Activity. This unit is currently represented on an exclusive basis by the NFFE which was certified as the exclusive representative on December 14, 1970. The record reveals that, although an agreement previously was negotiated by the NFFE and the Activity, approval of the agreement was denied by higher level agency management. No negotiated agreement was executed thereafter, and although the NFFE requested bargaining on or about April 28, 1976, negotiations were held in abeyance pending the outcome of the subject petitions.

In Case No. 72-6093, the ANA seeks an election in a unit consisting essentially of all full-time and regular part-time registered nurses employed by the Activity who currently are included within the exclusively recognized unit represented by the NFFE.

The Activity and the NFFE contend that severance of the petitioned for nurses from the NFFE's exclusively recognized unit would be inappropriate because such a severance would disturb the established and effective existing bargaining relationship. The Activity further asserts that should the Assistant Secretary find two separate units appropriate, one should cover all professional employees of the Activity, not merely the nurses. The Laborers takes the view that the petition filed by the ANA should be dismissed, and states that the existing unit represented by the NFFE is appropriate and there is no reason to modify or change it. The ANA, on the other hand, maintains that a separate unit of registered nurses constitutes an appropriate unit based on their unique, clear, and distinctly identifiable community of interest separate and apart from other professional employees of the Activity. It argues that the instant case is distinguishable from those situations in which "carve outs" have been denied. In those cases, it asserts, only one petition was filed seeking to represent a limited identifiable group within an overall existing unit, with no question concerning representation raised with respect to the particular existing unit involved. In the subject case, however, the ANA points out that the Laborers' petition raises a question concerning representation in the overall existing unit represented by the NFFE. Thus, in the ANA's view, even if there were no petition seeking a separate unit of registered nurses, the existing unit may be subject to change as a result of the Laborers' petition because if an election is ordered "the professional employees must be given the ballot option as to whether or not they wish to continue in a combined professional and nonprofessional unit." 3/ Also, it asserts that the record does not establish that the NFFE has effectively represented the existing unit. In addition, the ANA contends that the Public Health Nurses employed

3/ I agree that where an election is ordered in an existing mixed unit of professionals and nonprofessionals, the professional employees must be given the option to decide whether they wish to continue in a combined professional and nonprofessional employee unit. In this regard, I view Section 10(b)(4) of the Order, which precludes the inclusion of professional employees in a unit with employees who are not professionals without affording the professional employees an opportunity of separately expressing their desires respecting such inclusion, as applicable also to subsequent elections in which questions concerning representation have been raised in the mixed unit. Thus, in my view, the privilege accorded by Section 10(b)(4) to the professional employees is not necessarily limited to a single expression of their wishes and separate balloting for the professional employees involved herein should not be affected because they have already enjoyed the opportunity of such separate expression in the election held on November 20, 1970, which resulted in the certification of the NFFE on December 14, 1970, for a mixed unit of professional and nonprofessional employees.

by the Activity who are members of the Commissioned Officers Corps should be included in the unit. 4/

The Indian Health Service, which is part of Health Services and Mental Administration, United States Public Health Service, an organizational component of the Department of Health, Education and Welfare, is divided into eight service areas of which the Activity is one. The mission of the Activity, the Navajo Indian Health Service, is basically to provide the best of health care to all Indian people within its boundaries and jurisdiction. The Service Unit is an organizational entity of the Activity under the direction of the Service Unit Director who reports directly to the director of the Navajo Indian Health Service. It encompasses the Public Health Service Indian Hospital, including the in and out-patient clinics in Fort Defiance, Arizona, and the Indian Health Service Area Office, in Window Rock, Arizona. The Activity employs approximately 267 employees, of whom some 40 are registered nurses constituting a majority of its professional employees.

As noted above, the Laborers' petition covers the same unit currently represented by the NFFE. The evidence indicates that the employees in the claimed unit, which includes all of the employees of the Activity, share a clear and identifiable community of interest, and that such unit has and will, as asserted by the Activity, continue to promote effective dealings and efficiency of agency operations. Accordingly, I find the unit petitioned for by the Laborers, for which the NFFE currently is the exclusive representative, is appropriate for the purpose of exclusive recognition. 5/

4/ These nurses currently are excluded from the existing unit represented by the NFFE. I shall continue to exclude the Public Health Nurses employed by the Activity who are members of the Commissioned Officers Corps from any unit found appropriate as they are not civilian employees within the meaning of Title 5 of the United States Code. See United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266, and Department of Health, Education and Welfare (HEW), Health Services and Mental Administration (HSMHA), Maternal and Child Health Services, A/SLMR No. 192.

5/ At the hearing, the parties stipulated that the Public Health Nurse Consultant at the Window Rock Area Office, the Director of Nursing, the Assistant Director of Nursing, and the Director of Community Health Nursing Services at Fort Defiance Hospital should be excluded from the unit because they are either supervisors within the meaning of Section 2(c) of the Order, or management officials. As there was no record evidence to the contrary, I shall exclude these employees from the unit found appropriate.

Further, I find that dismissal of the ANA's petition is warranted. In this regard, the Assistant Secretary has held that absent "unusual circumstances," where the evidence shows that an established, effective, and fair collective bargaining relationship has existed, severance from an established more comprehensive unit will not be permitted. 6/ In the instant case, the record reveals that the NFFE and the Activity have conducted regular meetings which have resulted in the implementation of certain practices designed to benefit employees in the unit. Thus, the NFFE has been instrumental in effecting the establishment of training courses, and the parties have worked out, among others, local procedures with respect to dues check off and official time regarding the attendance of employees at regional conferences sponsored by the NFFE. Further, the evidence reflects that the NFFE has represented all unit employees, and there is no indication that the NFFE has failed or refused to represent any unit employees, including those in the ANA's proposed unit, regarding grievances or any other matters affecting their terms and conditions of employment. Based on the foregoing, I find that no "unusual circumstances" exist which would warrant the severance of the registered nurses from the existing unit, or from a unit of other professional employees. Accordingly, I shall dismiss the ANA's petition. 7/

The Activity contends that its head nurses are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit. The record indicates that head nurses have the administrative and clinical responsibility for providing continuity of nursing care on a 24-hour basis. Typically, the tour for the head nurses is the day tour. The head nurse is responsible for planning and making daily work assignments and schedules, and reviewing the work of the nursing personnel; has authority to grant leave subject to review by the Director of Nursing who usually concurs with the head nurse's decision; evaluates the performance of the staff nurses; and makes recommendations with respect to promotions or disciplinary action which are generally sustained. In addition, the record reveals several instances where recommendations for awards were initiated by head nurses and were generally approved. Under these circumstances, I find that head nurses are supervisors within the meaning of Section 2(c) of the Order inasmuch as they assign and review work, evaluate performance, and have made effective recommendations

6/ See United States Naval Construction Battalion Center, A/SLMR No. 8.

7/ Cf. Veterans Administration Hospital, Portland, Oregon, A/SLMR No. 308, Veterans Administration Center, Mountain Home, Tennessee, A/SLMR No. 89, and Veterans Administration Center, Togus, Maine, A/SLMR No. 84. The fact that the Laborers' petition raises a question concerning representation in the overall existing unit represented by the NFFE was not considered to warrant a contrary result.

with respect to promotions and disciplinary actions, and awards. Accordingly, I shall exclude them from the unit found appropriate.

I find that the following employees of the Activity may constitute a unit appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

> All General Schedule and Wage Grade professional and nonprofessional employees of the Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, excluding all temporary, part-time, and intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

As stated above, the unit found appropriate includes professional employees, and, therefore, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following voting groups:

Voting Group (a): All General Schedule and Wage Grade professional employees of the Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, excluding all nonprofessional employees, temporary, part-time, and intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

Voting Group (b): All General Schedule and Wage Grade nonprofessional employees of the Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, excluding all professional employees, temporary, part-time, and intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

The employees in the nonprofessional voting group (b) will be polled whether they desire to be represented by the NFFE, the Laborers, or neither.

The employees in the professional voting group (a) will be asked two questions on their ballot: (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 NFFE, the Laborers, or neither. In the event that a majority of the valid votes of voting group (a) is 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) is 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 the NFFE, the Laborers or no labor organization 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 the 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 General Schedule and Wage Grade professional and nonprofessional employees of the Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, excluding all temporary, part-time, and intermittent 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 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 will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

> (a) All General Schedule and Wage Grade employees of the Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, excluding all professional employees, temporary, part-time, and intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

(b) All General Schedule and Wage Grade professional employees of the Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, excluding all nonprofessional employees, temporary, part-time, and intermittent employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors as defined in the Order.

ORDER

IT IS HEREBY ORDERED that the petition filed in Case No. 72-6093 be, and it hereby is, dismissed.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted, 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 Navajo Nation Health Care Employees, Local Union No. 1376, Laborers International Union of North America, AFL-CIO, or by National Federation of Federal Employees, Local No. 189, or by neither.

Dated, Washington, D. C.
January 19, 1977

Bernard E. DeLury, Assistant Secretary of Labor for Labor-Management Relations

January 19, 1977

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

DEFENSE PROPERTY DISPOSAL SERVICE,
DEFENSE PROPERTY DISPOSAL REGIONS,
MEMPHIS, COLUMBUS, and OGDEN, et. al.
A/SLMR No. 779

This case arose as a result of petitions filed by the American Federation of Government Employees, AFL-CIO, which was joined at the hearing by the International Association of Machinists and Aerospace Workers, AFL-CIO, and the Metal Trades Department, AFL-CIO, as Joint-Petitioners, seeking separate elections in units composed of all nonprofessional employees of the Defense Property Disposal Service (DPDS) employed in its Defense Property Disposal Regions (DPDR's) located at Memphis, Tennessee, Columbus, Ohio, and Ogden, Utah. The National Federation of Federal Employees, (IND.), through various Locals, filed numerous petitions seeking separate units of all nonprofessional employees of certain designated Defense Property Disposal Offices (DPDO's) of the DPDS. The Activity contended that no unit smaller than a DPDR is appropriate for the purpose of exclusive recognition under the Order.

The Assistant Secretary found that separate units of all nonprofessional employees of the DPDR's were appropriate for the purpose of exclusive recognition. In this regard, he noted that the DPDS employees in each region enjoy common overall supervision, uniform personnel policies and practices, and essentially similar working conditions, and that there is a substantial degree of transfers of employees within each DPDR as well as work related contacts. He further noted that authority for personnel and labor relations matters existed at the Regional level. As a result, the Assistant Secretary found that the employees assigned to the DPDR's in Memphis, Tennessee, Columbus, Ohio, and Odgen, Utah, share a clear and identifiable community of interest separate and distinct from each other and from the other DPDS employees and that such region-wide units would promote effective dealings and efficiency of agency operations. Accordingly, he ordered separate elections among the employees assigned to the DPDR Memphis, Tennessee, DPDR Columbus, Ohio, and DPDR Odgen, Utah.

The Assistant Secretary also found that separate units of nonprofessional employees of the DPDO's as petitioned for by NFFE, were not appropriate for the purpose of exclusive recognition under the Order. In this regard, he noted that the DPDO's are organizational components of the DPDR's and are subject to the authority and responsibility of the Regional Commanders within their respective regions. He noted also that the job descriptions and duties of the employees in the claimed DPDO units are essentially similar to those of other employees in the DPDR's, and that all employees in the individual regions enjoy essentially similar working conditions and common personnel policies and practices established by the respective Regional Commanders and there are numerous

instances of transfers among certain of the employees of the various DPDO's within the respective DPDR's. Under these circumstances, the Assistant Secretary found employees in the claimed DPDO units did not enjoy a clear and identifable community of interest separate and distinct from each other or from other employees in their respective regions. Moreover, noting that the Defense Property Disposal Officers have been delegated minimal authority with respect to personnel and labor relations matters, he found that the claimed units would artifically fragment the three DPDR's and could not reasonably be expected to promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary ordered that the petitions filed by NFFE be dismissed and that separate elections be held in the three DPDR's.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE PROPERTY DISPOSAL REGION, MEMPHIS,
DEFENSE SUPPLY AGENCY

Activity

and Case No. 41-3407(RO)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
(AFL-CIO), INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
AND METAL TRADES DEPARTMENT, AFL-CIO

Joint Petitioners 1/

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, (IND.)

Intervenor

DEFENSE PROPERTY DISPOSAL REGION, COLUMBUS, OHIO,
DEFENSE SUPPLY AGENCY

Activity

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
(AFL-CIO), INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
AND METAL TRADES DEPARTMENT, AFL-CIO

Joint Petitioners

and Case No. 53-7040(RO)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, (IND.)

Intervenor

DEFENSE PROPERTY DISPOSAL SERVICE, OGDEN REGION,
DEFENSE SUPPLY AGENCY

Activity

and Case No. 61-2173(RO)

1/ The Joint Petitioners' name appears as amended at the hearing.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO), INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND METAL TRADES DEPARTMENT, AFL-CIO

Joint Petitioners

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, (IND.)

Intervenor

DEFENSE PROPERTY DISPOSAL OFFICE, DEFENSE PROPERTY DISPOSAL SERVICE, MECHANICSBURG, PENNSYLVANIA, et. al.

Activity

and Case Nos. 20-4267(RO), etc.

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1276 (IND.), et. al.

Petitioner 2/

DEFENSE PROPERTY DISPOSAL OFFICE, DEFENSE PROPERTY DISPOSAL SERVICE, (SAVANNA, ILLINOIS)

Activity

and Case No. 50-9683(RO)

GOVERNMENT EMPLOYEES ASSISTANCE COUNCIL, INC., LOCAL No. 2

Petitioner

2/ Numerous locals affiliated with the National Federation of Federal Employees, (Ind.), hereinafter called NFFE, filed additional representation petitions involving numerous Defense Property Disposal Offices, hereinafter called DPDO's, of the Defense Property Disposal Service, hereinafter called DPDS, in various locations throughout the Continental United States in Case Nos. 20-4268(RO); 20-4295(RO); 20-3950(RO); 22-5027(RO); 22-5029(RO); 22-5037(RO); 22-5049(RO); 22-5050(RO); 22-5054(RO); 22-5055(RO); 22-5071(RO); 31-7529(RO); 32-3273(RO); 35-2935(RO); 40-5148(RO); 40-5149(RO); 40-5150(RO); 40-5151(RO); 40-5152(RO); 40-5153(RO); 40-5154(RO); 40-5155(RO); 40-5157(RO); 40-5158(RO); 40-5159(RO); 41-3418(RO); 41-3419(RO); 41-3420(RO); 42-2338(RO); 42-2362(RO); 42-2363(RO); 42-2388(RO); 50-9727(RO); 50-11000(RO); 50-11019(RO); 53-7018(RO); 60-3445(RO); 60-3526(RO); 60-3530(RO); 61-2174(RO); 61-2210(RO); 61-2211(RO); 60-2212(RO); 61-2222(RO); 62-3829(RO); 63-4222(RO); 63-4534(RO); 63-4576(RO); 63-4583(RO); 70-4111(RO); 72-4281(RO); 72-4350(RO); 72-4463(RO); 72-4464(RO); 72-4465(RO); 72-4498(RO); 72-4511(RO); and 72-4512(RO).

DECISION, ORDER 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 Richard C. Grant, Sr. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 3/

3/ Over the objection of the NFFE, the Hearing Officer granted the motion of the American Federation of Government Employees, AFL-CIO, hereinafter called AFGE, to amend its petitions in Case Nos. 41-3407(RO), 53-7040(RO) and 61-2173(RO) to show as Joint Petitioners the AFGE, the International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called IAM, and the Metal Trades Department, AFL-CIO, hereinafter called MTD. Thereafter, the NFFE renewed its objection in its post-hearing brief, arguing that it would be inappropriate to allow such motion without the knowledge or assent of the employees who signed the showing of interest for the various Joint Petitioners, as such employees had no opportunity to express their desire as to whether or not they wished to be represented by the Joint Petitioners. In this regard, the NFFE cited Veterans Administration Hosptial, Montrose, New York, A/SLMR No. 470. I find that the NFFE's contention and the case cited in support thereof to be inapposite in the instant situation. Thus, in the cited case, the Assistant Secretary found inappropriate an attempt by an exclusively recognized bargaining representative to change its affiliation from one national labor organization to another without first affording the employees involved an opportunity to express their desire in a secret ballot election. In the instant case, however, as discussed in detail below, the employees involved will have an opportunity to express their desire in a secret ballot election as to whether or not they wish to be represented exclusively by the Joint Petitioners. Under these circumstances, I affirm the ruling of the Hearing Officer.

As a consequence of the Hearing Officer's ruling on the AFGE's motion to amend its petitions, as noted above, and in order to protect its interest in these matters, on May 28, 1976, as well as by mailgram to the Hearing Officer on July 2, 1976, the NFFE requested intervention status in Case Nos. 53-7040(RO) and 61-2173(RO), as it previously had done in Case No. 41-3407(RO). At the hearing, as well as in its post-hearing brief, the Joint Petitioners argued that the NFFE's requests should be denied as untimely filed. Under the peculiar circumstances herein, and as I have been administratively advised that the NFFE has a sufficient showing of interest to support its requests to intervene in the more comprehensive, region-wide units sought by the Joint Petitioners by virtue of the showing of interest submitted in support of its petitions seeking units encompassed by the claimed region-wide units, I hereby grant the NFFE's request to intervene in Case Nos. 53-7040(RO) and 61-2173(RO).

Finally, during the course of the hearing, and partially as a consequence of the above actions, the various parties herein withdrew certain petitions and interventions. Thus, the AFGE withdrew its petition in Case No. 53-7038(RO); the IAM withdrew its petitions

(Continued)

Upon the entire record in these cases, including the briefs filed by the DPDS, the NFFE and the Joint Petitioners, the Assistant Secretary finds: 4/

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

2. In Case No. 41-3407(RO), the Joint Petitioners seek an election in a unit of all Wage Grade and General Schedule employees of Region 2, Defense Property Disposal Region, Memphis, Tennessee, including the Regional Headquarters, excluding employees of the DPDO's located at Eglin Air Force Base, Florida, Sheppard Air Force Base, Texas, and the Marine Corps Air Station Cherry Point, North Carolina, professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order.

In Case No. 53-7040(RO), the Joint Petitioners seek an election in a unit of all Wage Grade and General Schedule employees of the Defense Supply Agency (DSA), DPDS, Defense Property Disposal Region, Columbus, Ohio, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

In Case No. 61-2173(RO), the Joint Petitioners seek an election in a unit of all full-time, part-time and temporary employees expected to be employed over 90 days, serviced by the personnel office of the DPDS, Ogden, Utah, Region, excluding all DPDS employees located at Davis Monthan Air Force Base, Arizona, Mountain Home Air Force Base, Idaho, Minot Air Force Base, Minot, North Dakota, and Camp Pendleton MCB, California, who had already been petitioned for, management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order.

3/ in Case Nos. 50-11020(RO) and 53-5719(RO), as well as its intervention in all other cases herein; the MTD withdrew its interventions in all cases herein; and the NFFE withdrew its petitions in Case Nos. 41-3421(RO), 60-3528(RO), 60-3529(RO), 71-2681(RO), and 72-4513(RO).

4/ Although the National Association of Government Employees (Ind.), hereinafter called NAGE, intervened in Case No. 72-4512(RO), and was notified of the hearing in this matter, it did not appear at the hearing. I find that the NAGE's failure to appear at the hearing constitutes, in effect, a disclaimer of interest in representing the petitioned for employees. Under these circumstances, I hereby dismiss the NAGE's intervention in Case No. 72-4512(RO).

In Case No. 20-4267(RO), the NFFE seeks an election in a unit of all Wage Grade and General Schedule employees of the DPDO, DSA, Mechanicsburg, Pennsylvania, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order. 5/

In Case No. 50-9683(RO), the Government Employees Assistance Council, Inc., Local No. 2, hereinafter called GEAC, seeks an election in a unit of all Wage Grade and General Schedule employees of the DPDO, Savanna Army Depot, Savanna, Illinois, with the standard exclusions. 6/

The Joint Petitioners contend that the three separate petitioned for region-wide units of the DPDS are appropriate for the purpose of exclusive recognition under the Order as such units embrace all employees who share a clear and identifiable community of interest separate and distinct from all other employees of the DPDS and will promote effective dealings and efficiency of agency operations. On the other hand, the NFFE contends that its claimed DPDO units are appropriate for the purpose of exclusive recognition under the Order in that employees in such units enjoy a separate and distinct community of interest and that such units will promote effective dealings and efficiency of agency operations. Contrary to the Joint-Petitioners, the NFFE contends that the claimed region-wide units are not appropriate, as employees in such units do not share a clear and identifiable community of interest. Nor, in the NFFE's view, would such units promote effective dealings in view of the vast geographic areas encompassed by the regions of the DPDS. In agreement with the Joint-Petitioners, the DPDS contends that the petitioned for region-wide units are appropriate for the purpose of exclusive recognition under the Order and that the units sought by the NFFE would not promote effective dealings or efficiency of agency operations in view of the absence of effective and substantial authority for labor relations matters at the organizational level of recognition sought by the NFFE.

The DPDS, an activity within the DSA, was established in 1973 to provide for the integrated management of personal property reutilization and disposal operations of the Department of Defense on a world-wide basis. In this regard, the DPDS operates as a clearinghouse to help achieve optimum reutilization of Department of Defense owned materiel and equipment. The Headquarters of the DPDS is located in Battle Creek, Michigan, and consists of approximately 100 employees. The DPDS is

5/ In the numerous petitions filed by various NFFE locals involving DPDO's at various locations throughout the country, as noted above in footnote 2, the NFFE sought essentially the same type of unit as petitioned for in Case No. 20-4267(RO), limited to nonprofessional employees of the particular DPDO involved.

6/ Although the GEAC filed the petition in Case No. 50-9683(RO), it did not appear at the hearing in this matter. I find that the GEAC's failure to appear at the hearing constitutes, in effect, a disclaimer of interest in representing the petitioned for employees. Under these circumstances, I shall dismiss the GEAC's petition in Case No. 50-9683(RO).

administered by a Commander and a Deputy Commander. Its Headquarters Staff is divided into the following 11 Offices and Directorates: Special Assistant for Public Affairs; Military Personnel Officer; Security Officer; Safety Officer; Office of Counsel; Office of Plans and Management; Office of Comptroller; Office of Civilian Personnel; Directorate of Property Accounting and Disposal Operations; Directorate of Reutilization; and Directorate of Sales. The Headquarters staff establishes and administers the operational policies governing the world-wide operations of the DPDS. In addition, the DPDS is organizationally composed of five Defense Property Disposal Regions, hereinafter called DPDR's, which are headquarterd at: Columbus, Ohio; Memphis, Tennessee; Ogden, Utah; Lindsey Air Force Station, Wiesbaden, Germany; and Ft. Kamehameha, Hawaii. The DPDR Memphis, Tennessee, consists of a headquarters, 61 DPDO's, and 5 Residences, employing approximately 1,480 employees; the DPDR Columbus, Ohio, consists of a headquarters, 56 DPDO's, and 5 Residencies, employing approximately 1,200 employees; and the DPDR Ogden, Utah, consists of a headquarters, 35 DPDO's and 4 Residencies, employing approximately 1,400 employees. Each of the 3 DPDR's within the Continental United States are located with a DSA "host" activity which provides personnnel services throughout that region. The DPDR's are headed by a Commander, who is a military officer, and a Deputy Commander, who is a civilian employee. The headquarters of each of the DPDR's within the Continental United States is organized essentially the same as the DPDS headquarters, but consists only of 8 to 10 offices and directorates which, under the direction of the Commander, are responsible for the execution of all missions and functions of the DPDS within that particular region. The DPDR's also are composed of a number of "Residencies" which are composed of groups of functional specialists who are assigned to the region, but who perform their functions on site throughout the region, as extensions of the DPDR, in such prescribed functional areas as sales, surveillance and reutilization. Each DPDR issues its own regulations with guidelines established by the DPDS headquarters. These regulations vary from region to region depending on the type of work performed within that region, as well as the regulations of the specific DSA "host" activity at which it is located. All personnel actions are reviewed, approved and processed at the regional level and all personnel records are kept at the regional headquarters. A personnel specialist at the DPDR is assigned to handle certain DPDO's, and his name and phone number are posted at those DPDO's as the point of contact for personnel advice and actions. The payroll function is located at the DPDR and paychecks are distributed to employees from the DPDR payroll office. While there is no collective bargaining history in the DPDS, the record discloses that only the Regional Commander has been delegated authority to handle labor relations matters and is the final authority regarding grievances arising within his region.

All transfers, details and promotions must be approved by the Regional Commander. The record reveals that while there are minimal transfers between regions, there are numerous transfers occurring within each region, either from the Regional Office to a DPDO, from one DPDO to another, or from a DPDO to the Regional Office. Although, normally, there is little work contact between individual DPDO's within a DPDR, the record reveals that when there is a work backlog certain property may be moved physically from one DPDO to another along with the attendant responsibility. Further, in certain circumstances, when there is a substantial backlog, a "roving" DPDO may be established by the DPDR, by drawing employees from each of the DPDO's within the DPDR and temporarily moving them wherever the manpower is needed. In addition, the record shows substantial contact between the employees of the DPDO's and Residencies who, although they are assigned to the Regional Office, assist the DPDO's in their functional specialties.

The DPDO's are the operating arm of the DPDR and vary in size from 6 to 140 employees. They are headed by a Defense Property Disposal Officer. The DPDO's are responsible for receiving, classifying, segregating and reporting excess material for screening, collecting, preparing for sale, and, in some instances, selling. The larger DPDO's are organized into four components having separate branches for sales operations, reutilization, documentation and property management. Smaller DPDO's have one to three components. The larger DPDO's also may have a number of "holding activities," which are auxiliary property management facilities headed by a DPDS Property Disposal Agent, and are located at a site separate from, but organizationally assigned to, the DPDO. Although the Defense Property Disposal Officer at each of the DPDO's is delegated certain discretion in carrying out day-to-day functions, the evidence establishes that he is restricted by the guidelines established by the regulations issued by the DPDR. The Defense Property Disposal Officer has a key role in the negotiation of the agreement with the "host" activity where it is located, covering such matters as space, security, and heat, as well as other necessary services. However, although the Defense Property Disposal Officer may initiate numerous personnel actions, such as selection of new employees, merit promotions or incentive awards, these actions must be approved by the Regional Commander.

Based on all the above circumstances, I find that separate units of all nonprofessional employees of the DPDR's within the Continental United States, as petitioned for by the Joint Petitioners in Case Nos. 41-3407(RO), 53-7040(RO) and 61-2173(RO), are appropriate for the purpose of exclusive recognition under the Order. Thus, the record reflects that the DPDS employees in each region enjoy common overall supervision, uniform personnel policies and practices, essentially similar working conditions, a substantial degree of transfer within their individual regions, and work related contacts within the geographical boundaries of each region. Under these circumstances, I find that the employees assigned to the DPDR Memphis, Tennessee, the DPDR, Columbus, Ohio, and the DPDR Ogden, Utah, share a clear and identifiable community of interest separate and distinct from each other and from other DPDS employees. Moreover, noting the authority for personnel and labor relations matters at the Regional level, I find that such units will promote effective dealings and efficiency of agency operations. 7/

7/ Cf. Federal Energy Administration, A/SLMR No. 611.

Accordingly, I shall order separate elections among the employees assigned to the DPDR Memphis, Tennessee, the DPDR Columbus, Ohio, and the DPDR Ogden, Utah.

Further, under all the circumstances herein, I find that separate units of nonprofessional employees of the various DPDO's, as petitioned for by the NFFE, are not appropriate for the purpose of exclusive recognition under the Order. Thus, as noted above, the evidence establishes that the DPDO's are organizational components of the DPDS regions, are subject to the authority and responsibility of the Regional Commanders within their respective regions, the job descriptions and duties of the employees in the claimed DPDO units are essentially similar to those of other employees in the region, all employees in the individual regions enjoy essentially similar working conditions and common personnel policies and practices established by the respective Regional Commanders and there are numerious instances of transfers among certain of the employees of the various DPDO's within the respective DPDR's. Under these circumstances, I find that the employees in the claimed DPDO units do not enjoy a clear and identifiable community of interest separate and distinct from each other or from other employees in their respective regions. Moreover, noting that the Defense Property Disposal Officers have been delegated minimal authority with respect to personnel and labor relations matters, in my view, the claimed DPDO units would artifically fragment the three DPDR's and could not reasonably be expected to promote effective dealings and efficiency of agency operations. 8/ Accordingly, I shall order that the petitions filed by NFFE be dismissed.

Accordingly, I find that the following employees constitute units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of Executive Order 11491, as amended: 9/

> All employees assigned to the Defense Property Disposal Region, Memphis, Tennessee, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order. 10/

8/ Cf. Department of the Army, U.S. Army Reserves, 425th Transportation Command, Forest Park, Illinois, A/SLMR No. 636, General Services Administration, Region 3, A/SLMR No. 616, and Federal Energy Administration, cited above.

9/ As the record is unclear as to the status and/or number of temporary and part time employees at the DPDR Memphis, Tennessee, DPDR Columbus, Ohio, and the DPDR Ogden, Utah, I make no findings with respect to the eligibility of such employees.

10/ In Case No. 41-3407(RO), the Joint Petitioners excluded all DPDS employees located at Eglin Air Force Base, Florida, Sheppard Air Force Base, Texas, and the Marine Corps Air Station, Cherry Point,

(Continued)

> All employees assigned to the Defense Property Disposal Region, Columbus, Ohio, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.
>
> All employees assigned to the Defense Property Disposal Region, Odgen, Utah, excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order. 11/

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 20-4267(RO); 20-4268(RO); 20-4295(RO); 21-3950(RO); 22-5027(RO); 22-5029(RO); 22-5037(RO); 22-5049(RO); 22-5050(RO); 22-5054(RO); 22-5055(RO); 22-5071(RO); 31-7529(RO); 32-3273(RO); 35-2935(RO); 40-5148(RO); 40-5149(RO); 40-5150(RO); 40-5151(RO); 40-5152(RO); 40-5153(RO); 40-5154(RO); 40-5155(RO); 40-5157(RO); 40-5158(RO); 40-5159(RO); 41-3418(RO); 41-3419(RO); 41-3420(RO); 42-2338(RO); 42-2362(RO); 42-2363(RO); 42-2388(RO); 50-9683(RO); 50-9727(RO); 50-11000(RO); 50-11019(RO); 53-7018(RO); 60-3445(RO); 60-3526(RO); 60-3530(RO); 61-2174(RO); 61-2210(RO); 61-2211(RO); 61-2212(RO); 61-2222(RO); 62-3829(RO); 63-4522(RO); 63-4534(RO); 63-4576(RO); 63-4583(RO); 70-4111(RO); 72-4281(RO); 72-4350(RO); 72-4463(RO); 72-4464(RO); 72-4465(RO); 72-4498(RO); 72-4511(RO); and 72-4512(RO) be, and they hereby are, dismissed.

10/ North Carolina, because separate petitions had previously been filed for these individual units by the NFFE, and the region-wide petition involved was not timely with respect to intervention in any of these petitions. As I have found these individual units to be inappropriate for the purpose of exclusive recognition, and noting the fact that the NFFE will appear on the ballot in the region-wide unit found appropriate, I find that the unit description herein should include these unrepresented employees for the purpose of the election to be held in this matter. I have been administratively advised that the showing of interest submitted by the Joint Petitioners is sufficient even with the inclusion of these additional employees in the unit found appropriate.

11/ In Case No. 61-2173(RO), the Joint Petitioners excluded all DPDS employees located at Davis Monthan Air Force Base, Arizona, Mountain Home Air Force Base, Idaho, Minot Air Force Base, Minot, North Dakota, and Camp Pendleton MCB, California, because separate petitions had previously been filed for these individual units. As I have found these individual units to be inappropriate for the purpose of exclusive recognition, and noting the fact that the NFFE will appear on the ballot in the region-wide unit found appropriate, I find that the unit description herein should include these unrepre-

(Continued)

DIRECTION OF ELECTIONS

Elections 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 Administrators 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 shall vote whether they desire to be represented for the purpose of exclusive recognition by the Joint Petitioners, consisting of the American Federation of Government Employees AFL-CIO, International Association of Machinists and Aerospace Workers, AFL-CIO, and Metal Trades Department, AFL-CIO; by the National Federation of Federal Employees (IND.); or by neither.

Dated, Washington, D.C.
January 19, 1977

Bernard E. DeLury, Assistant Secretary of Labor for Labor-Management Relations

11/ sented employees for the purpose of the election to be held in this matter. I have been administratively advised that the showing of interest submitted by the Joint Petitioners is sufficient even with the inclusion of these additional employees in the unit found appropriate.

January 24, 1977

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,
OFFICE OF REGIONAL COUNSEL,
WESTERN REGION
A/SLMR No. 780

This case arose as a result of a petition filed by the National Treasury Employees Union seeking an election in a unit of all professional employees employed by the Department of the Treasury, Office of the Regional Counsel, Western Region (Activity). The Activity contended that such a unit was not appropriate as the employees involved did not share a clear and identifiable community of interest; the proposed unit would not promote effective dealings and efficiency of agency operations; and the unit was based solely on the extent of organization. In addition, the Activity asserted that the only appropriate unit would be a nationwide unit of professional employees within the Office of the Chief Counsel.

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In this regard, he concluded that the petitioned for employees share a clear and identifiable community of interest and that a unit of such employees would promote effective dealings and efficiency of agency operations. He noted that the claimed employees are under the general direction of the Regional Counsel and share a common mission, common working conditions, uniform personnel policies and practices and possess the same basic qualifications and skills. Moreover, the Regional Counsel retains significant discretion in personnel and labor relations matters, including the authority to negotiate agreements with labor organizations representing employees under his supervision.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

A/SLMR No. 780

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
OFFICE OF REGIONAL COUNSEL,
WESTERN REGION

Activity

and

Case No. 70-5161

NATIONAL TREASURY EMPLOYEES UNION

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 Jean Perata. 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 National Treasury Employees Union, hereinafter called NTEU, seeks an election in a unit of all professional employees of the U.S. Department of the Treasury, Office of the Regional Counsel, Western Region, excluding all nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order.

The Activity contends that the proposed unit is inappropriate inasmuch as the employees involved do not share a clear and identifiable community of interest; the proposed unit would not promote effective dealings and efficiency of agency operations; and the unit sought is based solely on the extent of organization. The Activity further contends that the only appropriate unit would be a nationwide unit of professional employees within the Office of the Chief Counsel.

The Office of the Regional Counsel, Western Region, is one of seven regional offices which, along with the national office, comprises the Office of the Chief Counsel. The Office of the Chief Counsel, a division within the Department of the Treasury's Office of the General Counsel, serves as the principal legal advisor to the Internal Revenue Service (IRS) although it is not an organizational component of the IRS. The seven Offices of the Regional Counsel, each headed by a Regional Counsel, are coextensive with IRS regional offices and serve as the principal legal advisors to the corresponding IRS regional offices.

Previously, the Assistant Secretary found in United States Department of the Treasury, Office of the Regional Counsel, Western Region, A/SLMR No. 161, that a unit of professional and nonprofessional employees of the Office of the Regional Counsel, Western Region, was appropriate for the purpose of exclusive recognition. 1/ Separate units of professional and nonprofessional employees subsequently were certified on July 11, 1972. However, no agreements were negotiated in either unit 2/ and the professional employee unit, which is the subject of the instant petition, was decertified on November 2, 1973. 3/

The Office of the Chief Counsel at the national level is headed by the Chief Counsel. Serving under the Chief Counsel are a Deputy Chief Counsel and two Associate Chief Counsels. The Associate Chief Counsel, Tax Litigation, supervises the following four Divisions, each of which is headed by a Director: Tax Court Litigation; Interpretative; Refund Litigation; and Legislation and Regulations. The Associate Chief Counsel, General, supervises the following five Divisions, each of which is headed by a Director: General Litigation; Criminal Tax; General Legal Services; Disclosure; and Administrative Services.

The Office of the Regional Counsel, Western Region, is headquartered in San Francisco. There are five branch offices within the region located in Los Angeles, Phoenix, Seattle, Portland and Salt Lake City. 4/ Approximately 79 professional employees are employed throughout the Western Region, which includes primarily attorneys and a number of technical advisors. 5/ The Tax Court Litigation, General Litigation and Criminal Tax functions are performed in the branch offices as well as the regional office headquarters while the General Legal Services function is performed only in the San Francisco office.

1/ On appeal to the Federal Labor Relations Council, the Council upheld the Assistant Secretary's unit determination noting, among other things, that the Assistant Secretary had properly considered the criteria set forth in Section 10(b) of the Order. See U.S. Department of the Treasury, Office of Regional Counsel, Western Region, 1 FLRC 259, 260 [FLRC No. 72A-32].

2/ The record indicates that there is currently a dues withholding agreement covering the nonprofessional unit.

3/ There is no other collective bargaining history within the Office of the Chief Counsel.

4/ The Western Region covers a ten state area, including California, Arizona, Utah, Nevada, Idaho, Oregon, Washington, Montana, Alaska, and Hawaii.

5/ Technical advisors assist attorneys in the Criminal Tax function.

The Tax Court Litigation function at the regional level handles tax court cases assigned to it from the Tax Court Litigation Division at the national level. The General Litigation function is concerned with the assessment and collection of taxes. It also handles matters pertaining to the collection and protection of tax claims and liens of the United States in certain proceedings under the Bankruptcy Act. The Criminal Tax function handles cases involving alleged criminal violations of Internal Revenue laws which are referred by the IRS' Assistant Regional Commissioner (Intelligence). The General Legal Services function provides legal advice to the IRS in such matters as personnel, fiscal and facilities management, labor relations and equal employment opportunity. In this regard, it provides representation in formal hearings involving adverse actions, unfair labor practice and discrimination complaints, representation proceedings, arbitration of the terms of a negotiated agreement and various other employee appeals. It also acts as legal advisor in negotiations and in the administration of negotiated agreements and provides representation in suits against regional officers and employees. The Tax Court Litigation Division, the General Litigation Division, the Criminal Tax Division and the General Legal Services Division at the national level maintain advisory, procedural and technical contact with the Regional Counsels, including the preparation, approval and issuance of procedural and technical memoranda to Regional Counsels in the respective subject areas.

General responsibility for the administration of the Office of the Regional Counsel, Western Region, rests with the Regional Counsel who has the general authority to plan, direct and coordinate the legal work of the region and is responsible for regional administration and management. The Regional Counsel assigns work to personnel throughout the region and often assigns cases across the various functions. Staffing recommendations are made by the Regional Counsel to the Director of Administrative Services Division. The Regional Counsel prepares and submits the regional office budget to the Administrative Services Division which plans and controls the fiscal and budgetary operations within the Office of the Chief Counsel.

The record indicates that while all professional employees throughout the Office of the Chief Counsel possess the same basic qualifications, share the same skills, and utilize the same technical knowledge, the Regional Counsel and his staff are responsible for recruiting and interviewing prospective employees. Personnel policies are equally applicable to all professional employees throughout the regions although the Regional Counsel must make the initial recommendation for noncompetitive promotions up to the GS-14 level. Promotion to the GS-15 nonsupervisory level is competitive with the area of consideration being nationwide. Requests for transfers and reassignments are channeled through the Regional Counsel to the Administrative Services Division. While training is administered on a national basis, the Regional Counsel can authorize training on localized problems. The regional office maintains personnel files for professional employees although the official personnel file is kept at the national office.

The Regional Counsel has the authority to adjust grievances in such matters as work assignments and questions involving the use of leave, and makes recommendations as to discipline which are submitted to the Director of Administrative Services Division who then accepts, modifies or rejects the Regional Counsel's recommendation. 6/ The Regional Counsel can also request that an attorney who is not performing satisfactorily during the trial period tender his or her resignation. The record further discloses that the Regional Counsel has the authority to negotiate basic labor agreements and local supplemental agreements which are subject to the terms of a controlling master agreement.

Based on all of the foregoing circumstances, I find that a regionwide unit of professional employees within the Office of the Regional Counsel, Western Region, is appropriate for the purpose of exclusive recognition. Thus, the record shows that all professional employees are under the general direction of the Regional Counsel and that they all share a common mission, common working conditions, uniform personnel policies and possess the same basic qualifications and skills. The Regional Counsel retains the authority to assign cases and cross-assign cases to employees on his staff and has significant discretion in personnel and labor relations matters, including the authority to adjust grievances with respect to work assignments and the use of leave, as well as the authority to make effective recommendations on disclipinary matters. Under these circumstances, I find that the petitioned for employees share a clear and identifiable community of interest separate and distinct from other professional employees within the Office of the Chief Counsel. Further, noting the Regional Counsel's significant discretion in personnel and labor relations matters and his authority to negotiate agreements with labor organizations representing employees under his supervision, I find that such a unit will promote effective dealings and efficiency of agency operations. 7/

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

> All professional employees of the United States Department of the Treasury, Office of the Regional Counsel, Western Region, excluding nonprofessional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and supervisors as defined in the Order. 8/

6/ The record reveals that in only one instance was the recommendation of the Regional Counsel modified.

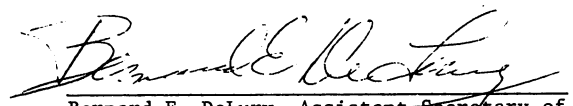
7/ In reaching the disposition herein, it was noted also that the factual situation herein has remained substantially unchanged from that which existed when a professional unit was previously found appropriate in U.S. Department of the Treasury, Office of Regional Counsel, Western Region, cited above.

8/ The parties stipulated that the three attorneys assigned to the General Legal Services function in the regional office perform Federal personnel work and, as such, should be excluded from the unit found appropriate. In the absence of any evidence contrary to the parties' stipulation, I find that such employees should be excluded from the unit found appropriate.

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 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 wish to be represented by the National Treasury Employees Union.

Dated, Washington, D. C.
January 24, 1977



Bernard E. DeLury, 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 THE NAVY,
NAVAL AIR REWORK FACILITY,
ALAMEDA, CALIFORNIA
A/SLMR No. 781

This case arose as a result of an unfair labor practice complaint filed by the International Association of Machinists and Aerospace Workers, AFL-CIO, Local 739, Oakland, California, alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order based on its actions in refusing and/or denying an employee's request for union representation at a meeting concerning a possible violation of the Agency's rules and regulations. Subsequent to the meetings in question, the employee involved was given a letter of reprimand.

The Administrative Law Judge recommended dismissal of the complaint on the basis that the meetings involved did not constitute "formal discussions" within the meaning of Section 10(e) of the Order and that it followed that the denial of representation at such meetings did not violate Section 19(a)(1) and (6) of the Order.

The Assistant Secretary deferred his decision in the subject case pending the Federal Labor Relations Council's Statement On Major Policy Issue concerning the representational rights of employees under the Order. The Council's statement was issued on December 2, 1976.

Noting particularly the absence of any exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and, consistent with the major policy statement by the Council, ordered that the complaint be dismissed.

A/SLMR No. 781

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AIR REWORK FACILITY,
ALAMEDA, CALIFORNIA

Respondent

and

Case No. 70-4340

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORERS, AFL-CIO, LOCAL 739,
OAKLAND, CALIFORNIA

Complainant

DECISION AND ORDER

On February 24, 1975, 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.

Thereafter, on June 23, 1975, the Assistant Secretary informed the Complainant and the Respondent that it would effectuate the purposes and policies of the Order to defer his decision in the subject case pending the Federal Labor Relations Council's resolution of a major policy issue which has general application to the Federal Labor-Management Relations program:

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

On December 2, 1976, the Council issued its Statement On Major Policy Issue, FLRC No. 75P-2, Report No. 116, finding, in pertinent part, that:

> 1. An employee in a unit of exclusive recognition has a protected right under the last sentence of Section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and
>
> 2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigation meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with Section 11(a) 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 the subject case, and noting particularly that no exceptions were filed, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge.

The complaint alleged essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing and/or denying an employee's request for union representation at a meeting concerning a possible violation of the Agency's rules and regulations.

The Administrative Law Judge concluded, and I concur, that the discussions on April 24 and 25, 1974, were confined solely to the employee's alleged failure to follow a rule or regulation with respect to the time for taking luncheon breaks and did not constitute "formal discussions" within the meaning of Section 10(e) of the Order. Accordingly, and for the reasons set forth by the Council in FLRC No. 75P-2, I agree that the denial of representation at the nonformal meetings herein did not constitute a violation of Section 19(a)(1) and (6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-4340 be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 24, 1977

Bernard E. DeLury, 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 NAVY NAVAL AIR REWORK FACILITY ALAMEDA, CALIFORNIA Respondent and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AFL-CIO, LOCAL 739, OAKLAND, CALIFORNIA Complainant	Case No. 70-4340

A.S. Calcagno, Esq.
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For the Respondent

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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 July 16, 1974, under Executive Order 11491, as amended, by the International Association of Machinists and Aerospace Workers, AFL-CIO, (hereinafter called the Union or Complainant) against the Naval Air Rework Facility, Alameda, California, (hereinafter called the Agency or Respondent), a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the San Francisco, California, Region on October 4, 1974.

The complaint alleges, in substance, that the Agency violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in refusing and/or denying employee David L. Salberg's request for union representation at a meeting concerning a possible violation of the Agency's rules and regulations.

A hearing was held in the captioned matter on November 22, 1974, in San Francisco, California. 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 findings of fact, conclusions and recommendations:

Findings of Fact

1. On April 17, 1974, employee David L. Salberg and two other fellow employees left their respective work stations at approximately 11:00 a.m. and took an early lunch break.

2. Upon Salberg's return from lunch on the afternoon of April 17, 1974, he was approached by his immediate foreman George H. Miller and informed that there would be a meeting in the general foreman's office.

3. Later during the afternoon of April 17, 1974, Salberg, along with the two other employees who had accompanied him to lunch earlier, attended a meeting in the general foreman's office with Larry Williams, general foreman; Ralph Dolan, electrican foreman; John Perry, electrical general foreman; Bill Bryant, electrical foreman; and George Miller, mechanical foreman. During the course of the meeting electrical general foreman Perry informed Salberg and his luncheon companions that they had been wrong in going to lunch 25 minutes early and proceeded to give them a lecture on the applicable rules and regulations in effect at the installation. Thereafter, when neither Salberg nor his luncheon companions failed to deny or confirm the accusations made by Perry, general foreman Williams told Salberg's immediate supervisor, George Miller, to write up Salberg.1/

4. On April 24, 1974, foreman George Miller approached Salberg and attempted to discuss the April 17th events with him, particularly the reason underlying his action in leaving for lunch earlier than his scheduled lunch break. Salberg refused to discuss the matter without a representative from the Union, which was the exclusive representative of the machinists unit at the installation. Miller informed Salberg that he was not entitled to representation and the discussion or attempted discussion then ended.

5. On April 25, 1974, foreman Miller again approached Salberg and requested him to sign a "Supervisor/Employee Discussion Report" which summarized the events of April 17 and 24, 1974, described above. Salberg refused to sign the report in the absence of union representation. Thereupon, Miller, in accordance with usual practice, summoned foreman Dolan to witness the fact that Salberg refused to sign the report. According to the credited testimony of Miller, the employee's signature on the report does not constitute an admission of the facts summarized in such report, but merely amounts to an acknowledgment that the report has been shown to the employee involved.

6. Subsequently, on May 20, 1974, Salberg was given a letter of reprimand for "leaving your work station without permission approximately 25 minutes before your lunch break, on 17 April 1974".

1/ According to the credited testimony in the record, a "write up" means summarizing the events on paper, making a report or record.

DISCUSSION AND CONCLUSIONS

Section 10 (e) of Executive Order 11491 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". The denial of such right and/or opportunity is violative of Sections 19 (a) (1) and (6) of the Order. U. S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278.

In the instant case the discussions on April 24 and 25, 1974, wherein employee Salberg requested the presence of, or representation by, a union representative, were confined solely to Salberg's alleged failure to follow a rule or regulation with respect to the time for taking luncheon breaks. Accordingly, in the absence of any evidence, whatsoever, that the meetings or discussions on the above cited dates were related to the processing of a grievance or involved general working conditions or work performance, such meetings did not constitute "formal discussions" within the meaning of Section 10 (e) of the Order. Department of Defense National Guard Bureau, Texas Air National Guard, A/SLMR 336. In these circumstances and since I find the facts of the instant case to be indistinguishable from those set forth in Department of Defense, National Guard Bureau, Texas National Guard, supra, it follows that the denial of representation at the two meetings here involved did not constitute a violation of Sections 19 (a) (1) and (6) of the Order.

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: February 24, 1975
Washington, D. C.

January 24, 1977

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

DEPARTMENT OF THE NAVY,
SPECIAL SERVICES DEPARTMENT,
NAVAL STATION, NORFOLK, VIRGINIA
A/SLMR No. 782

This case involved three petitions for clarifications of unit (CU) filed by Local 23, Hotel, Restaurant and Cafeteria Employees Union, AFL-CIO, (Petitioner) seeking to clarify certain existing exclusively recognized units, located at the Norfolk Naval Base, to reflect changes in the units which resulted from various consolidations and/or reorganizations. Specifically, the Petitioner sought to include in its Naval Station (NAVSTA) unit those Special Services employees previously located on the Naval Air Station (NAS) and to exclude from the NAVSTA unit those employees of the clubs, messes, and package liquor stores who had been administratively transferred to the NAS and to include them in the NAS. In addition, the Petitioner sought to clarify the existing units of the Navy Exchange, NAS, and the Navy Exchange, NAVSTA which were consolidated and redesignated Navy Exchange, Naval Base, by excluding the Enlisted Men's Clubs, (Tradewinds and Aerodrome) from these respective units, and by including them in the NAS unit to which they had been administratively transferred. The parties agreed essentially on the proposed clarifications.

The Assistant Secretary found that, subsequent to a reorganization, the Special Services employees previously located on the NAS shared a clear and identifiable community of interest with NAVSTA unit employees separate and distinct from employees of the Navy Exchange, Naval Base, and NAS units. He noted that they all shared a common mission and supervision, personnel policies and practices, and essentially, similar job skills and working conditions. Further, there was a common area of consideration for promotion and reduction-in-force procedures. The Assistant Secretary also determined that such unit will promote effective dealings and efficiency of agency operations.

In regard to the petitioned for clarification of the NAS unit, the Assistant Secretary noted that the employees of the clubs, messes and package liquor stores shared common supervision, the same personnel policies and practices, and similar job skills and working conditions, and, in effect, shared a clear and identifiable community of interest separate and apart from the employees of the Navy Exchange, Naval Base, and Special Services. Moreover, he noted that the clarified unit will promote effective dealings and efficiency of agency operations.

With respect to the Navy Exchange units, the Assistant Secretary found that, subsequent to a consolidation, the Navy Exchange, NAS, unit was no longer in existence, and that its remaining component, the Food Service Operation, was incorporated into the existing Navy Exchange, NAVSTA unit, which was now redesignated as the Navy Exchange, Naval Base. The Assistant Secretary noted that the employees of the Navy Exchange, Naval Base, shared a clear and identifiable community of interest separate and apart from employees of other units. Moreover, the employees shared common supervision and work sites, a common personnel office with personnel policies which apply to Exchange personnel only, and a common area of consideration for promotions and reductions-in-force. In addition, he noted that effective dealings and efficiency of agency operations had been experienced in the unit as evidenced by the negotiated agreements executed by the Petitioner and the Navy Exchange, Naval Base.

Accordingly, the Assistant Secretary ordered that the subject units be clarified to reflect the changes resulting from the consolidation and/or reorganizations which had occurred.

A/SLMR No. 782

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
SPECIAL SERVICES DEPARTMENT,
NAVAL STATION, NORFOLK, VIRGINIA

Activity

and Case No. 22-6687(CU)

HOTEL, RESTAURANT AND CAFETERIA
EMPLOYEES UNION, LOCAL 23, AFL-CIO

Petitioner

DEPARTMENT OF THE NAVY, NAVY
EXCHANGE, NAVAL BASE, NORFOLK,
VIRGINIA

Activity

and Case No. 22-6688(CU)

HOTEL, RESTAURANT AND CAFETERIA
EMPLOYEES UNION, LOCAL 23, AFL-CIO

Petitioner

DEPARTMENT OF THE NAVY, MESS
MANAGEMENT DIVISION, NAVAL AIR
STATION, NORFOLK, VIRGINIA

Activity

and Case No. 22-6689(CU)

HOTEL, RESTAURANT AND CAFETERIA
EMPLOYEES UNION, LOCAL 23, AFL-CIO

Petitioner

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 Bridget Sisson. 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 in behalf of the Activities, the Assistant Secretary finds:

The Hotel, Restaurant and Cafeteria Employees Union, AFL-CIO, Local 23, herein called Petitioner, is the exclusive representative of certain nonappropriated fund employees in each of the above-named Activities. In this proceeding, involving petitions for clarification of unit (CU), the Petitioner seeks to clarify the status of certain existing exclusively recognized bargaining units to reflect changes in such units which have resulted from various reorganizations and/or consolidations. The Activities agree essentially with the proposed clarifications.

In Case No. 22-6687(CU), the Petitioner seeks to clarify the status of certain employees with respect to its exclusively recognized unit at the Naval Station, Norfolk, Virginia, hereinafter called NAVSTA. In this connection, the Petitioner seeks to include in the NAVSTA unit certain Special Services employees under the command of the Commanding Officer, Naval Station. The record reveals that on April 24, 1967, the Petitioner, pursuant to Executive Order 10988, was granted exclusive recognition for a unit of nonappropriated fund employees of the NAVSTA, comprising "all eligible employees in the Special Services Department and the Commissioned Officer's Mess (Open)." 1/

In Case No. 22-6688(CU), the Petitioner seeks to clarify the effect of a consolidation and reorganization on the status of certain employees in certain exclusively recognized units. In this connection, on June 23, 1967, the Petitioner was granted exclusive recognition for a unit of "all eligible employees of the Navy Exchange, Naval Station, of the Food Services Department (including all those working the Food Service Warehouse and all Navy Exchange Cafeterias), the Tradewinds and Breakers Enlisted Clubs, and all the several warehouses of the Naval Exchange", and on June 29, 1967, it was granted exclusive recognition at the Navy Exchange, Naval Air Station for a unit consisting of all eligible employees of the Laundry, Food Service Operation and the Enlisted Men's Club (Aerodrome). The Petitioner seeks to clarify the recognition to reflect the incorporation of the employees in the Navy Exchange, Naval Air Station unit into the Navy Exchange, Naval Station unit and the subsequent redesignation of the latter as the Navy Exchange, Naval Base.

In Case No. 22-6689(CU), the Petitioner seeks to clarify the status of an existing exclusively recognized unit of the Naval Air Station, hereinafter called NAS. On April 24, 1967, the Petitioner was granted

1/ At the time recognition was granted the Special Services Department operated the Petty Officers Mess and the Chief Petty Officers Mess in addition to providing recreational and sports facilities.

exclusive recognition for a unit of nonappropriated fund employees in the Non-Commissioned Officers Clubs and messes of the Naval Air Station. 2/ In this connection, the Petitioner seeks to include within the unit, the clubs, messes and package stores of the NAVSTA and the Enlisted Men's Clubs of the Navy Exchanges which have been transferred to the operational control of the Commanding Officer, NAS.

The record indicates that, subsequent to the various grants of exclusive recognition, negotiated agreements were entered into by the parties and that all such agreements, but one, 3/ have expired and are no longer in force.

BACKGROUND

On November 4, 1972, the Chief of Naval Operations issued a directive initiating the consolidation of the Navy Exchange, Naval Station and the Navy Exchange, Naval Air Station under the command of the Commander, Norfolk Naval Base.

On June 19, 1973, the Chief of Naval Personnel approved the transfer of the Naval Station Enlisted Men's Club (Tradewinds) and the Naval Air Station Enlisted Men's Club (Aerodrome) from their respective Exchanges to the control of the Activity on which they are physically located. 4/ The clubs were also redesignated as Enlisted Mess (Open). The record shows that the transfer of the Tradewinds and Aerodrome was effected on July 25, 1973, and, from that point on, the consolidated Navy Exchange no longer engaged in the operation of any clubs.

On February 18, 1975, the Commander, Norfolk Naval Base issued a directive calling for the consolidation of common recreational and entertainment functions and a command realignment. All Special Services activities 5/ at the NAVSTA and the NAS were assigned to the Commanding Officer, NAVSTA, and the operation of all clubs, messes, and package

2/ The existing Commissioned Officers Club (also known as Breezy Point) was not included in the original unit recognition.

3/ A negotiated agreement between the Navy Exchange, Naval Base and the Petitioner is currently effective.

4/ The Breakers Enlisted Men's Club had closed down prior to the reorganization.

5/ These included programs and facilities such as movie theaters, hobby shops, bowling alleys, gymnasiums, swimming pools, ball fields, golf courses and boat rentals.

liquor stores of the NAVSTA and the NAS were assigned to the NAS command. On July 1, 1975, the consolidation and common realignment was effectuated. Thus, the evidence establishes that the Commanding Officer, NAVSTA, assumed operational control over all the Special Services employees. 6/ The evidence further establishes that the Commanding Officer, NAS, assumed operational authority over the clubs, messes, and package stores that were physically located on the NAVSTA in addition to those already within his control at the NAS. In addition, the package stores which had been consolidated previously on their respective Activities, were further consolidated and the Commanding Officer, NAS, assumed control over them also. 7/

Case No. 22-6687(CU)

The mission of the Special Services Department, Naval Station, is to provide recreational programs, services and facilities for all tenant activities of the Norfolk Naval Base and those forces afloat who berth at the NAVSTA.

The record indicates that, subsequent to the reorganization, the former employees of the Special Services, NAS, have been administratively and physically integrated with the Special Services employees of the NAVSTA. Thus, the evidence establishes that the former NAS Special Services employees now work alongside of, and share common supervision with, NAVSTA Special Services employees. Moreover, the evidence shows that there is a substantial identity of job skills between these two groups of employees and that such skills differ from the job skills of the employees of the Exchange, and the clubs, as well as the messes and package stores. In addition, there is no interchange between the NAVSTA employees and those of the other Activities. The evidence establishes also that the Special Services employees, including the former NAS employees, share the same personnel policies and personnel office and are within the same area of consideration for promotions and reduction-in-force procedures.

6/ These included approximately 200 employees, 170-175 of whom were originally in the NAVSTA unit and 25-30 of whom were located at the NAS, but were not within any exclusively recognized unit.

7/ Originally, each Commissioned Officers Club, Chief Petty Officers Club, and Petty Officers Club had a package liquor store operating as a department of each individual club. In 1973, the three stores on each Activity were made independent of the clubs and operated as a separate entity while still within the premises of each club. In 1975, the package stores were consolidated and moved into a single building on each Activity. By virtue of the July 1, 1975, reorganization, the package stores were combined into two locations with a common warehouse and supervision but operate as a single entity.

Under these circumstances, I find that the Special Services employees formerly located at the NAS, now share a community of interest with, and are an integral part of, the existing unit of the Special Services employees of the NAVSTA represented by the Petitioner. Moreover, in my view, under the reorganized command structure, the unit as clarified will promote effective dealings and efficiency of agency operations.

Accordingly, I shall order that the existing unit of the Special Services Department, NAVSTA, be clarified to include the Special Services employees formerly within the command of the NAS.

Case No. 22-6689(CU)

The mission of non-commissioned and commissioned clubs is to dispense food, beverages, and to furnish entertainment for patrons and members, while an Open Mess functions as a facility for the serving of food and beverages and is open to all those who meet the requirements for admittance. A package store, as is involved in this case, serves as a carry-out facility for beer and alcoholic beverages.

The record indicates that prior to 1973 both the NAS and the NAVSTA operated their own clubs, messes, and package stores, and that the Exchange at each Activity operated one Enlisted Men's Club. When the Navy Exchange, Naval Base was established as the result of the consolidation, discussed below, the clubs were removed from its control and placed under the control of each Activity. Moreover, after the subsequent reorganization of July 1, 1975, all of the clubs, messes, and consolidated package stores came under the control of the Commanding Officer, NAS, and under the immediate supervision of the Mess Management Officer, NAS. 8/ Thus, the record reveals that the former employees of the NAVSTA non-commissioned officers and enlisted men's clubs, messes, and package stores have been administratively and functionally integrated into the existing unit of nonappropriated fund activity employees of the NAS and that they share a clear and identifiable community of interest with such NAS employees. In this regard, the evidence establishes that all former NAVSTA employees now share common supervision with NAS employees; they have similar job skills and functions different from those in the Exchange and the Special Services; and they share the same personnel policies implemented by a single personnel office separate and apart from the Exchange and Special Services. In addition, their work contacts

8/ On July 1, 1975, these included the Commissioned Officers Mess at both the NAS and the NAVSTA, the Chief Petty Officers Mess at the NAS and the Chief Petty Officers Messes 1 and 2 at the NAVSTA, the Petty Officers Messes at the NAS and the NAVSTA, and the Enlisted Men's Messes at both the NAVSTA and the NAS. The record reveals that the Commissioned Officers Mess at the NAVSTA closed on October 31, 1975.

and interchange is limited to the employees in the clubs, messes and package stores. Moreover, I find the inclusion of these former NAVSTA employees in the NAS unit will promote effective dealings and efficiency of agency operations.

Accordingly, I shall order that the existing NAS unit be clarified to include all the eligible employees of the Non-Commissioned Officers Clubs, Enlisted Men's Clubs and package stores which before the reorganization were administratively assigned to the NAVSTA.

Case No. 22-6688(CU)

The mission of the Navy Exchange at the Naval Base, Norfolk, is to provide a convenient and available source from which authorized patrons may obtain, at the lowest practicable cost, articles and services required for their well being and contentment; to provide through profits a source of funds to be used for the welfare and recreation of Naval personnel; and to promote the morale of the command in which it is established through the operation of a well-managed, attractive and serviceable exchange.

Prior to the consolidation of July 25, 1973, both the NAS and NAVSTA had a separate Navy Exchange unit. In order to maximize economies and improve services and to place the control of the exchanges under a single authority, the Commanding Officer of the Naval Base, the Chief of Naval Operations ordered consolidation of the aforementioned units into one unit and the transfer of the respective Enlisted Men's Clubs from the responsibility of the two Exchanges to the control of the NAS and the NAVSTA. 9/

The result of this consolidation was that the exclusively recognized unit at the Navy Exchange, NAS, no longer existed as its only remaining component, 10/ the Food Service Operation, was incorporated into the Exchange unit of the NAVSTA, which was thereafter redesignated Navy Exchange, Naval Base. 11/ The record reveals that, subsequent to the consolidation, the Navy Exchange, Naval Base unit consists of a Food Service Department, Food Service Warehouse, Navy Exchange Cafeterias

9/ The Breakers Enlisted Men's Club closed prior to the consolidation and transfer.

10/ The laundry, which had been in the original unit, was closed several years prior to the consolidation.

11/ In this connection, I shall clarify the existing exclusively recognized unit to reflect its current designation.

and the several warehouses of the Navy Exchange. In this regard, the evidence establishes that the Food Service employees of the Navy Exchange, Naval Base, have a clear and identifiable community of interest separate and apart from the employees in the NAS and NAVSTA units. Thus, the employees in this unit share common supervision and work sites and have similar job skills and functions. Moreover, the Navy Exchange, Naval Base, utilizes its own personnel offices and a separate set of personnel instructions which apply only to its personnel. Further, the area of consideration for promotions and reductions-in-force is within the Navy Exchange, Naval Base.

Under these circumstances, I find that all the food service employees of the Navy Exchange, Naval Base, share a clear and identifiable community of interest, separate and apart from employees of the NAS and the NAVSTA. Moreover, it was noted that effective dealings have been experienced in the unit as evidenced by the negotiated agreements executed by the Petitioner and the Navy Exchange, Naval Base, and that the parties agree that such a unit has promoted effective dealings and efficiency of agency operations.

Accordingly, I shall order that the redesignated unit of the Navy Exchange, Naval Base be clarified further to include all Food Service Department employees formerly employed by the Navy Exchange, NAS, and to exclude from the designated unit the employees of the Enlisted Men's Clubs of the NAS unit, as indicated above.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified in Case No. 22-6687(CU), in which the Hotel, Restaurant and Cafeteria Employees Union, Local 23, AFL-CIO, was recognized in 1967 as the exclusive representative of certain employees of the Special Services Department, Naval Station, Norfolk, Virginia, be, and it hereby is, clarified to include in said unit the Special Services employees previously employed by the Naval Air Station, Norfolk, Virginia, and to exclude from said unit all employees of clubs, messes, and package liquor stores.

IT IS FURTHER ORDERED that the unit sought to be clarified in Case No. 22-6688(CU), in which the Hotel, Restaurant and Cafeteria Employees Union, Local 23, AFL-CIO, was recognized in 1967 as the exclusive representative of certain employees of the Naval Exchange, Naval Station, Norfolk, Virginia, be, and it hereby is, clarified by substituting Navy Exchange, Naval Base, for Navy Exchange, Naval Station and Navy Exchange, Naval Air Station, by excluding from said unit the employees of the Tradewinds and Aerodrome Enlisted Men's Messes Open, and by including in said unit the employees of the Food Service Operation, who have been incorporated into the Navy Exchange, Naval Station now redesignated Navy Exchange, Naval Base.

IT IS FURTHER ORDERED that the unit sought to be clarified in Case No. 22-6689(CU), in which the Hotel, Restaurant and Cafeteria Employees Union, Local 23, AFL-CIO, was recognized in 1967 as the exclusive representative of certain employees of the Naval Air Station, Norfolk, Virginia, be, and it hereby is, clarified to include in said unit the employees of the clubs, messes and package liquor stores administratively reassigned to it from the Naval Station, Norfolk, Virginia, and the employees of the Tradewinds and Aerodrome Enlisted Men's Messes administratively reassigned to it from the Navy Exchange, Navy Base, Norfolk, Virginia.

Dated, Washington, D. C.
January 24, 1977

Bernard E. DeLury, Assistant Secretary of Labor for Labor-Management Relations

January 24, 1977

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

NATIONAL TREASURY EMPLOYEES UNION
(INTERNAL REVENUE SERVICE)
A/SLMR No. 783

On September 22, 1976, the United States District Court for the District of Columbia in National Treasury Employees Union v. Paul J. Fasser, Jr. et al., Civil Action No. 76-408 (D.D.C. 1976) held that an absolute ban upon all picketing as, in effect, was contained in A/SLMR No. 536, FLRC No. 75A-96, is overly broad and violates the First Amendment when improperly applied. Accordingly, the Court vacated the Decision and Order in A/SLMR No. 536, in which the Respondent, National Treasury Employees Union was found to be in violation of Section 19(b)(4) of Executive Order 11491, as amended. On January 4, 1977, an appeal by the Government from the decision of the District Court was withdrawn.

Thereafter, on January 5, 1977, the Federal Labor Relations Council (Council) issued a Statement on Major Policy Issue, FLRC No. 76P-4, in which the Council noted, among other things, that the District Court had determined that the application of Section 19(b)(4) to the precise fact situation in the instant case contravened the First Amendment.

Based on the District Court's holding, the rationale contained therein, the Council's rationale contained in FLRC No. 76P-4, and the facts as found in A/SLMR No. 536, the Assistant Secretary ordered that the complaint in the instant case be dismissed in its entirety.

A/SLMR No. 783

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL TREASURY EMPLOYEES UNION

Respondent

and

Case No. 22-5976(CO)
A/SLMR No. 536
FLRC No. 75A-96

INTERNAL REVENUE SERVICE

Complainant

SUPPLEMENTAL DECISION AND ORDER

On September 22, 1976, the United States District Court for the District of Columbia in National Treasury Employees Union v. Paul J. Fasser, Jr. et al., Civil Action No. 76-408 (D.D.C. 1976) held, among other things, that while the Executive Order "can constitutionally prohibit any picketing, whether or not peaceful and informational, that actually interferes or reasonably threatens to interfere with the operation of the affected Government agency", an absolute ban upon all picketing during any labor controversy as, in effect, was contained in A/SLMR No. 536, FLRC No. 75A-96, is overly broad and violates the First Amendment when improperly applied. Accordingly, the Court vacated the Decision and Order in A/SLMR No. 536 in which the Respondent, National Treasury Employees Union, was found to be in violation of Section 19(b) (4) of Executive Order 11491, as amended.

On January 4, 1977, an appeal by the Government from the decision of the District Court was withdrawn. Thereafter, on January 5, 1977, the Federal Labor Relations Council (Council) issued a Statement on Major Policy Issue, FLRC No. 76P-4, in which the Council noted, among other things, that the District Court had determined that the application of Section 19(b)(4) to the precise fact situation in the instant case contravened the First Amendment.

Based on the District Court's holding in the instant case, the rationale contained therein, the Council's rationale contained in FLRC No. 76P-4, and the facts as found in A/SLMR No. 536, I shall order that the complaint herein be dismissed in its entirety.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

FLRC No. 76P-4

STATEMENT ON MAJOR POLICY ISSUE

Pursuant to section 4(b) of the Order and section 2410.3 of the Council's rules of procedure (5 CFR 2410.3), the Council provides this major policy statement on the implementation of the decision rendered by the District Court in National Treasury Employees Union v. Paul J. Fasser, Jr., et al., Civil Action No. 76-408 (D.D.C. 1976), appeal from which was withdrawn by the Government effective on January 4, 1977.

In the subject case, the Court vacated the decision and order of the Assistant Secretary in A/SLMR No. 536, sustained by the Council in FLRC No. 75A-96 (Mar. 3, 1976), Report No. 97, in which the union was held to have violated section 19(b)(4) of the Order by its picketing of several Internal Revenue Service facilities in the course of a labor-management dispute with that agency.

While the Court determined that the application of section 19(b)(4) to the precise fact situation in the subject case contravened the First Amendment, the Court denied the union's request that the picketing ban in section 19(b)(4) be declared unconstitutional. Instead, the Court ruled, in the latter regard, that the Order "can constitutionally prohibit any picketing, whether or not peaceful and informational, that actually interferes or reasonably threatens to interfere with the operation of the affected Government agency." Further, the Court, after expressing the need for more facts and the application at least initially of expert judgment on the problem, suggested that the Council—either through rulemaking or otherwise—develop facts as to the precise Government interest to be protected and as to possible differentiations between types of picketing, based on such matters as the sensitivity of the particular governmental function involved, the location of the picketed facility, the number of pickets, and the purpose of the picketing.

Consistent with the decision of the Court, the Council has decided to accomplish the delineation of picketing which is permissible or nonpermissible under section 19(b)(4) on a case-by-case basis, utilizing the adjudicatory procedures established in sections 4(c)(1) and 6 of the Order. Clearly only when picketing of an agency by a labor organization in a labor-management dispute actually interferes or reasonably threatens to interfere with the operation of the affected Government agency will that picketing be found nonpermissible under section 19(b)(4). If picketing of an agency by a labor organization in a labor-management dispute does not actually interfere or reasonably threaten to interfere with the operation of the affected Government agency that picketing will be found permissible under section 19(b)(4). The Council has concluded that it is less

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-5976(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 24, 1977

Bernard E. DeLury, Assistant Secretary of Labor for Labor-Management Relations

practicable to delineate through rulemaking the myriad circumstances in which such nonpermissible or permissible picketing might occur. Moreover, the development of facts as to the precise Government interest to be protected in given circumstances and as to possible differentiations between types of picketing can best be accomplished on a case-by-case basis through the adjudicatory procedures established under the Order. These procedures include provision for the presentation of arguments by amici curiae under section 2411.49 of the Council's rules.

More particularly as to the adjudicatory procedures, upon a complaint filed by an agency alleging that a labor organization unlawfully picketed the agency in a labor-management dispute, in violation of section 19(b)(4), the Assistant Secretary shall continue to process such complaint in accordance with the expedited procedures set forth in section 203.7(b) (29 CFR 203.7(b)) and related provisions of the Assistant Secretary's Rules and Regulations (including the procedure for the issuance of an order providing for cessation of the picketing pending disposition of the complaint). In such cases, the Assistant Secretary shall determine whether the picketing involved in the particular case interfered with or reasonably threatened to interfere with the operation of the affected Government agency and thereby violated section 19(b)(4) of the Order. In this connection, the Assistant Secretary shall fully develop in the record and carefully consider the precise Government interest sought to be protected and such matters as the sensitivity of the governmental function involved, the situs of the picketed operation, the number of pickets, the purpose of the picketing, the conduct of the pickets, and any other facts relevant to the exact nature of the picketing and the Government organization concerned. Based upon these detailed findings in each case, the Assistant Secretary shall render his decision as to whether the picketing was permissible or nonpermissible under section 19(b)(4) of the Order.

Thereafter, upon a petition for review of the decision of the Assistant Secretary duly filed by a party to the case and upon acceptance of that petition for review by the Council under part 2411, subpart B of the Council's rules of procedure (5 CFR 2411.11 et. seq.), the Council will carefully review the decision of the Assistant Secretary. As appropriate, the Council will carefully analyze the Assistant Secretary's determination and the required supporting findings by the Assistant Secretary referred to hereinabove relating to whether, under the particular circumstances of the case, the picketing interfered with or reasonably threatened to interfere with the operation of the Government agency involved, in violation of section 19(b)(4) of the Order. Requests of interested agencies, unions or other persons to submit their views on these matters, as amici curiae, will be entertained by the Council in accordance with section 2411.49 of the Council's rules (5 CFR 2411.49). Founded on this analysis, and in conformity with section 2411.18(b) of the Council's rules (5 CFR 2411.18(b)), the Council will issue its decision sustaining, modifying or setting aside the Assistant Secretary's ruling that the picketing at issue was permissible or nonpermissible under section 19(b)(4) of the Order.

In this manner, on a case-by-case basis and demonstrated by the facts in each case, the Council will effect the specific delineation of picketing

which is permissible or nonpermissible under section 19(b)(4) of the Order, as suggested by the Court in the National Treasury Employees Union decision. The decision of the Council rendered in each case will, of course, serve as a precedent which will be binding on the disposition of any like situation which may subsequently be presented.

The foregoing practice and considerations will apply in all pending and future cases involving complaints that a labor organization unlawfully picketed an agency in a labor-management dispute, as proscribed by section 19(b)(4) of the Order.

By the Council.

Henry B. Frazier III
Executive Director

Issued: January 5, 1977

January 24, 1977

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,
OFFUTT AIR FORCE BASE
A/SLMR. No. 784

This case involved an unfair labor practice complaint, which was amended at the hearing de novo, alleging essentially that employee Lucille Daugherty was disciplined and discharged because she engaged in certain union activities in violation of Section 19(a)(2) and (1) of the Order, and that the Respondent violated Section 19(a)(1) of the Order by virtue of certain anti-union remarks and interrogations by supervisors of the Respondent and by issuing a certain Notice and a Direction which improperly restricted employee discussion of union activity.

The Administrative Law Judge concluded that Mrs. Daugherty was reprimanded and discharged from her position as a waitress at the Respondent's Noncommissioned Officer's Club (NCO Club) because of her union activities in violation of Section 19(a)(2) and (1) of the Order. In this regard, he found that the agency procedure for review of such action was not an "appeals procedure" within the meaning of Section 19(d) of the Order and, thus, did not preclude his consideration of Mrs. Daugherty's alleged discriminatory treatment under the unfair labor practice procedures of the Order. In addition, he found that the Respondent violated Section 19(a)(1) of the Order by issuing a Notice and also a Direction which, in effect, improperly barred discussion of union activity by employees; by certain anti-union remarks made by the NCO Club's manager; and by engaging in certain improper conduct involving other employees of the NCO Club and a job applicant.

The Assistant Secretary concurred with the Administrative Law Judge's finding that the Respondent violated Section 19(a)(2) and (1) of the Order by reprimanding and later discharging Mrs. Daugherty. He agreed also with the conclusion of the Administrative Law Judge that the Activity procedure available to Mrs. Daugherty for the purpose of contesting her discharge (which procedure was never invoked) was not an "appeals procedure" within the meaning of Section 19(d) of the Order and, thus, was not a bar to his consideration of the alleged discriminatory discharge. In this regard, he noted that the term "appeal" is defined in the Federal Personnel Manual as a "request...for reconsideration of a decision to take an adverse action...," and that the Report and Recommendations of the Federal Labor Relations Council (1971) contemplated that only a procedure which provides third-party review of such adverse action "appeals" would meet the exclusionary standard established in Section 19(d). Accordingly, the Assistant Secretary concluded that the term "appeals procedure" as used in Section 19(d) did not encompass a nonstatutory appeals system which did not provide third-party review of an agency adverse action. Therefore, the "appeals" procedure available to Mrs. Daugherty, which was non-statutory and which did not provide for third-party review, did not preclude his consideration of her discharge. In the Assistant Secretary's view, to conclude that the Respondent's "appeals" procedure was the exclusive means for review of Mrs. Daugherty's alleged discriminatory discharge would mean she and similarly situated nonappropriated fund activity employees would never have the opportunity to seek independent third-party review of any adverse action, a conclusion which he found would be clearly inconsistent with the purposes and policies of Section 19(d) as explicated by the Federal Labor Relations Council in its 1971 Report. Under these circumstances, he ordered the Respondent to reinstate Mrs. Daugherty and make her whole for any loss of income she had incurred.

The Assistant Secretary found also that the Respondent had violated Section 19(a)(1) of the Order with respect to certain anti-union remarks by the NCO Club manager; and by the issuance of a March 19, 1973, Notice and by a Direction of April 11, 1973. However, he dismissed on procedural grounds certain portions of the complaint upon which the Administative Law Judge found other violations of the Order as the particular findings were based on allegations of violations of the Order previously dismissed by the Regional Administrator but which the Administrative Law Judge allowed as amendments to the complaint at the hearing de novo.

Accordingly, the Assistant Secretary issued a remedial order for those violations of the Executive Order which he had found.

A/SLMR No. 784

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
OFFUTT AIR FORCE BASE

Respondent

and

Case No. 60-3588(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1486

Complainant

DECISION AND ORDER

On June 10, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, 1/ 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 Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order, the Complainant filed an answering brief, and the Respondent filed a supplemental brief in support of its exceptions. 2/

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 entire record in the subject case, including the Respondent's exceptions, supporting brief, and supplemental brief, and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein. 3/

The Administrative Law Judge concluded that the Respondent issued certain written reprimands to Lucille Daugherty and ultimately discharged her from her position as a waitress at its Noncommissioned Officer's Club (hereinafter called NCO Club) because of her union activities in violation of Section 19(a)(2) and (1) of the Order. In this regard, he held that, under the particular circumstances herein, Section 19(d) of the Order did not preclude the consideration of the issue of Mrs. Daugherty's alleged discriminatory treatment. Additionally, the Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) of the Order by issuing a Notice and Direction which had the effect of barring discussion of union activity by NCO Club employees while "on duty" or on "duty time"; by certain anti-union remarks made by the NCO Club's manager; and by engaging in certain improper conduct involving other employees of the NCO Club and a job applicant.

I agree with the Administrative Law Judge's conclusion that the Respondent violated Section 19(a)(2) and (1) of the Order by issuing written reprimands to Mrs. Daugherty and later discharging her because she contacted, sought assistance from, and was active on behalf of the Complainant. In my view, the record reflects that, but for such union activities, Mrs. Daugherty would not have been discharged.

I concur also with the Administrative Law Judge's conclusion that the Activity procedure available to Mrs. Daugherty for purposes of contesting her discharge (which procedure was never invoked) is not an "appeals procedure" within the meaning of Section 19(d) of the Order, 4/ and, consequently, is not a bar to the consideration, under the unfair labor practice procedures of the Order, of Mrs. Daugherty's alleged discriminatory discharge. In this regard, it was noted that although the term "appeals procedure" as used in Section 19(d) is not defined in the Order, Chapter 771, "Appeals and Grievances to the Agency", Subchapter 1, "General Provisions", Section 1-2 "Definitions" of the Federal Personnel Manual defines the term "appeal" as "a request by an

1/ A nine day hearing was held in this case before Administrative Law Judge Thomas W. Kennedy. The hearing consisted of three, three-day sessions held on July 31, August 1, and August 3, 1974; September 25-27, 1974; and October 29-31, 1974. Thereafter, due to the death of Judge Kennedy, the case was reassigned to Administrative Law Judge Samuel A. Chaitovitz who ordered a hearing de novo in this matter.

2/ Subsequent to the filing of the Respondent's supplemental brief, the Complainant requested that either the supplemental brief not be considered by the Assistant Secretary as it was not properly limited in scope or, alternatively, that the Complainant be allowed to file a response to the Respondent's supplemental brief. Both requests are hereby denied.

3/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station Quonset Point, Rhode Island, A/SLMR No. 180, the Assistant Secretary held that as a matter of policy he would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record in this case, I find no basis for reversing the Administrative Law Judge's credibility findings with respect to the violations of the Order found herein.

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

employee for reconsideration of a decision to take adverse action against him." 5/ Thus, the term "appeals procedures" as used in Section 19(d) appears to relate to those procedures applicable in adverse action situations. It was noted further that the Report and Recommendations of the Federal Labor Relations Council (1971) contemplated that only a procedure which provides for third-party review of such adverse action "appeals", (as is provided in nearly all "statutory appeals procedures" 6/) would meet the exclusionary standard established in Section 19(d). Thus, the 1971 Report, referred to above, in recommending that the language of Section 19(d) of the Order be changed to its present form, indicated that employees covered under the Order should have "an opportunity to seek third-party adjudication of any issue involving an alleged unfair labor practice," i.e., an alternative to agency management being the final judge of its own conduct. Moreover, in recommending that the existing rule that issues which could properly be raised under an appeals system could not be raised as unfair labor practices be retained, the Council noted that, "Employees currently have the opportunity to seek third-party review of agency action under appeals procedures established by statute." 7/ Based on the foregoing, in my view it is clear that the term "appeals procedure" as used in Section 19(d) of the Order is not intended to encompass nonstatutory "appeals" procedures which do not provide for third-party review of an agency action.

In the instant case, the record indicates that the procedure as set forth in AFM 176-5 8/ by which Mrs. Daugherty could have appealed her discharge was a nonstatutory appeals system, i.e. it was established by the Air Force, a higher echelon within the same agency as the Respondent,

5/ The term "adverse action" is defined in Chapter 752, "Adverse Actions by Agencies", Subchapter 1, "Coverage of Chapter", Section 1-1, "Action Coverage", of the Federal Personnel Manual to include, with certain exceptions not relevant to this case, "disciplinary and nondisciplinary removals, suspensions, furloughs without pay, and reductions in rank or pay."

6/ The term "statutory appeals procedures" includes "appeals procedures established by Executive order, or regulations of appropriate authorities outside the agency to implement or administer responsibilities assigned by statute with respect to the subject matter involved," in addition to those appeals procedures directly prescribed by statute. See FLRC Information Announcement, March 22, 1972, Question and Answer No. 4, 1 FLRC 669, at 670.

7/ Report and Recommendations of the Federal Relations Council, 1971, Part C.

8/ The record indicates that Exhibit C-102 was intended to constitute a complete copy of AFM 176-5. However, the copy submitted as part of the official record is incomplete to the extent that it lacks, among other things, paragraph 2-25 which concerns the right of (Continued)

as distinguished from an appropriate authority outside the agency. 9/ It provided essentially that, after a written determination by the base commander, the final "appeal" rested with the base commander's superior, the major air command, in this case the Strategic Air Command. As noted by the Administrative Law Judge, this procedure did not provide for an appeal to persons outside of the Department of the Air Force or even outside of the chain of command. Therefore, to conclude that the Respondent's "appeals" procedure was the exclusive means for review of the alleged discriminatory discharge of Mrs. Daugherty would mean that she and similarly situated nonappropriated fund activity employees would never have the opportunity to seek independent third-party review of any adverse action. 10/ In my view, such a conclusion would be clearly inconsistent with the purposes and policies of Section 19(d) as explicated by the Council in its 1971 Report. Accordingly, I find that I am not precluded by Section 19(d) of the Order from considering the allegation herein concerning Mrs. Daugherty's discharge 11/, and having concluded previously that the Respondent's conduct with respect to Mrs. Daugherty's written reprimands and subsequent discharge were violative of Section 19(a)(2) and (1) of the Order, I shall order the Respondent, among other things, to reinstate Mrs. Daugherty to the same or substantially equivalent position as she held prior to her discharge, and make her whole for any loss of income she may have incurred. 12/

8/ nonappropriated fund employees to appeal when involuntarily terminated. As the missing paragraph was included by the Respondent as part of Exhibit R-1 at the first hearing in this matter, I shall consider it as part of the official record in this case.

9/ See footnote 6, above.

10/ Nonappropriated fund employees are not covered by Civil Service Commission appeals procedures available to most Federal employees. See 5 U.S.C. 2105(c).

11/ In my view, this conclusion is not inconsistent with the Assistant Secretary's decision in Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, wherein it was held that Section 19(d) of the Order was dispositive with regard to the statutory appeals procedure therein established pursuant to statute (32 U.S.C. 709), which statute specifically precludes third-party review.

12/ Noting particularly the absence of any statute specifically precluding the payment of back pay to nonappropriated fund employees, I find that my authority to direct back pay to the nonappropriated fund activity employee involved herein is clearly proper under the authority vested in the Assistant Secretary by Section 6(b) of the Executive Order. In my view, the remedial order herein, absent specific prohibition, represents, in effect, an intra-Executive Branch administrative adjustment to rectify an improper act, as distinguished from an outside claim against the United States Government.

In addition to concurring with the Administrative Law Judge's conclusions with respect to the improper nature of the Respondent's conduct regarding Mrs. Daugherty referred to above, I agree also with his conclusions that the Respondent violated Section 19(a)(1) of the Order by the NCO Club manager's anti-union remarks made at the March 8 and 9, 1973, meetings with Mrs. Daugherty, and that the Respondent violated Section 19(a)(1) of the Order by its issuance of the March 19, 1973, Notice barring discussion of the Union by NCO Club employees while "on duty" and by its issuance on April 11, 1973, of Direction SS-OI-34-2 which prohibited nonappropriated fund employees from talking to union representatives on "duty time", including those union representatives who were also NCO Club employees. In this latter regard, it was noted that both the Notice and the Direction had the effect of barring union activity by NCO Club employees during their non-work time, including breaks and lunch hours, a limitation which has been found to be violative of the Order, absent unusual circumstances not present here. 13/

However, under the particular circumstances herein, I reject the conclusions of the Administrative Law Judge with respect to his findings that the Respondent engaged in conduct violative of Section 19(a)(1) of the Order with respect to certain other NCO Club employees and a job applicant. 14/ Contrary to the Administrative Law Judge, I find that the Assistant Regional Director's (now designated as Regional Administrator) letter of May 10, 1974, intended to dismiss all allegations in the complaint directly concerning the Respondent's conduct with regard to Susie Furfari, job applicant Patrick Furfari, and any other employees of the NCO Club other than Lucille Daugherty. No request for review was filed with respect to the Regional Administrator's action in this regard. Under these circumstances, the motion to amend the complaint at the hearing de novo to include portions of the complaint previously dismissed by the Regional Administrator was erroneously granted by the Administrative Law Judge. 15/ Therefore, I shall dismiss those portions

13/ Cf. Charleston Naval Shipyard, A/SLMR No. 1, and Federal Energy Administration, Region IV, Atlanta, Georgia, A/SLMR No. 541.

14/ At the hearing de novo, the Administrative Law Judge, over the objection of the Respondent, granted the Complainant's motion to amend its complaint to include, for Section 19(a)(1) purposes, allegations concerning the Respondent's conduct with respect to "employees" other than Lucille Daugherty.

15/ Moreover, the allegations relating to Linda Hull and Carol Littlefield do not appear to have been appropriately raised as the record reveals that these alleged incidents occurred just prior to the start of the first hearing in this case in July 1974, and apparently were never the subject of pre-complaint charges. Therefore, these allegations are also procedurally defective under Section 203.2(a)(1) and (2) of the Assistant Secretary's Regulations which requires that unfair labor practice allegations must be the subject of written pre-complaint charges filed within six months of the occurrence of the alleged unfair labor practices.

of the amended complaint which concern job applicant Patrick Furfari 16/ and employees of the NCO Club other than Lucille Daugherty.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Air Force, Offutt Air Force Base, shall:

1. Cease and desist from:

(a) Discharging, disciplining, or discriminating in any manner against Lucille Daugherty in regard to her hire, tenure, promotion, or other conditions of employment in order to discourage membership in the American Federation of Government Employees, AFL-CIO, Local 1486, or any other labor organization.

(b) Promulgating, maintaining, or enforcing any regulation, rule, or direction which prohibits or prevents employees from discussing union activities at their workplace during non-work time, providing there is no interference with the work of the agency.

(c) Applying and/or enforcing existing procedures, policies and regulations, in a manner which discriminates against members of the American Federation of Government Employees, AFL-CIO, Local 1486, or any other labor organization.

(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 purpose and policies of the Order:

(a) Offer Lucille Daugherty immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or to her other rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of its discrimination by paying to her a sum of money equal to the amount which she would have earned or received from the date of her discharge to the date of the offer of reinstatement, less any amounts earned by such employee through other employment during the above noted period.

16/ In view of the disposition herein, I find it unnecessary to make a finding with regard to the Administrative Law Judge's conclusion that a job applicant is an "employee" for purposes of the Order.

(b) Rescind the "NOTICE TO ALL CLUB EMPLOYEES" dated March 19, 1973 and the Base Direction labeled SS-OI-34-2.

(c) Post at all activities at Offutt Air Force Base which employ nonappropriated fund employees 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 Commander and they 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 Base Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the amended complaint alleging violations of Section 19(a)(1) with respect to "discriminatory" treatment of employees and individuals other than Lucille Daugherty be, and they hereby are, dismissed.

Dated, Washington, D. C.
January 24, 1977

Bernard E. DeLury, 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 discharge, discipline or discriminate in any manner against Lucille Daugherty in regard to her hire, tenure, promotion, or other conditions of employment in order to discourage membership in the American Federation of Government Employees, AFL-CIO, Local 1486, or any other labor organization.

WE WILL NOT promulgate, maintain, or enforce any regulation, rule, or direction which prohibits or prevents our employees from discussing union activities at their workplace during non-work time, providing there is no interference with the work of the agency.

WE WILL NOT apply and/or enforce existing procedures, policies and regulations in a manner which discriminates against members of the American Federation of Government Employees, AFL-CIO, Local 1486, or any other labor organization.

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 offer Lucille Daugherty immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or to her other rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of our discrimination by paying to her a sum of money equal to the amount which she would have earned or received from the date of her discharge to the date of the offer of reinstatement, less any amounts earned by her through other employment during the above noted period.

WE WILL rescind the "NOTICE TO ALL CLUB EMPLOYEES" dated March 19, 1973, and the Base Direction labeled SS-OI-34-2.

_____
(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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Office Building, 911 Walnut Street, Room 2200, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
American Federation of Government Employees, AFL-CIO, Local 1486 Complainant	:	
v.	:	Case No. 60-3588(CA)
Department of the Air Force Offutt Air Force Base Respondent	:	

CAPTAIN CHARLES L. WIEST, JR.
Office of the Staff Judge Advocate
San Antonio Air Logistics Center
Kelly Air Force Base, Texas 78241

P. JOSEPH STRUCKMAN
Labor Relations Officer
3902 AB Wg. (DPCE)
Offutt Air Force Base, Nebraska 68113
For the Respondent

MARILYN G. BLATCH, Esq.
1335 Massachusetts Avenue, N. W.
Washington, D. C. 20035

CARL W. HOLT
National Representative, AFGE
P. O. Box 1152
Omaha, Nebraska 68101
For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

On May 10, 1974, the Regional Administrator for the

Labor-Management Services Administration, Kansas City Region, issued a Notice of Hearing in this case. The Notice directed a hearing on the Complaint filed by the American Federation of Government Employees (AFGE), Local 1486, herein called AFGE Local 1486 or the Union, against Offutt Air Force Base, and the Non Commissioned Officers' Club, (NCO) at Offutt Air Force Base, Nebraska, hereinafter called the Activity or Respondent alleging violations of Sections 19(a)(1) and (2) of Executive Order 11491, as amended, hereinafter called the Order.

A nine-day hearing was held pursuant to this Notice before Administrative Law Judge Thomas W. Kennedy. The hearing consisted of three, three-day sessions held on: July 31, August 1, and August 3, 1974; September 25-27, 1974; and October 29-31, 1974. Subsequently, due to the untimely death of Judge Kennedy, the case was reassigned to the undersigned Administrative Law Judge.

On November 10, 1975, the undersigned ordered a de novo hearing in this case. A hearing before the undersigned was held on January 13, 14, and 15, 1976 in Omaha, Nebraska. At this hearing, the parties reached agreement on certain stipulations. Specifically, the parties agreed that in lieu of recalling certain witnesses who testified at the previous hearing, they would stipulate to the prior testimony of fourteen of those witnesses, and the exhibits introduced through their testimony. 1/ To avoid confusion, it was agreed that exhibits introduced into evidence at the second hearing would be prefaced by the number one hundred (100). Similarly, the page numbers of the transcript of the second hearing would be prefaced by the letter "A". In this way, the exhibits and testimony at the two hearings would be easily distinguished. Further, 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. Briefs were filed on March 29, 1976 and have been considered.

Upon the basis of the entire record, including the stipulations entered into by the parties and my observation of the witnesses who appeared before me and their demeanor, I make the following conclusions and commendations.

1/ The parties stipulated to the first Hearing testimony of Mrs. Furfari, Mrs. Velda Embree, Master Sergeant Patrick Furfari, Mr. Charles W. Gilmore. Mr. Robert Capps, Mr. Joseph Scheiblhofer, Mrs. Linda Hall, Mrs. Cecilee Ann Block, Mrs. Carol Littlefield, Sergeant Dennis Daugherty, Mr. Jack Stillabower, Mr. Joseph Struckman, Miss Teresa Guizar, and Mrs. Margaret Creeley.

STATEMENT OF FACTS

1. Background

The NCO Club is a non-appropriated fund activity (NAF) located at Offutt Air Force Base near Omaha, Nebraska. The Club provides food and entertainment facilities and services to its members. The events relevant to this case involve, for the most part, only civilian employees of the Club who are directly or indirectly involved in the pool operations of the Club, and higher management personnel on the Base.

The Club employs approximately 95 people including supervisory and management personnel. In the Dining Room itself, there are approximately 18-20 non-supervisory employees, including 10 waitresses, 8 buspersons, a cashier, hatcheck, and a hostess. The Dining Room Supervisor, Helen Morton, is the immediate supervisor of all of the Dining Room personnel. She reports directly to John Ransom, the Club Manager.

The Chef is in charge of the kitchen and supervises approximately 12 employees, some of whom are part-time military personnel. There is also an Assistant Manager and three to four Night Managers who are in charge of the entire Club in the absence of Mr. Ransom.

Mr. Ransom, the Club Manager, is in charge of the day-to-day operations of the Club and has authority to hire and fire employees. The Major Command (MAJCOM), the Strategic Air Command is, however, required to insure that the Club is operated in a manner consistent with the personnel policies and practices prescribed in Air Force Manuel 176-5 (AFM 176-5) including those relating to the Order. Finally, the installation commander is required to provide guidance and assistance to non-appropriated fund activities and bears intermediate responsibility for personnel administration within command. Mr. Ransom's immediate superior at all times relevant to this case was Colonel Blakeslee, Chief of Recreational Services. Blakeslee, in turn, reports to the base commander.

AFGE Local 1486 has been the exclusive bargaining representative of all Wage-Grade employees at Offutt since 1968. At no times relevant to this case were the employees of the NCO Club exclusively represented by any union.

2. The Discharge of Lucille Daugherty

Prior to her discharge on April 30, 1973, Lucille Daugherty had been employed as a waitress at the NCO Club for approximately seven years. She had also worked as a waitress for three years at the NCO Club at Bangor, Maine. It is undisputed that Mrs. Daugherty had been considered to be an excellent waitress, and enjoyed a good relationship with her supervisors, Helen Morton

and John Ransom. She had never been disciplined or reprimanded.2/ In fact, due to her good work, Mrs. Daugherty was often the employee selected to be put in charge of the Dining Room if Helen Morton was temporarily absent. Even when other employees who served as Assistant to Dining Room Supervisor were available, if she was on duty, Mrs. Daugherty was automatically presumed to be in charge.3/ She also recieved a wage differential.

Prior to March 1973, Mrs. Daugherty was considered a valuable and trusted employee who enjoyed a good working relationship with her superiors.

The March 3 Incident 4/

A dispute over assignments to parties and sharing tips gave rise to this incident relevant to this case. Pursuant to usual practice, Helen Morton had made out the weekly schedule and put a "P" after those individuals assigned to work parties. 5/ For the evening of Saturday, March 3, Helen Morton, Mrs. Daugherty, Michael Cornelio, and Bonnie Wing were assigned to parties. Later, Helen Morton took off for the evening because it was her birthday.

2/ There was some evidence that in March 1972, Mrs. Daugherty received a reprimand for trying to complain, on behalf of the other employees, over the practice of permitting Mrs. Morton to share in party tips even when Mrs. Morton didn't work on the party. Apparently, however, the reprimand was never perfected or entered into Mrs. Daugherty's file. Thus, it apparently never really became an official reprimand.

3/ Waitresses, including Mrs. Daugherty, who were put "in charge" in the absence of Helen Morton did not exercise the full scope of her supervisory powers. Rather, these waitresses sought the assistance of Mr. Ransom, or the night manager, if any problems arose regarding employees, and limited themselves to making sure the Club was clean, customers satisfied, etc. Mrs. Daugherty was not considered to be a supervisor.

4/ Unless otherwise noted all dates herein refer to 1973.

5/ The schedule is not to be confused with the party sheet. There was a weekly schedule showing who worked what hours, and indicating whether the employee was assigned to the Dining Room, or to parties. The schedule did not specify which party and individual was assigned to, however, and Helen Morton usually informed the person of which party orally, when they reported to work for the day. A separate party sheet was made out for each party. The record indicates that prior to being turned in at the end of the evening, either the employee themselves or Helen Morton recorded the names of those entitled to a tip for that particular party.

On the evening of March 3, there were two parties scheduled at the Club. Helen Morton had been scheduled to work the small party in the Top Three Room (also referred to as Sargeant Park's Party). Mrs. Daugherty, Mike Cornelio, and Bonnie Wing were scheduled for the large party in the Nebraska Room. Ms. Morton testified that when she decided to take off, she specifically informed Sgt. Park, Mrs. Daugherty and Bonnie Wing that Ms. Wing was to take her place at the small party. The record indicates, however, that while she may have informed Ms. Wing, Ms. Morton did not inform Mrs. Daugherty, Michael Cornelio or Sgt. Park. Further, it is undisputed that all three employees did, in fact, serve both parties and Ms. Wing said nothing to Mrs. Daugherty or Mike Cornelio to indicate that she believed she alone was assigned to the smaller party.

Apparently both Mrs. Daugherty and Mike Cornelio had assumed, that since Ms. Morton was off, they and Ms. Wing were assigned to both parties. Further, with Helen Morton absent, Mrs. Daugherty was automatically in charge of the food operation. After they were through serving, Mrs. Daugherty obtained the party sheet for the Sargeant Park's party and added her name and Mike Cornelio's name to the sheet.

Nothing was said that evening, but on Sunday, March 4, when Mrs. Daugherty took her "bank" to the office at the close of the shift, she was informed that her name and Mike Cronelio's name had been taken off the party sheet. Mrs. Daugherty expressed her surprise and said she was going to Building C (the Personnel Office) to see about it. The Assistant Manager, Jack Stillabauer, and Night Manager, Ross Meadows, told her that she should discuss the matter first Mr. Ransom and that she would get fired if she went to Building C.

That evening, Mrs. Daugherty discussed the incident with her husband. Her husband advised her to seek the assistance of AFGE Local 1486. She was unable to reach the Local President of AFGE Local 1486 and, therefore, contacted National Representative Carl Holt. After discussing the problem, Mr. Holt arranged to meet with Mrs. Daugherty and other interested employees. He encouraged Mrs. Daugherty to begin organizing NCO Club employees; explained what was involved; and arranged a meeting with the Inspector General of the Base to discuss Mrs. Daugherty's tip problem.

Subsequently, Mrs. Daugherty did begin orgainzing NCO Club employees.

The Events of March 8

The meeting with the Inspector General, Colonel O'Neil, was scheduled for March 8, aroung 4:00 in the afternoon. Present were the Inspector General (IG), Carl Holt, Mrs. Daugherty, and Francis Gardner, another waitress at the NCO Club. Colonel O'Neil was also the deputy base commander.

The meeting was apparently cordial. Mrs. Daugherty explained the nature of her problem and expressed her concern over possible retaliation, particularly in view of the remark made to her on March 4 by management officials stating she would be fired if she went to Building C. The Inspector General assured her she had every right to come to him, assured her no action would be taken against her, and advised them to first discuss the problem with Mr. Ransom. The Inspector General also assured them that Mr. Holt could act as her representative in the matter.

After this meeting, Mr. Holt and Mrs. Daugherty proceeded directly to the NCO Club to talk to Mr. Ransom and Helen Morton. Upon arriving at the Club, Mrs. Daugherty found that her time card was pulled. 6/ She was told Mr. Ransom wanted to see her in his office and went there immediately. Mr. Holt waited downstairs.

When Mrs. Daugherty entered the office and saw that six management representatives were waiting for her, she asked to be excused to get her cigarettes. 7/ Instead, she went to get Mr. Holt. The two returned to Ransom's office. Mrs. Daugherty sat inside the office and Mr. Holt stood in the doorway and waited until Ransom finished a phone call.

6/ Apparently it was Mr. Ransom's practice to pull an employee's time card when Mr. Ransom wished to speak to that employee.

7/ Present were Mr. Ransom, Helen Morton, Ross Meadows (the Night Manager), Jack Stillabower (Assistant Club Manager), Larry Bibbich (Management Trainee), and Mildred Bought (Ransom's secretary).

When the phone call was concluded, Mr. Holt introduced himself, identified his position, and informed Mr. Ransom that he represented Mrs. Daugherty. Mr. Ransom responded: "We don't have no damn union here and we don't intend to", and asked Holt to leave. A heated conversation ensued. Mr. Holt insisted the meeting was a kangaroo court and he would not leave Mrs. Daugherty alone and unrepresented before six management officials.

Mr. Ransom then called Joe Scheiblehofer, the civilian personnel officer to find out Holt's "status" or right to be there. After this phone call, Ransom asked if Mrs. Daugherty was a member of the Union. She answered yes and Ransom asked to see her Union card. Holt advised her she did not have to show him her Union Membership Card. At this point, Ransom said there would be no meeting that day and he would let them know when one could be held. Holt also asked to meet with Mrs. Morton but was told again that there would be no meeting that day. The parties agreed to meet at another time, shook hands, and the meeting concluded. 8/

After the meeting, Mr. Holt left and the employees returned to work. Mrs. Daugherty also returned to work but had a problem with one customer's steak. Management inquired into the matter and the customers told Mrs. Daugherty the next day (March 9) that she did not blame Mrs. Daugherty and did not understand why management was making so many inquiries about the incident.

Letter of Reprimand Received on March 9, 1973

On March 9, Mr. Ransom asked to see Mrs. Daugherty. She accompanied him to his office. Ransom closed the door and handed her an undated Letter of Reprimand addressed to her. He asked her to read and sign it. She refused, stating that it was not all true. Ransom then called in Sgt. Harrol to witness receipt of the document by Mrs. Daugherty. When Sgt. Harrol left, Ransom shut the door and threw the Letter across the desk stating: "Here, give this to your union representative. I will have you know he is going to [SIC] do nothing but hurt you." This letter dealt solely with the dispute concerning the serving of the Sgt. Park's party on March 3.

8/ There was some confusion as to whether the parties had agreed that Mrs. Daugherty would put her complaint in writing.

The March 14 Meeting With Colonel Blakeslee

Pursuant to the request of Mr. Holt a meeting with Colonel Blakeslee, Chief of the NAF, was scheduled to discuss alleged unfair labor practices committed by NCO Club management. Mr. Holt wanted to discuss Ransom's apparent refusal to permit him to represent Mrs. Daugherty, and the remarks made to her on March 3 by management to the effect she would be fired for going to Building C.

Present at the meeting were Mr. Holt; Mrs. Daugherty; Francis Gardner, (another waitress at the NCO Club); Colonel Blakeslee; Ron Harbour, labor-relations specialist; and Mr. Scheiblehofer.

Colonel Blakeslee, although in charge of Non-Appropriated Fund Activities on the base, was not very familiar with the issues and more or less turned the meeting over to Harbour and Scheiblehofer. Harbour took the position that Mrs. Daugherty had no right to any representative at the initial stage of the complaint or grievance procedure. Mr. Holt disputed this and pointed out that the regulations did not specify one way or the other. The discussion of these regulations continued without resolution and nothing else was accomplished.

The March 19 Reprimand

On March 19, Mrs. Daugherty received another written disciplinary notice. 9/ The substance of this notice was that Ransom was reprimanding her for her "failure to follow Club policy. The notice, stated that on February 27 and 28, 1973, at a meeting, Mrs. Daugherty and other employees were informed that if they had complaints they should be brought first to the supervisor and then, if not satisfied to Mr. Ransom. The notice stated further that after all the "confusion" on March 3, 1973, instead of discussing the problem with the supervisor or Mr. Ransom she discuss her problems with "several other employees", the "Base Inspector" and "several other agencies". (Emphasis Added). By "other agencies," Ransom clearly meant the Union. Mr. Ransom was disciplining Mrs. Daugherty for going to the Union, the IG, and attending the meeting with Colonel Blakeslee regarding

9/ The official record of the second hearing contains two exhibits labeled R-108. The first R-108 is the same document as C-108, but represents a more legible copy. The record's corrected and the legible copy of the March 19 reprimand now labeled R-108 is corrected and shall be deemed substituted for the document labeled C-108.

management's alleged unfair labor practices. 10/

It is important to note that the term "other agencies" as used in the March 19 reprimand, included the Union. Furthermore, Ransom indicated in his testimony that the Reprimand of March 19 included reprimanding Mrs. Daugherty for attending the March 14 meeting with Colonel Blakeslee, the purpose of which was to discuss alleged unfair labor practices committed by management. Thus Mr. Ransom was, at least to a great part reprimanding Mrs. Daugherty because of the Union's involvement in her case and because she met with Colonel Blakeslee on March 14 concerning an alleged unfair labor practice. 11/

Other Incidents Involving Mrs. Daugherty

Mrs. Daugherty, for the first time, was not assigned to the SAC Credit Union party, which paid each waitress a $25 tip. This was justified by claiming she was needed to supervise the Dining Room. However, the Dining Room was virtually empty during the annual SAC Credit Union party since virtually the entire membership of the NCO Club attended the party.

Mrs. Daugherty was also watched with regard to her use of the telephone. While Ransom had always told employees that the Club telephone was not for personal use except in emergencies, this policy, if enforced at all, had been loosely enforced. Mrs. Daugherty had never been personally criticized for her use of the phone, and she and other employees regularly received personal calls at work. Yet,

10/ Mr. Ransom testified further that he is justified in disciplining any employee for failing or refusing to put a grievance in writing, if he believes he will need a written record to explain his response to the grievant to anyone outside the NCO Club. The factor which made Mrs. Daugherty's conduct a serious offense was the fact that she caused other "outside" people to become involved in the dispute.

Mr. Ransom believes that employees have an obligation to come to him first before making inquiries at Building C or the Inspector General, or the Base Commander, or the Union.

11/ On April 12, 1973, another meeting was held in an effort to resolve the unfair labor practice charges filed by the Union against management. Present were John Ransom, Ron Harbour, Joe Scheiblehofer, Local 1486 President Stiggers, Local Vice-President Reeks, Carl Holt, Mrs. Daugherty, Sue Furfari, and Francis Gardner.
Footnote 11/ continued on page 10.

on or about April 7, 1973, Mrs. Daugherty was called to the phone and Helen Morton and Larry Bibbich approached her and told her she could not use the phone. Mrs. Morton could not observe Mrs. Daugherty from her duty station. Neither Mr. Morton nor Mr. Bibbich bothered to inquire whether the call was personal or Club business; waitresses regularly took down take-out orders over the phone

Sometime in March, 1973, a notice appeared on the employee bulletin board. This notice was dated March 19, 1973 and was addressed to all Club employees. It read as follows:

> "You are not authorized to discuss anything about Union's while on duty. No Union official is allowed to discuss Union business with you while on duty. 12/ The discussion of Union between employees while on duty is prohibited."

Employees (and Mr. Ransom himself) uniformly testified that tnere were no other restrictions on what they talked about while "on duty". In fact, everyone discussed whatever they wanted. The only "Club policy" on this was that employees were not supposed to look idle, or congregate in the Dining Room to talk. Employees could use the Family Room for breaks, etc. There were no other restrictions on employee discussions on duty time. Mr. Ransom's testimony made it clear that the term "duty time" included breaks and lunch hours. It was, therefore, not synonymous with the term "work time".

Direction SS-OI-34-2 issued by the Offutt Air Force Base on April 11, 1973 applies to NAF employees. It provides that employees will not converse with a union representative "on duty time" until it is established in writing that the union representative is representing the employee in an official capacity. This direction apparently is applicable to the Agency's grievance procedure set forth in AFM 176-5, Chapter 5. Change 1, SS-OI-34-1 was subsequently issued but didn't specifically recind that part of SS-OI-34-2 that limits the right of an employee to talk to a union representative.

Footnote 11/ continued from page 9.

The meeting began with Mr. Harbour challenging the right of Mr. Reeks to be present on official time. Mr. Stiggers protested strongly since it had always been the practice to permit representatives of Local 1486 attend such meetings on official time. Mr. Harbour insisted and, finally, Mr. Stiggers left to check with the base commander. The base commander was out, however, and the parties were unable to resolve the matter and no further business was transacted.

12/ Mrs. Daugherty was known to be the NCO Club Union Steward. Since the Union did not have exclusive recognition at the NCO Club, she was the only "Union official" employed at the Club.

Termination Notice

On Monday, April 30, 1973, Mrs. Daugherty worked as usual. As usual, she saw Mr. Ransom during the course of the day and exchanged the normal greetings. 13/ She went home at the end of her shift -- about 2:30 or 3:00. Around 6:00 that evening, Larry Bibbich called her at home and told her that Mr. Ransom wanted her to come back down to the Club, and that it was very important. Mrs. Daugherty explained that she could not come that evening.

On Tuesday, May 1, Mrs. Daugherty traded shifts and, therefore, did not work. On Wednesday, May 2, when she reported to work, her time card was pulled. She therefore reported to Mr. Ransom's office and he attempted to give her a final notice of her termination and her paycheck. She refused to accept them and left. Mr. Ransom subsequently mailed them to her.

The reasons given for her termination were as follows:

a. Dining-In, April 6, 1973

On April 6, Mrs. Daugherty and Jackie Hurlburt were assigned to serve a Dining-In ceremony. Mrs. Daugherty testified that after dinner was finished, Helen Morton told Mrs. Daugherty to remove everything from the table. 14/ Ms. Hulbert and Mrs. Daugherty did as requested. The wine glasses later had to be replaced since the toasts continued through the evening after dinner.

The termination letter and Morton claim that Ms. Morton told Mrs. Daugherty to remove everything but the glasses. 15/

13/ Mr. Ransom testified that he normally saw Mrs. Daugherty about five times a day each day she worked.

14/ Ms. Morton claims she always gives this type of minute instructions to Mrs. Daugherty.

15/ Mr. Ransom stated that he does not recall whether or not he checked with Mrs. Daugherty as to what she was told, although he stated that his usual policy would be to talk to the employee before disciplining them.

It is undisputed, however, that Ms. Hurlbert also removed the glasses and was not disciplined in any way for it. Mrs. Daugherty was not aware of any undue inconvenience this may have caused -- it took only five minutes to replace the glasses -- and was not aware of any customer complaints. She believed she was simply following orders.

b. Trading Shifts, April 10, 1973

The second reason given for termination was trading shifts without obtaining approval first from Mrs. Morton. Allegedly, this prior approval was necessary so that no waitress would unnecessarily run into overtime.

Mrs. Daugherty testified that she traded shifts without checking first. However, she testified, as did several other employees, that they had always done this in the past; had observed others doing it; and there were never any complaints from management. The first time employees heard that they had to check first with their supervisor was when it was given as a reason for Mrs. Daugherty's termination. Further, Mr. Ransom testified that he did not know who initiated the request to trade shifts whether it was Mrs. Daugherty or the other employees involved. He did not recall if he asked Helen Morton who initiated the request; and he did not recall if he checked with Mrs. Daugherty. Neither the other employee involved in this incident nor any other employees have been disciplined for this alleged offense.

c. Busboy Remark, March 23, 1973

On March 23, 1973, just after Mrs. Daugherty had come on duty, the assistant manager asked how many busboys were on duty. Mrs. Daugherty replied that she didn't know, she wasn't being paid to be a supervisor. In her view, the remark would be taken as a joke. The assistant manager said nothing further, and did not appear to be upset. Ransom testified that he checked the incident with the assistant manager but does not recall if he checked with Mrs. Daugherty.

d. Delegating Closing Duties, April 20 and 21

The fourth reason given in the termination letter is the fact that Mrs. Daugherty, on two evenings when she was left in charge, asked another waitress to close for her. Mrs. Daugherty admits doing this, but points out that she has frequently done this in the past and had no idea anyone objected. When she did this, she stayed at the Club, went upstairs to visit friends or listened to the music, and when the Club closed, came back to check and make sure

everything was in order. No one had ever objected to this practice. Moreover, Mrs. Daugherty had checked with the night manager, explained that her daughter was visiting from South Dakota, and she wanted to visit with them. He raised no objection. On the dates in question, Jackie Hurlburt closed for Mrs. Daugherty.

Mr. Ransom testified that he had no difficulty with permitting Ms. Hurlburt to close. Rather, he viewed Mrs. Daugherty's actions as insubordinate. He stated that he does not recall if he ever checked with Mrs. Daugherty as to whether or not she had actually done this, or whether she had done it in the past.

e. Failure to File Report on Busboy, April 29, 1973

The fifth reason given for her termination was her refusal to come in on her day off and write a report on busboy Michael Valadez.

According to Mrs. Daugherty, she did have a dispute with Mr. Valadez that night, but did not tell him to clock out. He clocked out on his own. Mrs. Daugherty, pursuant to usual practice, reported the incident to the night manager. Mr, Valadez had clocked out on his own before, and was not disciplined for doing this then or on April 29. Mrs. Daugherty had never written a report on any employee (as substitute supervisor); was not asked to do so by the night manager; and was not asked to do so when she reported to work on Monday, April 30.

Both Mr. Ransom and Mrs. Morton stated that, the usual procedure would be for the substitute supervisor or the supervisor to report the incident to him directly (orally), or in his absence, to the night manager who would record it in the log. Even Helen Morton does not ordinarily write-up employees. Mr. Ransom does not recall checking this incident with Mrs. Daugherty.

f. Previous Written Reprimands

The last reason given in the termination notice, in effect, incorporates by reference the previous written reprimands discussed above. The weight of the evidence indicates that the reasons given in these previous reprimands were very critical, and among the most serious reasons

for Mrs. Daugherty's discharge. 16/

Ransom testified that it was his policy to pull an employee's time card when he wanted to discuss something with them. He did, in fact, pull Daugherty's time card on March 8 and on May 2 when he wanted to see Mrs. Daugherty. He further testified that it was his policy to discuss incidents with employees prior to disciplining them. In spite of these policies, the record indicates, that after March 9 Mr. Ransom made no attempt to discuss any of the incidents referred to above with Mrs. Daugherty on duty time. 17/ Mr. Ransom or his designee, did, on one or two occasions, call Mrs. Daugherty at home, these calls apparently involved requests to come in and sign disciplinary notices on her own time, rather than on Club time.

No evidence was presented to show that any other employee had ever been disciplined for any of the alleged offenses allegedly committed by Mrs. Daugherty, or for any alleged offense or mistake which would be comparable to the incidents set forth in the discharge notice. Mrs. Daugherty had worked at the Club longer than any other waitress and had an admirable work record. She was a family friend of both Helen Morton and John Ransom. In spite of this, she received no advance notice or opportunity to respond to the accusations contained in her termination letter.

16/ Mr. Ransom also testified that, in discharging Mrs. Daugherty, he relied upon her alleged failure to cooperate in scheduling sick leave. It seems that Mrs. Daugherty was out sick and was asked by Helen Morton when she would be able to return to work. Mrs. Daugherty did not know and said so. Upon cross-examination Mr. Ransom admitted he saw nothing wrong in an employee being unable to predict when they would be well enough to return to work, and indicated he did not know why he relied upon this in discharging Mrs. Daugherty.

17/ Mrs. Daugherty normally worked between 52 and 73 hours per pay period, and usually worked 6 days a week and Mr. Ransom saw her approximately 5 times a day when she worked.

3. Conduct Involving Surveillance and Other Employees

Both Linda Hull and Carol Littlefield, waitresses at the Club, testified that they were resigning because they had repeatedly been asked by John Ransom and Helen Morton to report on Sue Furfari and if Mrs. Furfari said anything about Mrs. Daugherty or the Union. Both were asked to watch Mrs. Furfari when she returned from her interview with Captain Weist and other management representatives prior to the first hearing in this case. Ms. Hull was asked by both Mr. Ransom and Ms. Morton, and Ms. Littlefield was asked by Ms. Morton. Both were told to watch Ms. Furfari and see if she made any telephone calls, or said anything after her interview.

Moreover, both Ms. Hull and Ms. Littlefield testified that Ms. Morton asked them to report on Ms. Furfari and her comments about Mrs. Daugherty or the Union frequently -- almost every night they were on duty. Both Mr. Ransom and Ms. Morton discussed the Union and Mrs. Daugherty's case with these employees and in these conversations, connected Mrs. Daugherty's discharge to her Union activities. While Mr. Ransom and Mrs. Morton appear to have avoided blatant anti-Union remarks, the connection between Mrs. Daugherty's discharge and her Union activity was specifically made.

The testimony of Mrs. Furfari's husband, Patrick Furfari, is equally significant and clearly indicates both surveillance of Sue Furfari, Mr. Patrick Furfari, Mrs. Furfari's husband, applied for a job as cashier at the NCO Club in the Spring of 1973. Mr. Ransom called him about his application and, on the phone, a discussion about unions, asking if Mr. Furfari knew anything about them. Mr. Furfari explained that he had had several university courses in labor-relations, and Mr. Ransom arranged to interview him personally that evening.

At the interview, Mr. Ransom asked Mr. Furfari if he was aware of his wife's involvement with the Union and asked if he knew she had filed affidavits concerning the Club. Mr. Ransom showed Mr. Furfari his wife's folder; and asked Mr. Furfari how he felt about his wife's involvement with the Union. Mr. Ransom asked if Mr. Furfari thought it was good or bad for Sue to be a Union member.

Mr. Furfari at no time initiated any discussion of unions, or his wife's involvement with them. Mr. Furfari never received an offer from Mr. Ransom and never was informed as to why he did not get the job.

Further, in view of the above, it is concluded that Mr. Ransom and Mrs. Morton had knowledge that Ms. Furfari was a Union member while she was employed in 1973 and well before she testified at the first hearing in July, 1974. Other known Union members were subject to disparate treatment. 18/ Velda Embree found her hours cut and she frequently written-up by Mrs. Morton. 19/

4. Conduct of Management Representatives Outside the NCO Club

It is clear from the record that Mrs. Daugherty's discharge was cleared and approved at each critical stage by higher officials at the Air Base including NCO Personnel Coordinator Joe Scheiblehofer and by the base NCO labor-relations specialist Ron Harbour. This clearance and approval included actually reading the text of the reprimands and termination notice.

5. Provisions of AFM 176-5 in AFR 123-11

Air Force Manual (AFM) 176-5 paragraph 1-4(a) provides that employees of nonappropriated funds are not Civil Service appointments and are "not covered by Civil Service Commission Regulations applicable to persons appointed in the competitive or classified service (5 U.S.C. 2105(c))."

AFM 176-5 paragraph 2-25 provides in subparagraph 6 that a NAF employee who is involuntarily separated "will be advised his right of appeal under the grievance procedure (Chapter 5 Section C)."

AFM 176-5 Chapter 5 is entitled "Employee Relations" and Section C is entitled "Employee Complaints and Grievances."

18/ While management claims to be unaware of their Union membership, their presence at labor-management meetings; the small and familiar nature of the dining room operation; the surveillance and questioning by management' and evidence that other employees either by choice or at management's request acted as informers, all believe this claim.

19/ This was at first denied by Mrs. Morton but she later acknowledged it when showed an actual copy of her write-ups.

This section then sets out grievance policies and procedures. 20/ The penultimate step of the grievance procedure provides for consideration of the grievance by the "grievance authority" which is the installation commander. The final and last step of the grievance procedure provides for appeal of the grievance authority's decision to MAJCOM. 21/

AFM 176-5 paragraph 5-3(b) provides procedures for giving an NAF employee a written reprimand. These procedures require notice of proposed action to the employee, including specific and detailed reasons; employee's opportunity to reply, and consideration of the employees reply. Then the employee is to receive a final notice which also sets forth the employee's appeal and grievance rights. Finally this paragraph also recommends that supervisors discussing employee problem with the employee in order to avoid or solve such problems.

Air Force Regulation (AFR) 123-11 deals with Civilian and Military personnel's 22/ right to use the Inspector General Complaint System." It states, as a policy that nothing requires the complainant to follow channels of command or to receive approval of a superior prior to filing a complaint with the Inspector General.

Conclusions of Law

A. Section 19(d) of the Order:

The Activity contends that Section 19(d) of the Order forecloses the consideration of the discipline and discharge of Mrs. Daugherty under the unfair labor practice procedures of the Order because, they contend, that AFM 176-5 provides an appeals procedure within the meaning of Section 19(d) of

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20/ AFM-176-5, paragraph 5-6; AFM 176-5 paragraph 5-5 provides that a union may not initiate a grievance.

21/ MAJCOM apparently stands for Major Command, that is the major air command having jurisdiction over the installation. In this case MAJCOM is a apparently the Strategic Air Command.

22/ It does not specifically state whether it applies to NAF employees.

of the Order. 23/

NAF employees are not covered by the statutory appeals systems available to most Civil Service Employees. 24/ The only procedures that were available to Mrs. Daugherty to seek review of her discipline and discharge by the NCO Club was under AFM 176-5. The question presented is whether the procedure provided in AFM 176-5 is an "appeals procedure" within the meaning of Section 19(d) of the Order, and would thus bar the consideration of Mrs. Daugherty's discipline and discharge as an unfair labor practices, as urged by the Activity, or whether it is a grievance procedure, which would not bar such consideration 25/, as urged by AFGE Local 1486.

AFM 176-5 subparagraph 5-5 is entitled "Grievance Policies and Exclusions" (emphasis added) and is specifically established for the use of NAF employees, who, it should be noted have no other appeals or grievance procedures available to them. 26/ Nothing called an appeals

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23/ Section 19(d) of the Order states: "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."

24/ Cf 5U.S.C. § 2105.

25/ It is clear that Mrs. Daugherty did not attempt to utilize or invoke the procedures set forth in AFM 176-5 with respect to her being disciplined and discharged.

26/ Unless they happened to be covered by a collective bargaining agreement which contains a grievance procedure. This is not the situation in the instant case.

procedure available to NAF employees is set forth elsewhere. Rather AFM 176-5 paragraph 2-25(b) sets forth that NAF employees who have been involuntary separated "will be advised of his right to appeal under the grievance procedure (Chapter 5 Section C.)" "(Emphasis added). This does not say an appeals procedure is available, 27/ but rather it states that if the employee wishes to appeal he should follow the grievance procedure. The foregoing is really semantic exercise. The title or name attached to a procedure does not determine whether it is an "appeal" or a "grievance" procedure. Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 508 (1975) see Footnote 10 of Administrative Law Judge's Report and Recommendation. The question is whether the procedure available is one that would fit under either the designation "appeal" or "grievance" when viewed in light of the aims and purposes of Section 19(d) of the Order. Phrased in a slightly different way the question is whether all agency grievance procedures are "appeals procedures" under Section 19(d) of the Order or can there be a distinction drawn between an agency grievance procedure and an agency appeals procedure, for Section 19(d) purposes.

In 1969, when originally adopted Section 19(d) of the Order provided that when an alleged unfair labor practice "is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint." This language was reviewed and in 1971 the Study Committee issued its report and recommendations. 28/ The Study Committed proposed, changing the language of Section 19(d) to its present form. In so making this recommendation, which was adopted, the Study Committee stated:

> "Further under section 19(d) when an alleged unfair labor practice is subject to an agency grievance procedure, agency management is the final judge of its own conduct. We believe there should be an opportunity to seek third-party adjudication of any issue involving an alleged unfair labor practice. To provide this opportunity we recommend elimination of the requirement that when the issue in certain unfair labor practice complaints is subject

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27/ Civil Service Employees would have the normal Civil Service appeals procedures available to them.

28/ Labor-Management Relations in the Federal Service 1971. This is in the nature of legislative history.

> to a grievance procedure, that procedure is "the exclusive procedure for resolving the complaint. We propose, instead, that when an issue may be processed under either a grievance procedure or the unfair labor practice procedure, it be made optional with the aggrieved party whether to seek redress under the grievance procedure or under the unfair labor practice procedure. The selection of one procedure would be binding; the aggrieved party would not be permitted, simultaneously or sequentially, to pursue the issue under the other procedure.
>
> The existing rule that issues which can properly be raised under established appeals procedures may not be raised under unfair labor practice complaint procedures should be retained. Employees currently have the opportunity to seek third-party review of agency action under appeals procedures established by statute." 29/ (Emphasis Added)

From the foregoing, it is clear that the Study Committee was drawing a clear distinction between a grievance procedure 30/ and an "appeals procedure." The Study Committee made it clear that the purpose of Section 19(d) was to provide that when an alleged unfair labor practice is "subject to an agency grievance procedure, agency management is the final judge of its own conduct"... the employee should have the "opportunity to seek third party review" by utilizing the unfair labor practice procedures provided by the Order. The employee elects which procedure he wishes to pursue and then is limited to that election. However the Study Committee provided further that where there is an "opportunity to seek third party review of agency action under appeals procedures established by statute "the employee has no election and

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29/ Labor-Management Relations in the Federal Service 1971, pages 29 and 30.

30/ This applies to both an agency's own grievance procedure or one that has been negotiated and appears in a collective bargaining agreement.

must pursue such appeals procedures. 31/

The procedures provides in AFM 176-5 subparagraph 5-5 and 5-6 do not sufficiently provide for third party review. The procedures are pretty standard grievance procedures. However, at the initial stages the "grievance authority," in this case the base commander 32/ decides what precise procedure to use in processing the complaint, either utilizing a grievance examiner, whom he appoints, or a grievance committee, 33/ which he has a large voice in selecting. The base commander receives and reviews the report of the grievance committee a grievance examiner and then makes a written determination. Finally the base commander's determination can be appealed to the appellate authority, the major air command, in this case the Strategic Air Command, the base commander's superior. This procedure hardly meets the objective of the Study Committee of providing third party review. Until the last step of this procedure the base commander, who through his immediate staff participated in the allegedly objectionable conduct, or his subordinates, make all the important decisions, including a determination on the merits of the complaint. The appeal from this determination goes to the base commander's superior. This is still a determination by "agency management" which is exactly what the Study Committee was trying to supply an alternative to. It is concluded that this is hardly third party review and consideration. It is submitted that it might appear that a superior would try to protect and affirm a subordinate. There is no appeal to persons outside the Air Force or even outside of the chain of command. The Order was attempting to provide employees with an opportunity to receive independent, third party review of their complaints. This procedure hardly meets that aim.

31/ Assuming of course that the appeals procedures permit the consideration of the unfair labor practice issue. In the subject case it is clear that the Air Force's procedures would permit the consideration of the discrimination allegations with respect to Mrs. Daugherty's discharge.

32/ The base commander, through his immediate staff had been involved in many of the disciplinary and discharge discussions concerning Mrs. Daugherty.

33/ A three member committee, one member appointed by the grievant, one selected by the base commander, and a third agreed upon by the first two. If they cannot reach agreement the base commander appoints the third member.

The ideal form of third party review contemplated by the study committee was the type review given by the Civil Service Commission to adverse actions taken against employees of the Federal Agencies. That procedure is hardly equatable with the procedure available in the subject case.

The cases cited by the Respondent are not despositive of this issue; neither the Federal Labor Relations Council nor the Assistant Secretary have addressed themselves to this precise issue. In Veterans Administration, Veterans Benefit Office, A/SLMR No. 296 (1973) the Assistant Secretary specifically did not rule upon the Administrative Law Judge's conclusion that an appeals procedure under Section 19(d) required third party review. In the Texas Air National Guard Case, A/SLMR No. 336 (1974) the appeal was to the Adjuntant General of the Texas Air National Guard, and it was found that Section 19(d) did bar consideration of the alleged unfair labor practice. However, the "third party issue" was not discussed, rather the question of whether the alleged unfair labor practice "issue" could be raised under the appeals procedure was the issue dealt with. Further, it should be noted that that appeals procedure was statutorily set up, not by an agency's own regulations. Finally the procedure in Department of the Navy, Aviation Supply Office, A/SLMR No. 434 (1974) specifically gives the employee the choice of utilizing Civil Service Commission review, a clear third party.

In light of all of the foregoing it is concluded that the agency's own grievance procedure, which is apparently utilized for ordinary grievances, as set forth in AFM 176-5 Chapter 5, does not sufficiently provide for a third-party review as is envisioned by the scheme of Section 19(d) of the Order. 34/ Therefore, such procedure is not an "appeals procedure" within the meaning of Section 19(d) of the Order and does not bar the consideration of Mrs. Daugherty's alleged discriminatory treatment.

B. Discipline and Discharge of Mrs. Daugherty

The credited evidence in the subject case established that Mrs. Daugherty was disciplined and discharged, at least as a major cause, because she contacted AFGE Local 1486, attempted to enlist its aid and became active on its behalf.

34/ This is not meant to indicate that an agency can not set up an "appeals procedure" within the meaning of Section 19(d) of the Order. Rather such a procedure must provide for third-party review.

Although the Activity, in its two letters of reprimand (March 9 and March 19) and termination notice of April 30 set out many reasons to justify the termination of Mrs. Daugherty, they were all clearly pretexts to cover and obscure the real reasons for the discipline and discharge, to wit, Mrs. Daugherty's action in contacting and enlisting the assistance of the Union.

Mr. Ransom testified that it was his practice to meet and discuss employee short comings before taking any disciplinary action. In fact this policy is specifically prescribed in AFM 176-5. He did not meet in advance with Mrs. Daugherty to discuss any of her alleged short comings prior to taking the disciplining action. 35/ With respect to the dispute concerning the March 3 incident, Mr. Ransom had on March 8, "pulled" Mrs. Daugherty's time card to discuss this dispute whith her. However, after her visit to the IG, when she came to his office with a Union representative, Mr. Ransom would not discuss the March 3 incident with her. Although there was some testimony by Mr. Ransom that he expected Mrs. Daugherty to put her complaint in writing, before she had an opportunity to do so, and without obtaining her version of the March 3 incident, Mr. Ransom, on the very next day, issued the March 9 reprimand letter, reprimanding her for the March 3 incident.

At both the March 8 meeting and the March 9 meeting when he gave Mrs. Daugherty the reprimand, Mr. Ransom made anti-union statements.

The March 19 reprimand letter specifically states that one of the reasons Mrs. Daugherty was being reprimanded was because she went to the "base inspector" and "several other agencies." From his testimony it is clear that Mr. Ransom was referring to the Union as one of the "several other agencies." The Activity defends this by arguing that it was not the "Union qua union" that was the object of Mr. Ransom's ire. Rather, it was the fact that Mrs. Daugherty went to anyone outside of the chain of command that caused Mr. Ransom to discipline her. However, what the activity fails to perceive is that this is the very thing the Order was designed to protect employees from. The Order grants employees the right to contact labor reorganizations and to seek their assistance, and an activity can not discipline an employee for exercising this protected right.

35/ Although the failure to follow procedure might not be conclusive proof of discriminatory motivation, it is considered evidenced bad intent.

To argue that she would have been disciplined no matter whom she contacted, even if it weren't a union, is to miss the point; the right to contact a union and seek its assistance is protected by the Order, the right to contact other persons is not protected by the Order.

The short comings set forth in the termination letter are clearly pretexts to justify firing Mrs. Daugherty. The matters were not investigated; Mrs. Daugherty's versions of the incidents were never obtained; and the matters were not discussed with her before the termination notice. With respect to the trading of shifts, busboy remark, delegating of the closing and failure to file a report on a busboy, the record establishes that Mrs. Daugherty was following established practice, her superiors were advised of her anticipated conduct and she was not advised that what she planned to do was improper. With respect to the trading shifts Mr. Ransom did not ascertain which employee initiated to switch, and the other employee was neither disciplined nor advised that the switch was improper. The April 6 Dining-In incident was apparently a misunderstanding which was minor, and caused no great inconvenience. Further, it is not even clear that Mrs. Daugherty was at fault and no attempt was made to ascertain her version of the incident.

Finally, the termination letter also relied on the prior written reprimands, including the one which concerned Mrs. Daugherty's seeking out union assistance. Mr. Ransom admitted that this was a reason for the discharge.

In light of all of the foregoing and the additional evidence of anti-union animus as exhibited by the findings involving Section 19(a)(1) of the Order set forth below, it is concluded that the Activity issued the written reprimands to Mrs. Daugherty and discharged her on April 30 because she contacted, sought assistance from and was active on behalf of AFGE Local 1486. By this discriminatory treatment of Mrs. Daugherty the Activity violated Sections 19(a)(2) and (1) of the Order. 36/

36/ Even if Mrs. Daugherty's Union activity were only a cause of the discriminatory treatment, such treatment would violate the Order. c. f. U. S. Postal Service, Berwyn Post Office, Illinois, A/SLMR No. 272 (1973) and the cases cited by the Administrative Law Judge at page 17.

C. Section 19(a)(1) violations

It is concluded that the activity violated Section 19(a)(1) of the Order by Mr. Ransom's anti-union remarks at the meetings of March 8 and 9. The remarks would clearly have the effect of undermining employees' confidence in the Union and would interfere with and coerce with employees' from exercising their rights guaranteed by the Order.

Similarly, the requests of both Ms. Hull and Ms. Littlefield by Mr. Ransom and Mrs. Morton that they engage in surveillance and report on Mrs. Furfari 37/ and her union activity and the statements made by Mrs. Morton and Mr. Ransom to Ms. Hull and Ms. Littlefield connecting Mrs. Daugherty's discharge to her Union Activity interfered with protected employee rights and therefore constitute violations of Section 19(a)(1) of the Order.

The questions asked by Mr. Ransom of Mr. Furfari, a job applicant, 38/ concerning Mrs. Furfari's Union activity and how much Mr. Furfari knew about her activities would interfere with employees' rights as guaranteed by the Order and violate Section 19(a)(1) of the Order.

The March notice limiting employees rights to discuss the Union while "on duty " clearly interfere with the employees' protected rights. "On duty" refers to the employee's entire work day and not just "work time." While an employer may have a right to limit employees' conversations

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37/ The complaint in the subject case originally alleged on Section 19(a)(2) violation with respect to Mrs. Furfari. On May 10, 1974, the Assistant Regional Director dismissed... "Those portions of the complaint relating to the alleged discrepant treatment of Mrs. Susie Furfari..." At the hearing before me, I ruled that evidence concerning other employees would be admitted for Section 19(a)(1) purposes, even if it involved conduct affecting Mrs. Furfari, because such conduct would interfere with those other employees' rights. No evidence would be admitted that dealt solely with Mrs. Furfari where no other employee was involved. This ruling was made because the dismissal language is not clear. The AFGE Local 1486, in its brief, asks that I reverse the ruling and consider evidence affecting only Mrs. Furfari. The Union's request is denied.

38/ For purposes of the Order a job applicant is an "employee" whose rights must be protected.

about a union while the employee is actually working, such an interference is violative of Section 19(a)(1) of the Order when it applies, as it did in this case, while the employees were on breaks. The evidence established while employees were on breaks and lunch hours, and using the "family room" there were no restrictions on what they could talk about, except this one prohibiting them from discussing the Union. This clearly violates Section 19(a)(1) of the Order. Similarly the directions, SS-0I-34-2, which prohibits employees from talking to union representatives on"duty time" unless certain procedures are followed interferes with employees' protected rights. The direction is not limited to "work time" and/or to union representatives who are not employees. This is too broad an interference with employee rights and violates Section 19(a)(1) of the Order.

Recommendations

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

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.25 of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations, hereby orders that the Department of the Air Force, Offutt Air Force Base, shall:

1. Cease and desist from:

(a) Discharging, disciplining or discriminating in any other manner against Lucile Daugherty, and any other employee or applicant for employment, in regard to their hire or tenure of employment, or any other condition of employment to discourage membership in the American Federation of Government Employees, AFL-CIO, Local 1486, or any other labor organization.

(b) Interfering with, restraining, or coercing Lucille Daugherty, Linda Hull and Carol Littlefield, or any other employee by interrogating them as to their Union membership or sympathies and by engaging or requesting such employees to engage in surveillance of the protected activities of members of AFGELocal 1486 .

(c) Issuing policies and/or regulations which unlawfully deny employees the right to discuss Union activities under the same circumstances in which employees are permitted to discuss other matters which are not work-related, and which discriminate against those employees who select a Union representative as their personal representative under agency complaint or grievance procedures.

(d) Applying and/or enforcing existing procedures, policies and regulations, in a manner which discriminates against members of AFGE Local 1486, or any other Union.

(e) 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) Offer Lucile Daugherty immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or toher rights and privileges, and make her whole for any loss of income she may have suffered by reason of its discrimination by paying to her a sum of money equal to the amount which she would have earned or received from the date of her discharge to the date of Respondent's offer of reinstatement, less her net earnings during such period; the sum so paid to draw interest at the rate of 6 percent per annum until payment.

(b) Rescind and retract all notices regarding discussion of Union activities on duty-time and the Base regulations labeled SS-01-34-2.

(c) Post at all activities at Offutt Air Force Base which employ Non-appropriated Fund employees copies of the attached Notice 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 Commander and shall be posted and maintained by him for sixty consecutive days thereafter in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. The Base Commander 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.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: June 10, 1976
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 discharge, discipline or discriminate in any other manner against Lucille Daugherty, and any other employee or applicant for employment, in regard to their hire or tenure of employment, or any other condition of employment to discourage membership in the American Federation of Government Employees, AFL-CIO, Local 1486, or any other labor organization.

WE WILL NOT interfere with, restrain, or coerce Lucille Daugherty, Linda Hull and Carol Littlefield, or any other employee by interrogating them as to their Union membership or sympathies and by engaging or requesting such employees to engage in surveillance of the protected activities of members of AFGE Local 1486.

WE WILL NOT issue policies and/or regulations which unlawfully deny employees the right to discuss Union activities under the same circumstances in which employees are permitted to discuss other matters which are not work-related, and which discriminate against those employees who select a Union representative as their personal representative under agency complaint or grievance procedures.

WE WILL NOT apply and/or enforce existing procedures, policies and regulations, in a manner which discriminates against members of AFGE Local 1486, or any other Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by Section 1(a) of Executive Order 11491, as amended.

APPENDIX

WE WILL offer Lucille Daugherty immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of income she may have suffered by reason of its discrimination by paying to her a sum of money equal to the amount which she would have earned or received from the date of her discharge to the date of Respondent's offer of reinstatement, less her net earnings during such period; the sum so paid to draw interest at the rate of 6 percent per annum until payment.

WE WILL rescind and retract all notices regarding discussion of Union activities on duty-time and the Base regulations labeled SS-OI-34-2.

_____
(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 Regional Administrator, Labor-Management Services Administration. United States Department of Labor, whose address is: Federal Office Building, 911 Walnut Street, Room 2200, Kansas City, Missouri 64106.

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

DEPARTMENT OF TRANSPORTATION,
UNITED STATES COAST GUARD SUPPORT CENTER,
THIRD DISTRICT,
GOVERNORS ISLAND, NEW YORK
A/SLMR No. 785

This case arose when District 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO (Petitioner) filed petitions seeking elections in a unit of Deckhands and Oilers as well as a unit of Masters and Chief Engineers engaged in ferryboat operations at the Activity. The Petitioner and the Activity, as well as the United Marine Division, Local 333, International Longshoremans Association, AFL-CIO (Intervenor), were in agreement as to the scope and composition of the claimed units; however the Regional Administrator issued a Notice of Hearing for the purpose of eliciting evidence on the status of certain employees who the Intervenor sought to exclude from a proposed unit of Deckhands and Oilers, and, on the status of Deckhands and Oilers who occasionally work at additional pay as Masters and Chief Engineers.

The Assistant Secretary found that the units sought were appropriate for the purpose of exclusive recognition and directed elections in those units. Further, he found that employees having temporary employment status pending the establishment of a Civil Service Register (Tapers) should be included in the unit of Deckhands and Oilers. Based on a lack of evidence the Assistant Secretary did not pass upon the eligibility of employees having Intermittent and Temporary status in the unit of Deckhands and Oilers. He found that Deckhands and Oilers who occasionally work as Masters and Chief Engineers should be included in the unit of Masters and Chief Engineers, and, further, that when such employees return to their normal work as Deckhands and Oilers they should be included in that unit. Accordingly, he found that such employees were eligible to vote in the election provided that their voting eligibility was determined at the time of the election in accordance with the foregoing eligibility principles.

A/SLMR No. 785

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
UNITED STATES COAST GUARD SUPPORT CENTER,
THIRD DISTRICT,
GOVERNORS ISLAND, NEW YORK 1/

Activity

and

Case Nos. 30-6623(RO) and
30-6676(RO)

DISTRICT 1, PACIFIC COAST DISTRICT,
MARINE ENGINEERS BENEFICIAL
ASSOCIATION, AFL-CIO

Petitioner

and

UNITED MARINE DIVISION, LOCAL 333,
INTERNATIONAL LONGSHOREMANS ASSOCIATION, AFL-CIO 2/

Intervenor

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 Eleanore S. Goldberg. 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:

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/ The name of the Intervenor appears as amended at the hearing.

2. In Case No. 30-6623(RO), the Petitioner, District 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO, seeks an election in a unit of all Deckhands and Oilers engaged in Governors Island ferryboat operations at the U.S. Coast Guard Support Center, Third District, New York, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees, supervisors as defined in the Order, and employees who do not perform ferryboat operating duties. In Case No. 30-6676(RO), the same Petitioner seeks an election in a unit of Masters and Chief Engineers engaged in Governors Island ferryboat operations at the U.S. Coast Guard Support Center, Third District, New York, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees, other supervisors as defined in the Order, and employees who do not perform ferryboat operating duties.

At the hearing, the parties were in agreement generally as to the scope and composition of the claimed units and stipulated that a separate supervisory unit of Masters and Chief Engineers and a separate nonsupervisory unit of Deckhands and Oilers would be appropriate for the purpose of exclusive recognition. However, the Regional Administrator issued an order consolidating the instant cases and a Notice of Hearing, in part, for the purpose of eliciting evidence on the status of certain employees who the Intervenor, United Marine Division, Local 333, International Longshoremans Association, AFL-CIO, seeks to exclude from the claimed nonsupervisory unit and on the status of certain Deckhands and Oilers who occasionally work as Masters and Chief Engineers at additional pay who the Intervenor seeks to include in the claimed supervisory unit herein. Contrary to the Intervenor, the Petitioner and the Activity contend that the proposed exclusions from the nonsupervisory unit are unwarranted, and the Activity contends that Deckhands and Oilers who occasionally work as Masters and Chief Engineers should be included in the claimed nonsupervisory unit. 3/

The record discloses that the Activity operates three diesel-electric ferryboats on a rotating tour of duty transporting passengers and vehicles between Governors Island, New York and Manhattan. On November 25, 1966, under Executive Order 10988, the Activity granted exclusive recogntion to the Intervenor, which, at that time, was

3/ With respect to the proposed supervisory unit, it should be noted that Section 24, paragraph 2 of the Order, states: "This Order does not preclude...(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." The evidence establishes that the Petitioner and the Intervenor are essentially maritime unions which represent supervisors in private industry and hold, or have held, exclusive recognition in the Federal sector for such supervisory personnel.

affiliated with the National Maritime Union, AFL-CIO (NMU), for a mixed unit of ferryboat operating personnel, including Masters, Chief Engineers, Deckhands and Oilers. Thereafter, on January 17, 1972, under Executive Order 11491, the Intervenor was certified as the exclusive representative of:

> "Supervisory ferryboat operating personnel engaged in the Governors Island ferryboat operation, including full-time Masters and Chief Engineers, but excluding nonsupervisory ferryboat operating personnel, Deckhands and Oilers, and Deckhands and Oilers who occasionally perform Masters and Chief Engineer duties on additional pay assignments. Also excluded are supervisory personnel and management officials of the Activity not performing ferryboat operating duties."

The record reveals that employees in the claimed supervisory unit are subject to special pilotage and license requirements and that in order to maintain ferryboat operations at the Activity some 48 civilian employees are utilized on a three shift watch, seven days a week. The crew complement includes: 7 Masters, 6 Chief Engineers, 14 Oilers, and 21 Deckhands. In this regard, the record reveals that 6 Oilers and 2 Deckhands are full-time employees having temporary employment status pending the establishment of a Civil Service Register (Tapers); 1 Oiler is a part-time employee without a regular tour of duty and is classified as Intermittent (Intermittent); and 1 Deckhand is a full-time temporary employee with a time limitation (Temporary).

Under all of the circumstances, and noting particularly the agreement of the parties as to the scope of the units sought and the fact that they conform substantially to the units represented by the Intervenor, I find that the claimed separate units of Deckhands and Oilers and Masters and Chief Engineers are appropriate for the purpose of exclusive recognition as the employees involved share a clear and identifiable community of interest and such units will promote effective dealings and efficiency of agency operations.

As noted above, certain eligibility questions were raised herein. Thus, there is disagreement among the parties with regard to the inclusion in the nonsupervisory unit of Tapers, Intermittents and Temporaries, as well as of Deckhands and Oilers who occasionally work as Masters and Chief Engineers at extra pay.

TAPERS

As of February 26, 1976, the Activity had eight employees on Taper assignments, 6 Oilers and 2 Deckhands. Such appointments were made because there were insufficient eligibles on Civil Service Registers for filling vacancies for ferryboats operations. The record reveals that Taper appointments are full-time positions without time limitations and that employees who are Tapers have their appointments converted to career employment within 90 days after three years of service. In this connection, the record shows that of the employees currently engaged in ferryboat operations at the Activity seven career employees were Tapers at one

time and that employees with Taper assignments often reach career status prior to three years of service. Moreover, employees with Taper assignments have the same supervision, job skills, work duties, health benefits, life insurance, and are subject to the identical maritime pay scale and special overtime wages as other career ferryboat employees. Under these circumstances, I find that employees with Taper assignments have a reasonable expectancy of continued employment for a substantial period of time, and I shall include them in the nonsupervisory unit of Deckhands and Oilers found appropriate. 4/

INTERMITTENTS and TEMPORARIES

The Intervenor seeks to exclude from the claimed nonsupervisory unit employees having Intermittent and Temporary appointments, whereas the Petitioner and the Activity seek to have such employees included in the aforementioned unit. The record indicates that employees with Intermittent status are part-time employees who may work from 8 to 64 hours per week and are subject to irregular tours of duty. Employees who have Intermittent status work on an "as needed" basis and do not enjoy the same life insurance, health benefits and leave accrual as other ferryboat employees. While the record indicates that the Activity began to hire Intermittents in 1967 or 1968, little or no evidence appears in the record as to the current status of Intermittent employees or their continued expectancy for future employment. Similarly, while the record demonstrates that employees having Temporary status appointments have been occasionally used as summer replacements for career ferryboat employees and that Temporaries may hold their appointment status for six months to one year, insufficient evidence was adduced at the hearing regarding whether or not employees holding Temporary status appointments have a reasonable expectancy of future employment or as to their current employment status. Under these circumstances, I conclude that there is insufficient evidence on which to determine the eligibility of employees having Intermittent and Temporary status. Accordingly, I make no findings in this regard. 5/

DECKHANDS AND OILERS WHO OCCASIONALLY WORK AS MASTERS AND CHIEF ENGINEERS

The record reflects that since 1971 Deckhands and Oilers who hold pilotage endorsements and U.S. Coast Guard licenses have occasionally worked as Masters and Chief Engineers at additional pay and that this situation is likely to continue in the future. In this regard, the evidence reveals that Deckhands who have appropriate pilotage endorsements have worked as Masters at the Activity's ferryboat operations from 4 to 55 days per year since 1971 and that Oilers with U.S. Coast Guard licenses have worked as Chief Engineers from 4 to 177 days during the same time period. Moreover, the record shows that when Deckhands and

4/Cf. United States Department of Agriculture, Forest Service, Francis Marion and Sumter National Forests, A/SLMR No. 227.

5/While I have made no finding as to the eligibility of employees having Intermittent or Temporary status in the claimed nonsupervisory unit, such employees may, of course, vote subject to challenge.

Oilers work as Masters and Chief Engineers, they utilize the same skills, receive the same pay, perform the same jobs, and are subject to identical working conditions as other Masters and Chief Engineers, and that the senority accrued for watches and leave as Masters or Chief Engineers is not transferable to the Deckhand and Oiler categories. Similarly, when such employees return to their regular Deckhand and Oiler positions their jobs and working conditions are identical to other Deckhands and Oilers. Under these circumstances, I find that Deckhands and Oilers who work occasionally as Masters and Chief Engineers should be included in the claimed supervisory unit found appropriate during those periods when they work in such capacities, and, further, that when such employees return to their normal work as Deckhands and Oilers they should be included in the nonsupervisory unit found appropriate herein. Accordingly, such employees will be eligible to vote in the election to be held herein, with the provision that their voting eligibility should be determined at the time of the election in accordance with the above stated eligibility principles. 6/

Based on all of the foregoing, I find that the following employees constitute units appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

All Deckhands and Oilers engaged in Governors Island ferryboat operations at the U.S. Coast Guard Support Center, Third District, New York, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees, supervisors as defined in the Order, and employees who do not perform ferryboat operations.

All Masters and Chief Engineers engaged in Governors Island ferryboat operations at the U.S. Coast Guard Support Center, Third District, New York, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, confidential employees, other supervisors as defined in the Order, and employees who do not perform ferryboat operations.

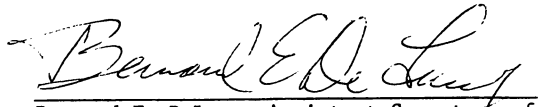
DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in the units found appropriate, as early as possible, but no 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 have quit or were discharged for cause since the designated payroll period and who

6/ See Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, A/SLMR No. 212.

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 District 1, Pacific Coast District, Marine Engineers Beneficial Association, AFL-CIO; by the United Marine Division, Local 333, International Longshoremans Association, AFL-CIO; or by neither.

Dated, Washington, D. C.
January 24, 1977



Bernard E. DeLury, Assistant Secretary of
Secretary for Labor-Management Relations

January 27, 1977

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,
VANDENBERG AIR FORCE BASE,
CALIFORNIA
A/SLMR No. 786

This case involved an unfair labor practice filed by the National Federation of Federal Employees, Local 1001 (Complainant) alleging, in substance, that the Respondent, Vandenberg Air Force Base, violated Section 19(a)(1) of the Order by reprimanding an employee because he circulated a union authorization petition and by placing the employee on sick leave indefinitely, after he had injured his back, in retaliation for his union activity. At the hearing, the Complainant was permitted to amend the complaint to include Section 19(a)(2) and (4) allegations based upon Respondent's having placed the employee on sick leave and its subsequent processing of that employee's disability discharge.

The Administrative Law Judge found that the Respondent's conduct was violative of Section 19(a)(1) because the reprimand was, in fact, issued in response to the employee's solicitation. He also concluded that the Respondent further violated Section 19(a)(1) when a supervisor questioned the employee regarding his solicitation shortly after the reprimand was given. With respect to the Complainant's contention that the Respondent's actions in placing the employee on sick leave and processing his disability discharge were violative of the Order, the Administrative Law Judge found that such actions were motivated by the Respondent's desire not to aggravate an injury the employee had incurred while on the job and were, therefore, not violative of Section 19(a)(1) and (2).

The Assistant Secretary adopted the findings and conclusions of the Administrative Law Judge but noted the latter's inadvertent failure to indicate that he had permitted an amendment of the complaint to include a Section 19(a)(4) allegation or to make a specific finding with respect to such allegation based upon the Respondent's actions in placing the employee on sick leave and processing his disability discharge. However, as it was clear from a reading of the Administrative Law Judge's Recommended Decision and Order that he intended to dismiss the Section 19(a)(4) allegation, and as the record did not support such allegation, the Assistant Secretary found that the dismissal of the Section 19(a)(4) allegation was warranted.

Accordingly, 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.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,
VANDENBERG AIR FORCE BASE,
CALIFORNIA

Respondent

and

Case No. 72-5702(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1001

Complainant

DECISION AND ORDER

On October 29, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order 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 Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

1/ While permitting an amendment of the complaint at the hearing to include Section 19(a)(2) and (4) allegations based upon the Respondent's having placed employee Clovis Rains on sick leave and its subsequent processing of Rains' disability discharge, the Administrative Law Judge inadvertently failed to indicate that he had permitted an amendment of the complaint to include a Section 19(a)(4) allegation or make a specific recommendation with respect to such allegation. However, as it is clear from a reading of his Recommended Decision and Order that the Administrative Law Judge intended to dismiss the Section 19(a)(4) allegation, and as the record does not support such allegation, I find that dismissal is warranted.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Air Force, Vandenberg Air Force Base, California, shall:

1. Cease and desist from:

(a) Reprimanding Clovis Rains, or any other employee, because of his activity on behalf of Local 1001, National Federation of Federal Employees, or any other labor organization.

(b) Interrogating employees concerning their activities on behalf of Local 1001, National Federation of Federal Employees, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected by Executive Order 11491, as amended.

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

(a) Remove the September 11, 1975, reprimand from the personnel file of Clovis Rains.

(b) Post at all its facilities at the Officers' Club 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 Vandenberg Air Force Base Officers' Club Manager, 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 Officers' Club Manager shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary of Labor for Labor-Management Relations, in writing, within 30 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)(2) and (4) of the Order be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 27, 1977

Bernard E. DeLury, 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 reprimand Clovis Rains, or any other employee, because of his activity on behalf of Local 1001, National Federation of Federal Employees, or any other labor organization.

WE WILL NOT interrogate employees concerning their activities on behalf of Local 1001, 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 protected by Executive Order 11491, as amended.

WE WILL remove the September 11, 1975, reprimand from the files of Clovis Rains.

_____
(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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 9061, Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
UNITED STATES AIR FORCE VANDENBERG AIR FORCE BASE, CA.	:	
Respondent	:	
and	:	CASE NO. 72-5702 (CA)
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, Local 1001	:	
Complainant	:	

Frank L. Sprague, Esquire
James W. London, Esquire
U.S. A.F. Headquarters
43920 Aerospace Support Group (SAC)
Judge Advocate General
Vandenberg AFB, California 93437

For the Respondent

Marie C. Brogan
President NFFE Local 1001
Post Office Box 1935
Vandenberg AFB, California 93437

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises under Executive Order 11491, as amended, herein called the Order. On November 10, 1975 a complaint was filed by Local 1001, National Federation of Federal Employees, hereinafter called the Union or Local 1001 NFFE, alleging that United States Air Force, Non-Appropriated Fund, Vandenberg Air Force Base, hereinafter called the Activity, violated Sections 19(a)(1) and (2) of the Order. The complaint specifically alleged that the Activity violated Sections 19(a)(1) and (2) of the Order by reprimanding employee Clovis Rains because Mr. Rains had been soliciting signatures of employees on a petition requesting a representation election on behalf of Local 1001 NFFE. The complaint further specified that, on November 5, 1975 Mr. Rains, after injurying his back at work, was placed on sick leave indefinitely in retaliation for his union activity.

The Regional Administrator, by letter dated May 11, 1976 partially dismissed the complaint. In his letter the Regional Administrator stated that he was dismissing the Section 19(a)(2) allegation because it concluded based on California National Guard, A/SLMR No. 348, that a reprimand for soliciting signatures is not a violation of Section 19(a)(2). The letter stated further that the Section 19(a)(1) allegations were not affected. The Union did not appeal this partial dismissal. Pursuant to the Rules and Regulations of the Assistant Secretary of Labor for Labor Management Relations, herein called the Assistant Secretary, a Notice of Hearing on Complaint with respect to the allegations that Section 19(a)(1) of the Order was violated was issued on June 14, 1976 by the Regional Administrator for the San Francisco Region.

A hearing was held before the undersigned in Santa Maria, California. Both parties were represented at the hearing and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Both parties have filed briefs which have been duly considered.

Upon the entire record in this matter, 1/ including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendation.

Findings of Fact

1. Clovis Rains was at all times material herein an employee of the Officers' Club located on the Vandenberg Air Force Base.

2. Mr. Rains first came to work at the Officers' Club in 1970 as a busboy and then dishwasher. About a year later in the latter part of 1971, he became a janitor and at some time subsequent, during 1973, he became janitor foreman. In 1975, in addition to Mr. Rains, there were two other janitors, one worked days and one was on the night shift.

3. As janitor foreman, Mr. Rains did not hire or fire employees; he did not appraise or evaluate employees; he did not interview prospective employees; he did not set the hours or schedule hours of work; he did not approve annual or sick leave; he did not reward or discipline employees; and he did not effectively recommend any of the foregoing. He worked the day shift and he would look over party plans and setups when he reported for work. Hw would then decide how the tables were to be setup and direct the other day janitor in making these special party arrangements. This work assignment was merely a form of work division and was rather routine work. Mr. Rains would also work setting up these party setups and spent most of his time performing the usual janitorial duties. He did not in any way assign work or direct the night janitor.

4. Sometime prior to July 1, 1975 Mr. Rains was called into the office of Captain Wesley M. Bitters, who was then Officer's Club Manager, and who informed Mr. Rains that as of July 1, 1975, and for a period of 90 days, Mr. Rains would no longer be the janitor foreman.

1/ A deposition of Jeffrey Scott Brown was taken by the parties subsequent to the close of the hearing herein and has been submitted into evidence. Mr. Brown's deposition is herby marked Joint Exhibit No. 1, received into evidence and made part of the record in this matter.

5. As of July 1 Mr. Rains in fact no longer assigned any work to the other janitors, on occasion was assigned to the night shift by himself and by September 1975 there was only one other janitor in addition to Mr. Rains, and Mr. Rains did not to any extent supervise him.

6. Prior to September 1975 Mr. Rains had received at least one award for his good work, Employee of the Quarter in 1974, he had received no reprimands and was apparently considered a good worker by his supervisors.

7. During 1975 there were about 44 employees in the Officers' Club, not including the office staff.

8. During the latter part of August 1975 Mr. Rains began soliciting signatures from employees on a petition on behalf of Local 1001 NFFE. He solicited these signatures during the work day, but during coffee, lunch and other "breaks."

9. On or about September 9, 1975 Mr. Rains was at the Officers' Club at about 5:30 a.m., before his starting time of about 6:00 a.m. On that day Airman Joseph Garwick, an employee of the Vandenberge, Noncommissioned Officers' Club arrived at the Officers' Club at about 5:30 a.m. and was admitted by Mr. Rains. 2/ Mr. Rains and Mr. Garwick sat down in the dining room and had coffee together; they sat there about 15 minutes. Mr. Garwick then left to look for Captain Bitters and Mr. Rains clocked in at about 6:00 a.m. After being unable to find Captain Bitters, Mr. Garwick went to the lounge and sat and had some hot chocolate. During

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2/ Mr. Garwick was there to see Captain Bitters to explore the possibility of transferring of some employees between the Officers' Club and the Noncommissioned Officers' Club.

this period of time Mr. Rains was working; he was mopping up the bar. 3/ While Mr. Garwick sat drinking his chocolate he saw Captain Bitters pass by. Upon finishing his hot chocolate Mr. Garwick went looking for Captain Bitters but could not then locate him.

10. During the morning of September 9, Captain Bitters, after having received complaints that the restrooms were dirty, told Mr. Rains to clean the restrooms. Subsequently the restrooms were apparently either not cleaned or not adequately cleaned.

11. During the morning of September 9, before lunch, Mr. Rains was ordered to go with warehouseman Manuel Cuellar to the commissary to pick up supplies. The supplies were apparently delayed. Mr. Cueller was instructed to return to the Officers' Club and Mr. Rains was to wait for the supplies. Mr. Rains remained at the commissary, picked up the supplies and delivered them to the Officers' Club's warehouse. By the time he had finished running his errands, it was quitting time and Mr. Rains clocked out.

12. On or about September 9 or 10 Mr. Rains solicited a the signature of Mr. Jeff Brown, a bus boy, in the Local 1001 NFFE, while Mr. Brown was on a coffee break. Head Chef and Kitchen Manager Mal Gaudin observed this.

13. Mr. Gaudin, soon after Mr. Brown signed the petition, told Mr. Brown that he could lose his job for signing the union petition. Later that same evening Captain Aanstad and Mal Gaudin asked Mr. Brown what the petition was about, who was circulating it and who else had signed it.

14. During September 9th and 10th, Captain Bitters advised Captain Aanstad that Mr. Rains had not adequately cleaned up the restrooms on September 9th and had been seen

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3/ The juke box might have been playing while Mr. Rains cleaned. It was apparently his habit to play the juke box while he worked. The Activity had never expressed any disapproval of this habit.

talking to Mr. Garwick. Captain Bitters did not either first consult with Mr. Rains, or Sargeant Mackle before reporting these shortcomings to Captain Aanstead. 4/

15. Mr. Rains was called into Captain Aanstad's office on September 11. Captain Bitters and Sargeant Mackle were present. For two hours or so work schedules were discussed. Then Mr. Rains was given a letter of reprimand signed by Captain Aanstad reprimanding Mr. Rains for not cleaning up the restrooms and for loafing for 30 minutes with Mr. Garwick, both allegedly occuring on September 9, 1976.

16. Sometime after this Mr. Gaudin asked Mr. Rains how many people he had signed up on the union petition.

17. Apparently during September 1975 Mr. Rains received an on the job injury and went on sick leave. He returned to work on October 9, 1975 after two weeks sick leave and presented a doctor's note stating that he could return to work but that permanently he should avoid excessive stooping and bending and should not lift more than 50 pounds. Mr. Rains then went on two weeks vacation.

18. Upon returning to work on about November 5, Mr. Rains returned to work and received notification that he was being placed on sick leave. By memorandum dated November 6, 1975 Mr. Rains was advised that the Activity was considering separating him for disability based on the above described doctor's note.

19. The Union on behalf of Mr. Rains opposed this action and by memorandum dated November 17, 1975 the Activity advised Mr. Rains that he was being separated for disability as of a date in the future. Such separation was cancelled by a personnel action dated December 23, 1975.

4/ Captain Bitters had been the Officers' Club Manager during 1975 until September 1. On September 1 Captain Aanstad became the Club Manager. Sargeant Mackle, on Septemberl, became the Officers' Club's operations manager and as such Mr. Rains immediate superior. Captain Bitters stayed on after September 1 as a type of consultant.

20. In January 1976 Mr. Rains was cleared by a doctor to return to work and he was permitted to return to work in mid January 1976.

Conclusions of Law

1. At the hearing the Union was permited to amend the complaint so as to add the allegation that the Activity violated Section 19(a)(2) of the Order because it allegedly placed Mr. Rains on sick leave and attempted to separate him for his disability because of his union activity. Such amendment was permitted because the treatment of Mr. Rains was the subject of the complaint and the Section 19(a)(2) allegation was dismissed by the Regional Administrator from the original complaint only with respect to the September 11 reprimand. Permitting such amendment did not involve any proof of additional facts or incidents. 5/ The Union was not permitted to amend the complaint to allege that the treatment of Mr. Brown and other employees also violated the Order, because such incidents, which occurred in many instances before the instant complaint was filed, were separate incidents and were not included within the language of the complaint. Further, the complaint was quite specific in that it only dealt with the treatment of Mr. Rains. It would have been improper to permit an amendment to raise totally different incidents and allegations.

2. Mr. Rains was not a supervisor within the meaning of the Order either prior to or subsequent to July 1, 1975. The only possible supervisory duties Mr. Rains exercised involved the assignment of setting up parties, but this apparently involved only routine work and was more in the nature of the type of duties of every lead man or senior man. After July 1, Mr. Rains didn't even have this routine duty.

5/ The Activity was advised that it could request additional time to present its case if it felt the amendment would require it. The Activity did not request any additional time.

3. Mr. Rains' conduct during late August and early September 1975 in soliciting signatures in support of Local 1001 NFFE is conduct protected by the Order.

4. The Activity through its supervisors became aware that Mr. Rains was engaging in the above described conduct protected by the Order.

5. It is concluded that the Activity violated Section 19(a)(1) of the Order because it gave Mr. Rains the reprimand on September 11, 1975 because he had engaged in the above described protected activity. It is further concluded that the reasons for the reprimand, as set forth therein, were pretextual in nature. This conclusion was reached based on Mr. Rains' past good work history; on the facts that Mr. Rains was not consulted, questioned or warned prior to this rather drastic act; that a supervisor had in fact put Mr. Rains in a position so that he was not available to clean the rest-rooms; that Mr. Rains had not in fact been loafing; that no investigation had been conducted; that the punishment was very severe for a first offense; that the Activity knew of Mr. Rains' activity and the reprimand occurred soon after such discovery was made; and, as found, the Activity's representatives engaged in conduct, such as the statements to Mr. Brown, which showed its anti-union animus.

6. It is concluded that the Activity engaged in conduct which violated Section 19(a)(1) of the Order when Mr. Guadin questioned Mr. Rains about the petition. Such conduct would, by its very nature, interfer with employees exercising of rights guaranteed by the Order and would thus violate Section 19(a)(1) of the Order.

7. It is concluded that the record does not establish that Mr. Rains was placed on sick leave and then processed for disability separation, because he engaged in the activity protected by the Order. Rather the record establishes that he was so treated because of the letter from his own doctor and the Activity's desire not to aggravate his injury. When it became apparent Mr. Rains was not injured seriously, he returned to work. Therefore, it is concluded that the Activity did not violate Section 19(a)(1) and (2) of the Order by tis placing Mr. Rains on sick leave and processing him for disability separation.

8. In view of all of the above, therefore it is concluded that Respondent violated Section 19(a)(1) of the Order but did not violate Section 19(a)(2) of the Order.

In light of the foregoing, I therefore recommend adoption of the Order set forth below:

RECOMMEND ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby dismisses the Section 19(a)(2) allegations of the complaint and orders that the United States Air Force, Vandenberg Air Force Base, CA shall:

1. Cease and desist from:

(a) Reprimanding Mr. Clovis Rains or any other employee because of his activity on behalf of Local 1001 National Federation of Federal Employees, or any other labor organization.

(b) Questioning and interrogatory employees concerning their activities on behalf of Local 1001 National Federation of Federal Employees or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights protected by Executive Order 11491, as amended.

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

(a) Remove the September 11 reprimand from the file of Mr. Clovis Rains.

(b) Post at all its facilities at the Officers' Club 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 Vandenberg Air Force Base Officers' Club Manager, and shall be posted and maintained by him for 60 consecutive days thereafter, in cinspicuous places, including all bulletin boards and other places where notices to all employees are customarily posted. The Officers' Club Manager shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 203.27 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: October 29, 1976
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 reprimand Mr. Clovis Rains or any other employee because of his activity on behalf of Local 1001 National Federation of Federal Employees, or any other labor organization.

WE WILL NOT question or interrogate employees concerning their activities on behalf of Local 1001 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 protected by Executive Order 11491, as amended.

WE WILL remove the September 11, 1975 reprimand from the files of Mr. Clovis Rains.

_____
(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 complaince with any of its provisions, they may communicate directly with the Regional Administrator 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.

January 27, 1977

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 TRAINING CENTER
ENGINEER AND FORT LEONARD WOOD
A/SLMR No. 787

This case arose as a result of an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 738 (NFFE) alleging, essentially, that the Respondent violated Section 19(a)(1), (2) and (6) of the Order in denying an employee's request for union representation at a meeting with management held on November 19, 1974, and by not permitting the NFFE to be represented at such meeting which was called for the purpose of delivering to the employee involved a notice of proposed suspension.

The Administrative Law Judge recommended dismissal of the complaint on the basis that the Respondent was not required to afford the Complainant an opportunity to be represented at the November 19, 1974, meeting, as such meeting was not a "formal discussion" within the meaning of Section 10(e) of the Order because it dealt solely with the individual conduct of the employee involved and the consequential measures to be taken against him alone. He found further that the Respondent did not violate Section 19(a)(2) of the Order because there was nothing in the record to indicate any discrimination based on an anti-union attitude on the part of the Respondent or discrimination which might have had an adverse effect on the Complainant.

The Assistant Secretary deferred his decision in the subject case pending the Federal Labor Relations Council's Statement on Major Policy Issue concerning representation rights of employees under the Order. The Council's statement was issued on December 2, 1976.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations with respect to the alleged Section 19(a)(1) and (6) violation of the Order and, consistent with the major policy statement by the Council, ordered that the allegations be dismissed. Regarding the alleged Section 19(a)(2) violation, he found that the issue of discrimination was not properly before the Administrative Law Judge because of the failure of the Complainant to include in its complaint specific allegations of discriminatory action previously contained in the pre-complaint charge. Accordingly, he concluded that dismissal of the Section 19(a)(2) allegation on this basis was warranted.

A/SLMR No. 787

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES ARMY TRAINING CENTER
ENGINEER AND FORT LEONARD WOOD

Respondent

and Case No. 62-4271(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 738

Complainant

DECISION AND ORDER

On January 29, 1976, Administrative Law Judge Robert J. Feldman issued his Recommended Decision and Order 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 Recommended Decision and Order.

On July 6, 1976, the Assistant Secretary informed the Complainant and the Respondent that it would effectuate the purposes and policies of the Order to defer his decision in the subject case pending the Federal Labor Relations Council's (Council) resolution of a major policy issue which has general application to the Federal Labor-Management Relations program.

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

On December 2, 1976, the Council issued its Statement on Major Policy Issue, FLRC No. 75P-2, Report No. 116, finding, in pertinent part, that:

> 1. An employee in a unit of exclusive recognition has a protected right under the last sentence of Section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and
>
> 2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with Section 11(a) 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, except as modified below.

The complaint alleged essentially that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by denying an employee's request for union representation at a meeting with management held on November 19, 1974, and by not permitting the Complainant to be represented at such meeting which was called for the purpose of delivering to the employee involved a notice of proposed suspension.

The Administrative Law Judge found, and I agree, that the Respondent was not required to afford the Complainant an opportunity to be represented at the November 19, 1974 meeting, as such meeting was not a "formal discussion" within the meaning of Section 10(e) of the Order because it dealt solely with the individual conduct of the employee involved and the consequential measures to be taken against him alone. Under these circumstances, and for the reasons set forth by the Council in FLRC No. 75P-2, I agree that the denial of representation at the nonformal meeting herein did not constitute a violation of Section 19(a)(1) and (6) of the Order.

The Administrative Law Judge found further that the Respondent did not violate Section 19(a)(2) of the Order because there was nothing in the record to indicate any discrimination based on an anti-union attitude on the part of the Respondent or discrimination which might have had an adverse effect on the Complainant. In my view, the allegation of discrimination against the subject employee was not properly encompassed within the scope of the instant complaint and, therefore, was not properly before the Administrative Law Judge. Thus, while the pre-complaint charge in this matter alleged discriminatory motivation as a basis for the Respondent's issuance of a notice of proposed suspension to the employee involved herein, the instant complaint omitted such allegation

as a basis for violation. It has been held previously that in the processing of an unfair labor practice case the failure of a complainant to include in its complaint specific allegations of unfair labor practices previously contained in a pre-complaint charge, as occurred in the instant case, will be considered to be attributable to the parties' informal resolution of those matters. 1/ Accordingly, dismissal of the Section 19(a)(2) allegation on this basis was considered warranted.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-4271(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
January 27, 1977

Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

1/ See United States Air Force, 380th Combat Support Group, Plattsburg Air Force Base, New York, A/SLMR No. 557.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
UNITED STATES ARMY TRAINING CENTER ENGINEER AND FORT LEONARD WOOD Respondent	:	
and	:	CASE NO. 62-4271(CA)
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 738 Complainant	:	

Major Robert R. Aldinger
Ft. Leonard Wood Army Post
Ft. Leonard Wood, Missouri
For Respondent

Gerald C. Tobin, Esq.
1737 H Street, N.W.
Washington, D.C.
For Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under the provisions of Executive Order 11491 (hereinafter called the Order). The complaint, filed December 31, 1974, alleged violations of Sections 19(a)(1),(2), (5) and (6). On May 23, 1975,the Assistant Regional Director for Labor-Management Services, Kansas City, Missouri, dismissed so much of the complaint as alleged a violation of Section 19(a)(5). On June 16, 1975, the Regional Administrator issued a notice of hearing on the remaining allegations.

The issues tendered for determination are: whether the Respondent committed an unfair labor practice under Sections 19(a)(1) or (6) of the Order in not permitting the Complainant Union to be represented at a meeting between management and an employee called for the purpose of delivering to the employee a notice of proposed suspension; and whether such disciplinary action discouraged membership in the union by discrimination in violation of Section 19(a)(2).

Pursuant to the notice of hearing above referred to, the undersigned held a hearing in this matter on August 21, 1975, at Building 1842, Fort Leonard Wood Army Post, Fort Leonard Wood, Missouri. Both parties were represented by counsel at the hearing, were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Thereafter, counsel for the respective parties filed briefs, which have been duly considered.

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 findings of fact, reach the conclusions of law, and submit the recommendation set forth below.

Findings of Fact

1. At all pertinent times, the Complainant, National Federation of Federal Employees, Local 738, has represented a unit composed of all civilian GS non-supervisory personnel at Fort Leonard Wood, with the exception of commissary store and fire-fighter employees.

2. Floyd G. Sullivan, a member of the Complainant Union, has been employed by the Respondent for some nine years, and during the year 1974, his position was that of housing inspector.

3. In or about the month of July, 1974, Sullivan, on behalf of himself and other housing inspectors, brought a complaint to Louis Brinegar, his immediate supervisor, concerning alleged discomfort or possible physical harm resulting from the use of an insecticide spray in the premises under inspection.

4. When the complaint failed to produce any definitive results, Sullivan filed a formal grievance in accordance with prevailing procedures. When meetings with Brinegar did not result in agreement, the grievance was carried to the second step, and several meetings were held during the month of August, 1974, with

Marion D. Summerford, Chief of the Housing Division, and other management representatives. Subsequently, the grievance was carried to the third step in which it was requested that the proceedings be reviewed by the Post Commander.

5. Throughout the above-described grievance procedure, Sullivan was reprsented by Mrs. Dolores Willis, who was chief steward of Local 738 until October, 1974, when she became president of that Local.

6. In or about the month of October, 1974, Sullivan was advised that the civilian personnel office was conducting an inquiry pertaining to some improper statements alleged to have been made by him in reference to certain fellow employees and/or managerial personnel. In connection therewith, he and Mrs. Willis were permitted to examine some reports or supporting statements obtained for possible use in disciplinary action.

7. During the morning of November 19, 1974, Brinegar informed Sullivan that Summerford wanted to see him in his (Summerford's) office at 1:15 that afternoon. Sullivan requested that he have representation at the meeting and Brinegar indicated that there would be no objection. Sullivan was unable to reach Mrs. Willis, however, since she was on leave that day, and he asked Brinegar to postpone the meeting until the following morning. On his return from lunch, Brinegar told Sullivan that Summerford had ordered both of them to report immediately to Summerford's office.

8. At the meeting in Summerford's office on November 19, 1974, at about 1:15 p.m., there were present four management representatives: Summerford; Harold Cook of the Civilian Personnel Office; Douglas Harvey, Housing Project Manager and Sullivan's second-line supervisor; and Brinegar. Sullivan again requested that he have Union representation, but was informed by Cook that such representation would not be necessary.

9. At this meeting, Sullivan was handed a letter dated November 19, 1974, signed by Summerford, informing Sullivan that it was proposed to suspend him for a period of three working days for failure to meet the standards of conduct expected of Federal employees in that he had made certain oral threats and malicious or offensive statements about named employees and officials of the Respondent on six specified occasions in September and October, 1974. The letter (Res. Exh. B) further advised Sullivan of his rights to protest the proposed action and the procedural requirements in connection therewith.

10. Sullivan was given time to read the letter and then was asked by Cook whether he understood the procedure and whether he had any questions. Sullivan responded to the effect that he understood the letter, but would ask no questions in the absence of a Union representative, and he declined to endorse an acknowledgement of receipt of the letter at the foot of a copy thereof.

11. Except as above stated, no discussion of any matter took place at the meeting of November 19, 1974.

12. At a meeting held in connection with the insecticide spray grievance held on August 29, 1974, Brinegar called the inspectors present (including Sullivan) "little peons". Mrs. Willis brought this incident to Summerford's attention, but no action was taken against Brinegar.

Conclusions of Law

In considering whether an unfair labor practice arises from the foregoing facts, it should be noted that pursuant to Information Announcement dated May 9, 1975, the Federal Labor Relations Council has under consideration the following major policy issue having general application to the Federal Labor-Management Relations Program:

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

Since the Council has not yet promulgated a major policy statement on that issue, we are perforce guided by prevailing decisions of the Assistant Secretary interpreting or applying the provisions of Section 10(e) of the Order, the last sentence of which reads as follows:

> 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 has been held that the above section establishes a concomitant right running to all employees in a unit and that the denial of an employee's request for union representation made during the formal discussion of one of the matters specified constitutes a violation of Section 19(a)(1). U.S. Department of the Army, Transportation Motor Pool, Ft. Wainwright, Alaska, A/SLMR No. 278. The Assistant Secretary has further held, however, that there is no violation of Sections 19(a)(1) or (6) where a union representative is not given the opportunity to participate in a meeting called for the purpose of talking over with an employee an individual problem such as his conduct, his performance rating, or contemplated disciplinary action against him, as distinguished from formal discussions of grievances, personnel policies, or general working conditions. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336; Federal Aviation Administration, National Aviation Facilities, Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438; Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 548.

In the instant case, it is clear from the evidence that such conversation as took place at the meeting of November 19, 1974, was confined to the purported statements referred to in the letter delivered to Sullivan at the time and to the proposed disciplinary action based thereon. The conference on that date might reasonably be characterized as a "formal discussion" by reason of the setting in which it was held, the surplusage of management personnel present, and the gravity of the action under consideration. Nevertheless, no facts were adduced that would establish, or even that would sustain a reasonable inference, that it was in any way related to the insecticide spray grievance or any other grievance. The meeting dealt solely with Sullivan's individual conduct and the consequential measures to be taken against him alone. No personnel policies or practices nor any other matters affecting general working conditions were involved. I therefore conclude that the Respondent was not required to give the Union an opportunity to be represented at the meeting of November 19, 1974, pursuant to Section 10(e), and that there was no violation of Sections 19(a)(1) or (6) in its failure to provide such opportunity.

The Complainant bases its allegation of a violation of Section 19(a)(2) upon its charge of discriminatory treatment arising from the fact that while disciplinary action was proposed for Sullivan because of his purported derogatory or otherwise offensive statements, an equally derogatory or otherwise offensive statement made by Brinegar was excused or overlooked. The section invoked, however, does not prohibit all

discriminatory conduct. It outlaws only the encouragement or discouragement of membership in a labor organization by discrimination in regard to hiring, tenure, promotion or other conditions of employment. To discourage membership, the proscribed discrimination must be motivated to some extent by union animus, or at least must be reasonably expected to be regarded as unfavorable to the union. See, e.g., Norfolk Naval Shipyard, supra, A/SLMR 548 at p. 8 of Administrative Law Judge's decision. There was some testimony to the effect that Sullivan had acted as a spokesman for the housing inspectors, but he held no union office, and there is nothing in the record to indicate that any discrimination against him might reflect any anti-union attitude on the part of Respondent or might have any adverse effect whatsoever on the Union. I therefore conclude that there was no violation of Section 19(a)(2).

RECOMMENDATION

On the basis of the foregoing findings of fact and conclusions of law, I hereby recommend to the Assistant Secretary that the complaint herein be dismissed in its entirety.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: January 29, 1976
Washington, D.C.

January 27, 1977

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 INTERIOR,
BUREAU OF INDIAN AFFAIRS,
ADMINISTRATIVE SERVICES CENTER,
ALBUQUERQUE, NEW MEXICO
A/SLMR No. 788

This case involved a petition for clarification of unit (CU) filed by the National Federation of Federal Employees, Local Union 40 (NFFE) seeking to clarify the status of its existing exclusively recognized unit. In 1969, the NFFE was recognized as the exclusive representative of the employees of the Indian Affairs Data Center (IADC), which performed certain central office functions for the Bureau of Indian Affairs (BIA), although it was located in Albuquerque, New Mexico. In addition, the IADC provided administrative services to the other central office functions located outside of Washington, D.C. The NFFE and the BIA entered into a negotiated agreement on August 3, 1970, and on April 9, 1974, entered into a new agreement. Prior to the execution of the second agreement, the BIA reorganized, and the IADC became the Administrative Services Center as a result of the reorganization with little change in its functions. However, in later 1974, the BIA began another reorganization. Although the name, Administrative Services Center, continued to be used, effectively its organizational components were separated out and it now report upwards through a different first level organizational structure. All employees involved, however, continued to perform the same work in the same location, under the same first level supervision. In addition, the separated organizational components remain under the Office of Administration.

The NFFE took the position at the hearing that the employees of all the central office components serviced by the former Administrative Services Center, including those employees who were employed by the former Administrative Services Center, should be accreted to its exclusively recognized unit. The Activity, on the other hand, contended that the NFFE was attempting to expand its unit to include employees which it had never represented. However, the Activity viewed the CU petition as a vehicle to identify those elements of the unit which remained after the reorganization and to clarify the status of certain inclusions in the exclusively recognized unit.

The Assistant Secretary found that the accretion sought by the NFFE was inappropriate and, therefore, its CU petition should be dismissed. Thus, except for the organizational components which were clearly identifiable as components of the former Administrative Services Center, there was no evidence presented that the other central office components of the BIA located outside of Washington, D.C. were ever part of the existing exclusively recognized unit or that the reorganization commingled their employees with the former Administrative Services Center employees such that they lost their individual identities.

Accordingly, the Assistant Secretary ordered that the CU petition be dismissed.

A/SLMR No. 788

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE INTERIOR,
BUREAU OF INDIAN AFFAIRS,
ADMINISTRATIVE SERVICES CENTER,
ALBUQUERQUE, NEW MEXICO

Activity

and

Case No. 63-6344(CU)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL UNION 40

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 A. Jack Lewis. 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:

The National Federation of Federal Employees, Local Union 40, hereinafter called NFFE, filed the subject petition for clarification of unit seeking to clarify the status of its existing exclusively recognized unit after a series of reorganizations by the Activity. Essentially, the NFFE seeks to include in its existing unit all those employees of the Bureau of Indian Affairs employed in the central office organizational units serviced by the Field Administrative Office. 1/ The Bureau of Indian Affairs, hereinafter called BIA, takes the position that the petition is, in actuality, an attempt to expand the NFFE's unit beyond the scope of its original recognition. However, it contends that the instant petition should be used as a vehicle to identify those elements that remain after the reorganizations from the original recognition which are still part of the appropriate unit. Additionally, it alleges that its professional employees were improperly added to the unit inclusions without the benefit of an election as required by the Order.

The NFFE was recognized as the exclusive representative of the employees of the Indian Affairs Data Center of the BIA in Albuquerque, New Mexico, on December 31, 1969, under the provisions of Executive Order 10988. 2/ An agreement was executed August 3, 1970, which stated that the exclusively recognized unit included all nonprofessional employees of the Indian Affairs Data Center. On April 9, 1974, the parties entered into a new two-year negotiated agreement, automatically renewable for one-year periods thereafter, which defined the exclusively recognized unit as all General Schedule (GS) employees of the Administrative Services Center, which was a successor organizational entity to the Indian Affairs Data Center. 3/

The record reveals that the Indian Affairs Data Center, hereinafter called IADC, was a central office component of the BIA located outside of the Washington, D.C. headquarters in Albuquerque, New Mexico, and that it was headed by an Executive Director who was responsible to the then Assistant Commissioner of the BIA for Administration. It was composed of three branches, Automatic Data Processing, Employee Data and Compensation, and Administrative Services. The first two branches provided their services bureau-wide, while the third branch provided essentially personnel and other administrative services to the other

1/ These central office organizational units were identified at the hearing as the Transportation Division; Investment Branch; Research and Cultural Studies Development, Indian Education Resources Center; Division of Accounting Management; Division of Automatic Data Processing Service; Field Administrative Office; Division of Facilities Engineering; Division of Safety Management; Land Records Improvement Program; Equal Employment Opportunity Office; Southwest Field Coordinator, all in Albuquerque, New Mexico; U.S. Indian Police Training and Research Center, Brigham City, Utah; Division of Educational Audio-Visual Services, Brigham City, Utah; Intergovernmental Relations Liaison Office, Denver, Colorado; Credit Examining Staff, Denver, Colorado; Indian Technical Assistance Center, Lakewood, Colorado; Intergovernmental Relations Liaison Office, Seattle, Washington; and the Joint Use Administrative Office, Flagstaff, Arizona. At the hearing, the parties stipulated that professional and nonprofessional employees of the Office of Indian Education Resources Center, located both in Albuquerque and Brigham City, Utah, should not be considered for inclusion as they were involved in an election held March 22, 1976, in Case No. 63-6207(RO), in which such employees indicated their desire not to be represented.

(Continued)

2/ At the hearing, a question was raised with respect to the legality of the grant of recognition as the letter approving such recognition was dated January 12, 1970, placing it under the provisions of Executive Order 11491. However, record testimony disclosed that the January 12, 1970, letter was, in fact, a confirmation of recognition which was actually granted December 31, 1969.

3/ The 1974 negotiated agreement included within its coverage professional employees and excluded Wage Grade (WG) employees. However, the record is not clear as to whether any professional employees or WG employees were employed by the Administrative Services Center at the time the agreement was signed.

central office components of the BIA located west of the Mississippi River. 4/ In this regard, the record reflects that many of the organizational entities or their predecessors, which the NFFE is seeking now to include in its exclusively recognized unit, were among those central office functions serviced by the Administrative Services Branch and were not included under the unit definition provided for in either negotiated agreement.

Beginning in 1972, the BIA began a series of reorganizations which essentially changed the top levels of its organization. In this regard, for all practical purposes the IADC was succeeded by the Administrative Services Center which was headed by an Assistant Director responsible to the Director of the Office of Administration. 5/ Under this Assistant Director's responsibility were two divisions, Automatic Data Processing and Operations. The latter division was composed of primarily the Employee Data and Compensation Branch from the IADC and certain Indian Trust Fund functions which were added by the reorganization. As prior to the change, both of these divisions provided their services bureau-wide. The former Administrative Services Branch was changed, after the reorganization, to the Administrative Office, reporting directly as a staff function to the Assistant Director. It continued to provide personnel and other administrative services to essentially the same central office functions or their successors as prior to the reorganization.

Beginning in November 1974, the BIA began another reorganization which affected the lower levels of its organization. In this regard, the Administrative Services Center was disestablished as an organizational entity. 6/ Both the Administrative Office and the Automatic Data Processing Division were placed under an Assistant Director for Support Services who is responsible to the Director of the Office of Administration. In this regard, the Automatic Data Processing Division retained its division status and its head is responsible directly to the Assistant Director for Support Services. However, the Administrative Office, now referred to as the Field Administrative Office, reports upwards to the Assistant Director for Support Services through the Chief of the Division of Administrative Services. Moreover, it continues, after the reorganization, to service the same central office components of the BIA, or their organizational successors, as prior to the reorganization.

4/ The record reflects that bureau-wide disbusements were also provided by this branch until April 1971, when this function was transferred to another central office component, the Division of Financial Management, also located in Albuquerque, but which was not part of the exclusively recognized unit.

5/ The Assistant Commissioner for Administration became, in effect, the Director of the Office of Administration as one part of the reorganization.

6/ The record reflects, however, that the name, Administrative Services Center, continued to be used at least until the date of the hearing in this matter.

On the other hand, the Operations Division of the Administrative Services Center was disestablished after the reorganization, with the Indian Trust Fund function being transferred to the newly created Office of Trust Fund Responsibilities, and the Employee Data and Compensation function becoming the Employee Data and Compensation Branch of the Division of Accounting Management, whose division chief reports upwards to the Assistant Director in charge of Financial Management under the Office of Administration. 7/ Therefore, while the Indian Trust Fund function remained in Albuquerque after the reorganization, it now reports upwards through an entirely different chain of command, and the BIA Commissioner is the only level of common supervision with the other components of the former Administrative Services Center. The Employee Data and Compensation Branch, however, remained under the Office of Administration after the reorganization, but it reports upwards through a different Assistant Director than the Automatic Data Processing Division and the Field Administrative Office.

The record reflects that the majority of the employees of what was called, prior to the reorganization, the Administrative Services Center, continue, after the reorganization, to perform the same work in the same location, under the same first line supervision. However, after the reorganization, the lowest level of common supervision of the employees engaged in the Automatic Data Processing function, the Administrative Services function, and the Employee Data and Compensation function, which employees are directly traceable to the original recognition, is the Office of Administration. In this regard, the Activity took conflicting positions at the hearing and in its post-hearing brief regarding which of these employees remain as part of the appropriate unit after the reorganization. Thus, at the hearing, the Activity contended that the employees of all three organizational entities that are directly traceable to the orginal recognition remain an appropriate unit, 8/ and in its brief it contended that just the Division of Automatic Data Processing and the Field Administrative Office remain as part of the appropriate unit because they are responsible to the same Assistant Director. In this latter regard, it argues in its brief, contrary to its argument at the hearing, that while the Employee Data and Compensation Branch was a component of the Administrative Services Center, it reported to a different Assistant Director after the reorganization, and that it should not be permitted to "swamp" the whole Accounting and Management Division into the exclusively recognized unit as sought by the NFFE in its petition.

7/ It should be noted that the Division of Accounting Management consists of two other branches, Finance and Accounting, and Systems. The majority of employees in Finance and Accounting perform the bureau-wide disbursing function which was originally performed by the Administrative Services Branch of the IADC. Therefore, it has certain roots in the original exclusively recognized unit.

8/ It was not clear whether the Activity was contending that just the employees engaged in the Employee Data and Compensation function should remain as part of the appropriate unit or whether the whole Division of Accounting Management should remain as part of the appropriate unit because of the roots of the Finance and Accounting Branch, i.e., the disbursing function, in the IADC.

Under all of the above circumstances, I find that the accretion sought by the NFFE's petition is inappropriate and, therefore, its petition should be dismissed. Thus, the exclusively recognized unit, as it appears under the current negotiated agreement's recognition clause, encompasses the employees of the Administrative Services Center, which succeeded the IADC. The record reflects that after the reorganization the Division of Automatic Data Processing, the Field Administrative Office of the Division of Administrative Services and the Employee Data and Compensation Branch of the Division of Accounting Management are the only clearly identifiable components of the existing exclusively recognized unit. 9/ Accordingly, as the other BIA central office organizational functions sought to be included as part of the existing exclusively recognized unit are not identifiable as components of the Administrative Services Center, as there was no record evidence presented that they have ever been part of the exclusively recognized unit, and as there was no record evidence presented that because of the reorganization the employees of such organizational functions have been commingled with the employees of the existing unit and thus lost their individual identity such that an accretion to the existing unit occurred, I shall order that the NFFE's petition be dismissed. 10/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 63-6344(CU) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 27, 1977

Bernard E. DeLury, Assistant Secretary of
Labor for Labor-Management Relations

9/ The record is unclear as to whether the other branches of the Accounting and Management Division are also identifiable as part of the existing unit. Therefore, I shall make no finding in this regard.

10/ Based on the disposition of the instant petition, I find it unnecessary to pass on the Activity's assertion regarding the alleged improper inclusion of professional employees in the existing unit. Cf., however, Department of Housing and Urban Development, Region II, A/SLMR No. 270.

January 27, 1977

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,
NATIONAL PARK SERVICE,
GOLDEN GATE NATIONAL RECREATION AREA,
SAN FRANCISCO, CALIFORNIA
A/SLMR No. 789

This case involved a petition filed by the Laborers International Union of North America, Local 1276, AFL-CIO, seeking a unit of all Wage Grade and Wage Leader personnel employed in the Maintenance Department of the Golden Gate National Recreation Area, excluding those Wage Grade employees assigned to Fort Point and Muir Woods and all General Schedule employees, or, in the alternative, an Activity-wide unit of all Wage Grade and Wage Leader employees, excluding all General Schedule employees. The Activity contended that both the petitioned for unit and the alternative unit were not appropriate as the claimed employees do not possess a community of interest separate and distinct from the General Schedule employees of the Activity. In addition, it argued that these fragmented units would not promote effective dealings and efficiency of agency operations.

Applying the three criteria found in Section 10(b) of the Order, the Assistant Secretary found that both the unit sought and the alternative unit were not appropriate for the purpose of exclusive recognition. Noting, among other things, that other employees of the Activity perform similar work, share similar working conditions, and are subject to the same personnel policies and practices, he concluded that the evidence established that the claimed employees do not share a community of interest separate and distinct from the other employees of the Activity, and that such units could not reasonably be expected to promote effective dealings or efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

A/SLMR No. 789

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE,
GOLDEN GATE NATIONAL RECREATION AREA,
SAN FRANCISCO, CALIFORNIA

Activity

and

Case No. 70-5207(RO)

LABORERS INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL 1276, 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 Susan L. Kaplan. 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's brief, the Assistant Secretary finds:

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

2. The Petitioner, Laborers International Union of North America, Local 1276, AFL-CIO, seeks an election in a unit of all Wage Grade and Wage Leader employees, including temporary employees, employed by Golden Gate National Recreation Area, National Park Service, Department of the Interior, excluding employees at Fort Point and Muir Woods, management officials, professional employees, employees engaged in Federal personnel work in other than a clerical capacity, and supervisors as defined in Executive Order 11491, as amended. 1/ The Activity contends that both the petitioned for unit and the alternative unit are inappropriate as the Wage Grade and Wage Leader employees do not possess a clear and identifiable community of interest separate and distinct from the General Schedule employees of the Activity. In addition, it argues that these proposed fragmented units will not promote effective dealings or efficiency of agency operations.

1/ The claimed unit appears as amended at the hearing. As an alternative unit, the Petitioner indicated that it would agree to an Activity-wide unit of all Wage Grade and Wage Leader employees employed by Golden Gate National Recreation Area.

The Activity is one of 39 such parks in the Western Region of the National Park Service, which encompasses the states of Hawaii, California, Arizona and Nevada. 2/ The Activity's superintendent, along with the superintendent at Point Reyes, reports to the General Manager, Bay Area National Parks, who is under the jurisdiction of the Regional Director, Western Region of the National Park Service. 3/ The mission of the Activity is to protect the natural resources within its area of responsibility; to provide recreational facilities and activities; and to identify, preserve, and maintain historical structures and places. To accomplish this mission, the Activity is organizationally composed of six departments: Administration, Interpretation, Park Police, Recreation, Resource Management and Visitor Services, and Maintenance. The Maintenance Department is further divided organizationally into Roads and Trails, Marin County, Buidings and Utilities, City Lands, Fort Mason, Alcatraz, and San Francisco Headlands. In addition, the superintendents at Fort Point and Muir Woods oversee the Interpretation, Resource Management, and Maintenance functions at these locations and are subordinate to the Activity's superintendent. The claimed unit consists of 49 employees, both skilled and unskilled, who are located in the Maintenance Department of the Activity. Six other Wage Grade employees are located at Fort Point and Muir Woods.

The record reveals that the Activity's Wage Grade and General Schedule personnel work together in planning and carrying out "special events" and other activities held in the park for the public. In addition, because the Wage Grade employees work throughout the park, there is frequent contact between them and the General Schedule employees on a day-to-day basis. The record also reveals that in the past 2 1/2 years there have been nine instances of interchange or transfer between Wage Grade and General Schedule personnel and that the working conditions of Wage Grade and General Schedule employees are such that certain employee facilities are shared. Common supervision of Wage Grade and General Schedule employees occurs only at the Activity superintendent level. 4/

2/ The parties stipulated that no previous bargaining history in the Activity exists and that there are no election, certification, or agreement bars to an election in this matter. There currently exist four exclusively recognized units in the Western Region of the National Park Service, two of which were established since 1970. One of the two units is a combined Wage Grade/General Schedule unit, and the other is an all Wage Grade employee unit.

3/ The Bay Area includes the Golden Gate National Recreation Area, Point Reyes, which is another park in the San Francisco Bay Area, and the Western Regional Office of the National Park Service.

4/ The superintendents at Fort Point and Muir Woods supervise Wage Grade and General Schedule employees, as does the Maintenance Department head.

Wage Grade employees are subject to the same personnel policies, practices, and benefits as General Schedule employees. With regard to personnel vacancies, the minimum area of consideration for the announcement of Wage Grade and General Schedule vacancies through GS-8 is the Bay Area. The competitive area for a reduction-in-force is limited to the Golden Gate National Recreation Area, including Fort Point and Muir Woods, but bumping rights of the employees are restricted to the career routes of the affected individuals. 5/ In addition, the Activity's superintendent has sole authority for negotiating a collective bargaining agreement and for hiring, promoting, and granting merit awards.

Based on the foregoing circumstances, and having given equal weight to the three criteria set forth in Section 10(b) of the Order, 6/ I find that the petitioned for unit is not appropriate for the purpose of exclusive recognition. Thus, in my view, the evidence establishes that the claimed employees do not share a clear and identifiable community of interest that is separate and distinct from other employees of the Activity. In this regard, it was noted that the employees in the claimed unit perform work similar to that done by other employees of the Activity. Moreover, they share with these other employees similar working conditions, and are subject to the same personnel policies, practices, job benefits, and area of consideration for promotions and reductions-in-force. Further, under the circumstances set forth above, a fragmented unit restricted to Wage Grade employees could not, in my view, reasonably be expected to promote effective dealings and efficiency of agency operations. Moreover, for the reasons set forth above, I find that the alternative unit sought by the Petitioner is not appropriate for the purpose of exclusive recognition as the employees involved do not share a clear and identifiable community of interest. Further, such a fragmented unit could not reasonably be expected to promote effective dealings or efficiency of agency operations. Accordingly, I shall order that the instant petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-5207(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
January 27, 1977

Bernard E. DeLury, Assistant Secretary of Labor for Labor-Management Relations

5/ In a reduction-in-force, an individual who has held both Wage Grade and General Schedule positions would be able to exercise his seniority bumping right in both categories, whereas the bumping right of an employee who has worked solely as a Wage Grade or as a General Schedule employee would be limited to only one category.

6/ Cf. Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Office (DCASO), Columbus, Ohio, A/SLMR No. 687.

February 7, 1977

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 GENERAL SUPPLY CENTER
A/SLMR No. 790

This case arose upon the filing of a complaint by the American Federation of Government Employees, Local 2047, (Complainant), alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by declining to sign and to put into effect an agreement which had been negotiated by duly authorized agents of the Activity Commander.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order when the Activity Commander failed to execute promptly the agreed upon contract. He further concluded that Section 19(a)(1) and (6) was violated because the agreement was not put into effect as required by Section 15 of the Order. In reaching these findings, the Administrative Law Judge concluded that the Activity Commander, at least in his capacity as local Commander, was obligated to sign the agreement once his agents had negotiated it. The Administrative Law Judge noted that the Commander also had been delegated Section 15 authority to review the agreement and commenced this review on the date the agreement was presented to him by his authorized bargaining representative. Accordingly, in the Administrative Law Judge's view, absent sufficient notice of disapproval within 45 days of commencement of that review, the agreement was binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

The Assistant Secretary adopted the conclusion of the Administrative Law Judge that the Respondent had violated Section 19(a)(1) and (6) of the Order. In this regard, he noted that, under the circumstances herein, the Activity Commander's signature was required merely as a ministerial formality once the terms had been agreed upon by his authorized negotiators. He also found that where, as here, dual roles are imposed on an Activity Commander, i.e., to negotiate and approve, the two powers are effectively merged and approval for one purpose is approval for both. Therefore, approval as Activity Commander, here rendered by his fully authorized bargaining representative, was also viewed by the Assistant Secretary as approval pursuant to Section 15 of the Order.

In his remedy, the Assistant Secretary directed that the Respondent sign the agreement as agreed to by the negotiating team, retroactive to the date on which they had presented it to the Activity Commander for his approval, and, upon request, place such agreement in effect, subject to the provisions of law, the Order, and regulations of appropriate authorities outside the agency.

A/SLMR No. 790

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE GENERAL SUPPLY CENTER

Respondent

and Case No. 22-6639(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2047

Complainant

DECISION AND ORDER

On August 6, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed a response to the Respondent'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 Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Respondent and the response thereto filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

As set forth more fully in the attached Administrative Law Judge's Recommended Decision and Order, the parties commenced negotiations for an agreement in early 1974. The evidence established that the Respondent's negotiating team had full authority to reach agreement on behalf of the Activity Commander. Included on the team was a representative of the Civilian Personnel Office who was a technical advisor to the team on, among other things, compliance with law, the Executive Order and regulations. As the negotiations progressed, the Civilian Personnel Officer advised the Respondent's negotiating team whenever a question arose as to whether a given clause might conflict with law, regulations, or the Order. It is not asserted that such advice ever was disregarded by the Respondent's negotiators. Each item of the agreement was initialed by both teams as agreement was reached until the negotiations were concluded in September 1975. On September 12, 1975, the initialed agreement was forwarded to General Billups, the Activity Commander, with the following note from his chief negotiator: "Attached is the agreement negotiated by myself and Mr. Wenkus [chief negotiator for the Complainant] for the Installation Club System. Upon approval, Mr. Wenkus would like a formal signing ceremony."

General Billups subsequently declined to sign the agreement, stating that he had submitted it to the Civilian Personnel Office for review and had been advised that the agreement conflicted with certain laws, regulations, and the Executive Order.

As noted above, when the agreement was forwarded to General Billups on September 12, 1975, its terms had been approved and initialed by his agents. Also, it is uncontroverted that the Respondent's negotiators had been fully authorized to reach agreement on behalf of the Activity Commander. It is thus evident, and I find, that the Activity Commander's signature was required merely as a ministerial formality once the terms of the agreement had been agreed upon. 1/ I am, therefore, in agreement with the Administrative Law Judge's finding that the Activity Commander was obligated to sign the agreement promptly and his failure to do so constituted a violation of Section 19(a)(1) and (6) of the Order. 2/

Further, under the particular circumstances of this case, it is clear the Activity Commander had a dual role. Thus, in addition to being responsible for approving the agreement at the local level as Activity head, he also was the official designated by the Defense Supply Agency (DSA) as responsible for approving or disapproving the agreement pursuant to Section 15 of the Order. 3/ Section 15 states, in part, that an agreement shall be approved by the agency head or his official designee if it conforms to applicable laws, the Order, existing agency policies and regulations, and regulations of other appropriate authorities, but will go into effect if not approved or disapproved within 45 days from the date of its execution. The Respondent argues

1/ Cf. United States Department of the Navy, U.S. Naval Station, Pearl Harbor, Hawaii, A/SLMR No. 504, and Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168.

2/ The Respondent argues that the Activity Commander could not approve the agreement until his Civilian Personnel Office could determine whether its terms conflicted with law, regulations or the Executive Order. However, the record is replete with uncontradicted evidence that the Civilian Personnel Office was represented on the Activity's bargaining team at all times and that it approved every item before the negotiators reached agreement.

3/ The text of Section 15 is set out in footnote 8 of the Administrative Law Judge's Recommended Decision and Order.

that because the Activity Commander never "executed" the agreement at the local level, the same Activity Commander was not obligated to act pursuant to his Section 15 approval authority. It would follow, also, that because the agreement never was "executed," it never went into effect. I cannot accept this argument. As found above, under the particular circumstances herein, the requirement for the Activity Commander's signature was a mere formality after the initial agreement was presented to him on September 12, 1975. Thus, the agreement already had been effectively executed by his authorized agents. In my view, if, after an agreement is fully agreed upon by his properly authorized agents, an activity head is permitted to repudiate the very same agreement under his Section 15 authority, the negotiating process in the Federal sector would be seriously undermined. For this reason, where, as here, dual roles, i.e.-- to negotiate and to approve -- are imposed on the same activity head, I find that the two roles are effectively merged and approval for one purpose is, in effect, approval for both. 4/ Therefore, in the particular circumstances of this case, approval as Activity Commander, rendered by his fully authorized negotiating team, was also tantamont to approval pursuant to Section 15 of the Order. Accordingly, I find that the Respondent additionally violated Section 19(a)(1) and (6) of the Order by refusing to implement the negotiated agreement.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for the Labor-Management Relations hereby orders that the Defense General Supply Center, Richmond, Virginia, shall:

1. Cease and desist from:

(a) Refusing to sign the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess.

4/ It might be argued that, although under the circumstances herein, General Billups was required to perform the ministerial act of signing the agreement as Activity Commander, his responsibility as the Section 15 approving authority specifically requires in the latter role his determination as to whether the agreement conflicts with law, the Order or regulations of appropriate authorities outside the agency. However, Section 15 provides that an agreement will go into effect without such determination if the approving authority fails to act. This leads to the possibility that an effective agreement could contain provisions in conflict with law, the Order, or regulations of appropriate authorities outside the agency. It should be noted, however, that this possibility was recognized by the Federal Labor Relations Council, and dealt with in its Report and Recommendations (1975), which makes it clear that any provision of an agreement which conflicts with law, the Order, or regulations of appropriate authorities outside the agency would be void and unenforceable. See Section VII of the Council's Report and Recommendations (1975).

(b) Refusing to place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

(c) 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 policies of the Order:

(a) Upon request, sign the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess, retroactive to September 12, 1975.

(b) Upon request, place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

(c) 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 Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and all 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.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
February 7, 1977

Jack A. Warshaw, Acting 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 refuse to sign the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess.

WE WILL NOT refuse to place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

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, sign the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess, retroactive to September 12, 1975.

WE WILL, upon request, place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975, with American Federation of Government Employees, Local 2047, covering the employees of the Officers' Open Mess, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

_____
(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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
Defense General Supply Center	:	
Respondent	:	
and	:	Case No. 22-6639(CA)
American Federation of Government Employees, Local 2047	:	
Complainant	:	

MR. ADAM WENCKUS
P. O. Box 3742
Richmond, Virginia 23234

For the Complainant

MR. CLIFTON DUKE
Office of Civilian Personnel
Defense General Supply Center
Richmond, Virginia 23237

For the Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

A complaint was filed on January 23, 1976 under Executive Order 11491, as amended, (hereinafter called the Order) by Local 2047, American Federation of Government Employees (herein called the Union or Local 2047 AFGE) against the Defense General Supply Center (herein called DGSC or the Activity) alleging that DGSC violated Section 19(a)(1) and (6) of the Order by improperly refusing to sign and

approve an agreed upon collective bargaining agreement because said agreement allegedly violated law and regulations. Accordingly, a Notice of Hearing on Complaint was issued by the Regional Administrator for the Philadelphia Region on March 26, 1976.

A hearing was held before the undersigned in Richmond, Virginia. All parties were represented and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. All parties were afforded an opportunity to argue orally. Both parties filed briefs, which have been duly considered.

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

Findings of Fact

Local 2047, AFGE, at all times material, represented a unit of employees of DGSC's Officers' Open Mess (hereinafter called O.O.M.). The Commander of DGSC is the Commander of the O.O.M.

During early 1974 the Union and DGSC commenced bargaining for a collective bargaining agreement covering the O.O.M. unit. On March 18, 1974 the parties entered into an agreement concerning the "ground rules" for negotiations. Negotiations then commenced and during September 1974 Lt. Col. Walter J. Barnes was appointed as the Activity's chief negotiator. 1/ At all times material the Union's Chief Negotiator was Adam Wenckus, then President of Local 2047 AFGE. The Activity's negotiating team had full authority to negotiate a collective bargaining agreement, to make concession and to agree to its terms, all on behalf of the base commander. The Activity's negotiating team included representatives of the Office of Civilian Personnel.

1/ Lt. Col. Barnes was apparently officially appointed Chief Negotiator by DGSC's then Commander, General Shelter.

The parties, during negotiations, considered each others proposals and suggestions and as they agreed to each article and section they "signed off" or initialed it and went on to the next. The Activity's negotiating team considered each proposed article and section from the viewpoint of whether it was desirable and whether it violated applicable laws and regulations. The Activity's Chief Negotiator agreed to, approved and intitaled individual articles and sections only after he was satisfied that it was in conformance with applicable laws and regulations. In those cases where there was a question as to whether a contract proposal violated any law or regulation, the matter was fully researched by various members of the Activity's negotiating team and the matter resolved to the satisfaction of the Activity's Chief Negotiator before it was approved. If necessary adjustments and changes in proposals were made to bring them into conformance with laws and regulations, at least to the satisfaction of the Activity's negotiating team.

Finally all the individual articles and sections had been agreed to and copies of the entire agreement were typed and reviewed by the Union Activity Chief Negotiators to make sure it accurately reflected all that was agreed to. Then after the two Chief Negotiators were satisfied it did so reflect what they had agreed to, the contract of approximately 50 pages was on September 12, 1975, forwarded to and received by DGSC Commander, Brigadier General Rufus L. Billups. 2/ A "Routing and Transmittal Slip" addressed to General Billups and signed by Lt. Col. Barnes was attached to the agreement. The transmittal slip stated, "Attached is the agreement negotiated by myself and Mr. Wenckus for the Installation Club System. Upon approval, Mr. Wenckus would like a formal signing ceremony."

Upon receipt of the agreement, General Billups transmitted it to his civilian personnel office to review it for conformance with applicable laws and regulations pursuant to Defense Supply Agency Regulations (DSAR) 1426.1. 3/

2/ General Billups took command of the Activity on or about September 2, 1975.

3/ DSAR 1426.1 IV B.1.i. is the precise section that was relied on. It provides:

(Footnote 3/ continued on page 4).

The attachments and enclosures referred to in DSAR 1426.1, cited above, were to a Department of Defense (DOD) Directive which is dated October 9, 1974 but was transmitted with a memorandum dated March 17, 1975. The DOD Directive was No. 1426.1 and attachment 2 para B 2b(8) provides in part that upon execution of agreements DOD components will forward them for review to a higher level within the DOD component and the parties should be informed of the results of the review within 30 days of receipt of the agreement. The memorandum of March 17, 1975 clearly referred to Executive Order 11838 which amended Executive Order 11491, and the memorandum provided that the above discussed review should in no event be concluded later than 45 days from the date the agreement is executed by the parties.

At a regular Labor-Management meeting on October 6, 1975 General Billups advised the Union representatives that he could not sign the agreement because it violated some rules and regulations. He was not more specific and did not state, with any specificity which contract clauses violated which laws, rules or regulations. On October 6 the Activity's Office of Civilian Personnel was still in the process of reviewing the agreement.

By letter dated October 8, 1975 the Union charged the Activity was violating the Order by refusing to sign the agreement. By letter dated October 28 the Union charged the Activity with violating the Order by its delay in reviewing the agreement and its violation of Section 15 of the Order.

General Billups sent a memorandum dated November 6, 1975 to Lt. Col. Barnes, with a copy to Local 2047 AFGE, wherein he advised Lt. Col. Barnes that he could not approve the

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Footnote 3/ continued from page 3

> The Heads of DSA Primary Level Field Activities are responsible for: . . . i. Executing and affixing final approval to negotiated labor agreements for DSA. Heads of DSA PLFA's are considered the Officials designated by the Director, DSA to make such approvals. This approval authority may not be further delegated. Agreements will not be approved if they do not conform to applicable laws, regulations of appropriate non-DOD authorities existing published policies and regulations of DOD and DSA. (See Enclosure 1, Attachment 2, para. B 2b(8).

agreement because of violations of "laws/regulations" citing "DSAR 1426.1, IV B.1.i." General Billups also stated that certain portions of the proposed agreement required "editorial changes or clarifications" and that prior to his approval certain portions of the contract would have to be modified in order to conform to applicable "laws, policies and regulations." He then referred to specific portions of the contract and indicated that they violated specific laws and regulations. 4/

General Billups sent a letter to the Union on November 14. It referred to the two unfair labor practice charge letters from the Union, and denied that the Activity violated the Order. It stated further that the agreement had been returned for further negations and will be approved when it is determined the agreement does not violate any law, regulation or agency policy. On November 14 the Activity's Office of Civilian Personnel sent the Union a letter also referring to the Union's October 28th letter. The Activity's letter stated that in accordance with DSAR 1426.1 paragraph IV B.1.i., "an agreement is executed when approved by the Commander..." and further, that pursuant to DOD Directive 1426.1 Attachment 2, paragraph B 2b(8), the 45 day period begins with the Commander's approval. Therefore, the agreement had been returned for further negotiations.

By letter dated January 12, 1976, and referring to the two unfair labor practice charges, the Union stated that the November 14 letter did not state that it was a final position, and it was concluded that a verbal refusal at a January 7 meeting was the Activity's final position. By letter dated January 20 General Billups advised the Union that the November 14 letter sets forth the final position of the command with respect to the 45 day time limit.

Conclusions of Law

Section 203.26(2) of the Assistant Secretary's Regulations (29 CFR §203.26(2)) provides:

> "(2) If a written decision expressly designated as a final decision on the charge is served by respondent on the charging party, that party may file a complaint immediately but in no event later than sixty (60) days from the date of such service."

4/ A few of the changes required were apparently editorial and did not refer to specific laws or regulations, for example:

> "Article XI--Overtime
> Section 3--'...administrative work week...' should read '...basic work week...'"

The Activity contends that its letter of November 14, 1975 was such a final decision and therefore the complaint in the subject case, which was filed on January 23, 1976, was not timely filed within the requirements of Section 203.26(2) because it was filed more than 60 days after this final decision. However, the November 14 letter was not, in any way, "expressly designated as a final decision." 5/ Therefore the 60 day requirement of Section 203.26(2) did not commence to run on November 14 and it is concluded that the complaint was timely filed with respect to this Section and was otherwise timely filed.

General Billups testified that he felt his review of the agreement, with respect to its conformance with laws, regulations and policies was final and that the Defense Supply Agency (DSA) would not review the agreement subsequent to his review. 6/

It seems quite clear based,on General Billups' understanding of his review and approval role, and the clear language of DSAR 1426.1 IV B.1.i. 7/ that DSA was delegating to the Base Commander its authority to exercise final review of collective bargaining agreements with respect to conformity with applicable laws, regulations and policies, as permitted by Section 15 of the Order.

5/ The Activity itself did not refer to the November 14 letter as its final decision till its January 20, 1976 letter.

6/ To conclude otherwise would have, in effect,been to create an additional level of review of an already agreed upon contract and would constitute a violation of Section 19(a)(6). See Dept. of Agriculture, A/SLMR No. 519.

7/ This is especially clear when read in conjunction with DOD Directive 1426.1 and its memorandum of March 17, 1975.

Therefore the review of the agreement that General Billups was conducting was, in fact, a Section 15 of the Order review. 8/ Section 15 provides that the 45 day time limitation to conduct such a review is computed from the date of an agreement's execution. In the subject case General Billups, who has been delegated by DSA, the Section 15 review authority, is also the executing authority and he refused to sign the agreement until he had conducted the Section 15 review. Therefore the parties are in the anomalous situation of the 45 day time limitation in Section 15 running from an action, execution, which the reviewing authority would not perform.

The Activity contends therefore that the 45 days had not run and General Billups was therefore privileged to return the contract for alleged failure to conform to laws, regulations and policies. To adopt the Activity's interpretation of the Order and General Billups' rights and obligations, would, in effect do away with the Activity's obligation to execute an agreed upon collective bargaining agreement and to perform any Section 15 review of such an agreement within 45 days.

8/ Section 15 of the Order provides:

"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 within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations."

The policy and scheme of the Order is quite apparent. In the normal course of events the Order envisions the parties, at the local level, agreeing upon and executing a collective bargaining agreement and then, rather promptly, having it forwarded to the head of the agency for a prompt review with respect to whether the agreement conforms to laws, the Order, regulations or policies.

In the subject case the agreement was forwarded to General Billups for his signature, on September 12, 1975, after his duly and fully authorized bargaining representative had approved and agreed to the contract. It is clear that, at least with respect to his position as Activity Commander, General Billups was obliged to execute this agreed upon contract promptly. Had he done so, it should be noted, it would have commenced running the 45 days as provided in Section 15.

It is clear that once the Activity's negotiators had agreed to the contract, General Billups, at least in his capacity as Activity Commander, was obliged to sign the contract, and his failure to do so constituted a violation of Section 19(a)(6) of the Order. See H. Q. Army Aviation Systems Command, A/SLMR No. 168, FLRC No. 72A-30 and Joint Tactical Com. Office, DOD, Fort Mammouth, N.S., A/SLMR No. 396. 9/

9/ It should be noted that during the course of the negotiations the DGSC representative had been examining each proposal in relation to whether it conformed to laws, regulations and policies and only approved an item when satisfied it did so conform. Therefore, in his capacity as Activity Commander, as distinguished from his capacity as a delegated Section 15 reviewing authority, General Billups could not again start to examine whether the contract conformed to laws, regulations and policies. That determination had already been made for him by his bargaining representatives.

Further, immediately upon receipt of the agreement, on September 12, 1975 General Billups did in fact commence the delegated Section 15 review. In these circumstances and since he did not in a reasonable time sign the agreement, it is concluded that the 45 day limit provided in Section 15 of the Order started running on September 12, the date the agreed upon contract was sent to General Billups for the formality of his signature. 10/

The record establishes that on October 6, at a regular labor-management meeting, General Billups advised the Union that he was not approving the agreement because it did not conform to laws, regulations and policies. He was not, to any extent, specific as to which portion of the contract violated which laws, regulations or policies, and further, the agreement was still being reviewed by the Office of Civilian Personnel. In these circumstances it is concluded that the foregoing was not sufficient "disapproval" notice to meet the requirements of Section 15. The record fails to establish any sufficient notice of disapproval of the agreement within 45 days of September 12 and therefore, pursuant to the terms of Section 15 of the Order the subject agreement was binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. Thus, when the Activity, in its letter of November 6, stated that it would not approve or put into effect any portion of the agreement until certain changes had been made, including some demands that sections be brought into conformance with Army regulations, it is concluded that the Activity was refusing to comply with the requirement of Section 15, that, absent timely disapproval notice, the contract was binding on the parties, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency. It is therefore further concluded that by refusing to comply with the requirements of Section 15, i.e. by refusing to recognize the contract as binding, and by refusing to put it into effect, the Activity refused to bargain in good faith with the Union and therefore engaged in conduct which violated Section 19(a)(6) of the Order.

10/ To hold otherwise would be to permit a party, because of its own unfair labor practice,to extend the 45 day limit for its own benefit. In effect, a party would be benefiting by its own unfair labor practice.

Further, it is concluded that by engaging in the conduct described above, which violated Section 19(a)(6) of the Order, the Activity engaged in conduct which would tend to interfer with and restrain employee rights protected by the Order and therefore, also violated Section 19(a)(1) of the Order.

Recommendations

Having found that the Activity has engaged in conduct which is violative of Sections 19(a)(1) and (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(b) of the Regulations, the Assistant Secretary of Labor for the Labor-Management Relations hereby orders that the Defense General Supply Center, Richmond, Virginia, shall:

1. Cease and desist from:

(a) Refusing to sign the negotiated agreement as agreed to on September 12, 1975, with Local 2047, American Federation of Government Employees covering the employees of the Officers' Open Mess.

(b) Refusing to place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees covering the employees of the Officers' Open Mess, subject to the provisions of law, the Order and the regulation of appropriate authorities outside the agency.

(c) In any like or related manner interferring 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) Upon request, sign the negotiated agreement as agreed to on September 12, 1975, with Local 2047, American Federation of Government Employees covering the employees of the Officers' Open Mess.

(b) Upon request place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees covering the employees of the Officer's Open Mess, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

(c) Make whole and reimburse any employee of the Officers' Open Mess for any loss of benefits incurred because of its failure to promptly sign and timely place into effect the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees covering the employees of the Officers' Open Mess.

(d) Post at its facility copies of the attached 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 and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous palces, 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.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: August 6, 1976
Washington, D. C.

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 refuse to sign the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees covering the employees of the Officers' Open Mess.

WE WILL NOT refuse to place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees covering the employees of the Officers' Open Mess, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

WE WILL NOT in any like or related manner interfer with, restrain or coerce our employees in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL, upon request, sign the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees covering the employees of the Officers' Open Mess.

WE WILL, upon request, place in effect and be bound by the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees, covering the employees of the Officers' Open Mess, subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency.

APPENDIX

WE WILL make whole and reimburse any employee of the Officer's Open Mess for any loss of benefits incurred because of our failure to promptly sign and timely place into effect the negotiated agreement as agreed to on September 12, 1975 with Local 2047, American Federation of Government Employees, covering the employees of the Officers' Open Mess.

_____
(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: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

February 7, 1977

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

ARMY AND AIR FORCE
EXCHANGE SERVICE, HEADQUARTERS,
DALLAS, TEXAS
A/SLMR No. 791

This case involved an Application for Decision on Grievability or Arbitrability filed by American Federation of Government Employees, AFL-CIO, Local 2921 (AFGE). The AFGE contended that under the negotiated agreement the Activity was obligated to process through the negotiated grievance procedure grievances involving a reduction-in-force (RIF), in which it was alleged that the Activity failed to notify the Applicant of RIF plans, to offer an employee a vacant position after his position was abolished, and to give the required notice period to an employee of a downgrade transfer.

The Administrative Law Judge concluded, and the Assistant Secretary agreed, that the negotiated grievance procedure specifically excludes from its scope matters not personal to the employee and therefore the Applicant may not grieve, in its own right as a union, under the parties' negotiated grievance procedure. Moreover, it was found that the grievance herein was not grievable under the parties' negotiated agreement because it did not involve matters which were subject to the negotiated grievance procedure.

A/SLMR No. 791

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE
SERVICE, HEADQUARTERS,
DALLAS, TEXAS

Activity

and Case No. 63-5601(GA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, Local 2921,
DALLAS, TEXAS

Applicant

DECISION ON GRIEVABILITY

On September 10, 1976, Administrative Law Judge William B. Devaney issued his Recommended Determination of Grievability or Arbitrability in the above-entitled proceeding, finding that the grievance involved in this proceeding was not on a matter subject to the grievance procedure set forth in the parties' negotiated agreement.

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 Recommended Determination of Grievability or Arbitrability and the entire record in this case, 1/ I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 63-5601(GA) is not on a matter subject to the parties' negotiated grievance procedure.

Dated, Washington, D. C.
February 7, 1977

Jack A. Warshaw, Acting Assistant Secretary
of Labor for Labor-Management Relations

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

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

ARMY AND AIR FORCE EXCHANGE SERVICE, HEADQUARTERS, DALLAS, TEXAS
Activity/Party to Agreement :

and Case No. 63-5601(GA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2921, DALLAS, TEXAS
Applicant :

Dennis M. Sullivan, Esquire
Assistant General Counsel
Labor Relations Law Branch
Headquarters, Army and Air
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Dallas, Texas 75222
For the Agency
and Activity

Mr. Pete Evans
National Representative
American Federation of Government
Employees, AFL-CIO, Local 2921
4347 South Hampton Road, Suite 110
Dallas, Texas 75232
For the Applicant

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DETERMINATION OF
GRIEVABILITY OR ARBITRABILITY

Statement of the Case

This is a proceeding pursuant to Sections 6(a) and 13(d) of Executive Order 11491, as amended, to determine whether the grievance involved herein is subject to the grievance procedure

of the parties' existing agreement (Jt. Exh. 1). An application for decision on grievability or arbitrability was filed April 22, 1975; a Notice of Hearing on said application issued March 30, 1976, for a hearing on May 18, 1976; and pursuant therein, a hearing was held before the undersigned on May 18, 1976, in Dallas, Texas. Because of delay in receipt of the transcript, the time for filing briefs was extended to June 30, 1976, and the Activity's brief was received on June 29, 1976.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved and to present oral argument. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommended determination of grievability:

Preliminary Statement

At the outset, it is necessary to delineate the matters which Applicant asserts are subject to the negotiated grievance procedure. Applicant's original statement of the grievance was set forth in the letter dated February 26, 1975, addressed to Colonel Hart and signed by Ms. Hazel M. McDaniel, President of Local 2921 (Jt. Exh. 6). The February 26, 1975, letter was a common statement of a grievance, albeit by the Union, on behalf of employee Henry M. Pardee.

Colonel Hart's reply (Jt. Exh. 7) stated that the matter involving Mr. Pardee was not grievable under the negotiated grievance procedure for at least three reasons. In addition to the grounds stated, Colonel Hart further stated that even if the matter were grievable, it had been lodged at the improper level.

Applicant's application for decision on grievability or arbitrability (Ass't Sec. Exh. 1) states the grievance as follows:

> "Local 2921 alleges that management violated Article XXIII, Sections 1, 2, 3, and 4 ... in that Mr. Pardee was interviewed for a vacant position on December 16, 1974 ... two days after it was decided to abolish his position. Therefore, management violated the above cited Section of the Bargaining Agreement, and further

> management violated Reduction-In-Force Section of the Contract since this action was accomplished without notifying Local 2921. In addition to the above, the downgrading transfer action is in violation of Article XXIII Section 2 ... in that Mr. Pardee was given the proposed downgrading action ... on Friday, January 31, 1975, and was ordered to report to the new position on Monday, February 3, 1975 without the required notice period pursuant to AR 60-21/AFR 147-15 Section 4-15-RIF procedure - USP Employees Subsection C., (5)(b), and (c) ..." 1/ (Ass't Sec. Exh. 1).

At the hearing, Applicant made it quite clear that it was not proceeding on its original statement of grievance which had been, as noted above, a grievance on behalf of employee Henry M. Pardee. 2/ Rather, that Applicant was now grieving as a Union for asserted violations of the Union's rights under the agreement.

Accordingly, the grievance is Applicant's assertion that it, as a union, has grievable rights under Article XXIII, Sections 1, 2, 3, and 4 of the collective bargaining agreement which it may assert in its own right, as distinguished from a grievance asserted by a union on behalf of an employee.

1/ Applicant's reference was in error. Applicant obviously intended to refer to Subsection C.(6)(b) and (c) as there are no subsections under subsection C.(5). (Jt. Exh. 2, pages 4-10).

2/ Applicant acknowledged that Mr. Pardee had a right to review and that he did not choose to ask for review. Section 3 of Article XXXV of the parties' agreement specifically excluded from the negotiated grievance procedure, inter alis, "(20) matters which are properly subject for a request for review." Parenthetically, Activity's denial of grievability of the original grievance on behalf of Mr. Pardee was correct for this reason alone, because Section 3(2) of Article XXXV of the agreement specifically excludes matters which are properly subject for a request for review.

Findings of Fact

1. The collective bargaining agreement is dated, and effective from, December 30, 1971, 3/ (Jt. Exh. 1). Although the agreement was for a term of two years, it has, in accordance with its automatic renewal clause, remained in full force and effect.

2. Article XXIII of the Agreement, entitled "Reduction in Force" provides as follows:

> "Section 1. It is agreed that prior to the issuance of reduction in force notices affecting any employee in the unit, the Employer will advise the Union with respect to the persons and positions affected.
>
> "Section 2. It is agreed that downgrade or separation of regular full-time employees will be avoided or held to the minimum. Vacant positions in the unit will be used for placement of qualified employees otherwise to be separated, provided that there is current need to fill said vacancies. ... However, reductions in force will be accomplished in accordance with applicable regulations.
>
> "Section 3. The Employer agrees to notify employees prior to transferring them on an involuntary basis. The employee will be given an opportunity to express his dissatisfaction with the transfer either orally or in writing. Upon request by the employee who is transferred involuntarily, the Employer agrees to explain the reason for the transfer.
>
> "Section 4. It is agreed that Union representatives may review records of employees, in accordance with applicable regulations, when specifically designated as an employee(s) representative during

3/ Henry M. Pardee was then President of Local 2921.

> a reduction in force." (Jt. Exh. 1, Article XXIII, pp. 27-28).

3. Exchange Service Personnel Policies, as set forth in Army Regulation No. 60-21, Air Force Regulation No. 147-15 (Jt. Exh. 2), in pertinent part provide as follows:

> "Chapter 4
>
> "Assignment and Compensation
>
> "4-1. Explanation of terms.
>
> * * * *
>
> "g. Transfer. A transfer is the change in assignment of an employee.
>
> * * * *
>
> (2) Local transfer. A local transfer is a change in the assignment of an employee. ... A transfer is a local transfer as long as the difference in the distance between the employee's residence and the old worksite, and the distance between the employee's residence and the new worksite, is less than 30 miles by the usually traveled route. ...
>
> "h. Downgrade. A downgrade is the reduction of an employee's grade ...
>
> * * * *
>
> "j. Detail. A detail is a temporary assignment and not a transfer.
>
> * * * *
>
> "4-5. Transfer. a. Transfers may be lateral, promotional, or downgrade.
>
> (1) A lateral transfer is a change in assignment with no change in grade and step ...
>
> * * * *
>
> (a) USP employees will be laterally transferred at the same grade and step.
>
> * * * *

(3) A downgrade transfer is a change of assignment resulting in a lower grade ...

b. Transfers may be administrative, local, or nonlocal ...

c. Local transfers may be made on the following basis:

(1) Lateral transfers may be made at any time and for any reason, as determined to be in the best interest of AAFES. Reasons for such transfers may include, but are not limited to, RIF ...

* * * *

(3) Downgrade transfers may be made upon -

(a) RIF.

* * * *

"4.6. Downgrade. a. Employees may be downgraded as a result of -

* * * *

(3) Transfer pursuant to RIF.

* * * *

c. In case of downgrade, the notice of proposed downgrade (or downgrade grade transfer) must be given to the employee indicating the basis for the downgrade the the proposed effective date. Fifteen days or more after notice of proposed downgrade, notice of downgrade will be given. The notice period will be 30 days [exceptions not applicable] ...

* * * *

"4.8. Salary retention.

* * * *

c. Salary will be retained at the base salary in effect on the date of downgrade for the grade and step held by the employee ...

* * * *

"4-10. Details. a. Employees may be detailed in accordance with b through e below to facilitate more effective use of AAFES personnel. ... A detail is not a transfer. Details are normally to the same worksite, but, when necessary, employees may be detailed within the local transfer area.

* * * *

b. An HPP employee may be detailed for the following and similar reasons: absences; unfilled positions; special projects; pending other personnel actions such as ... downgrade, transfer, or separation. ...

c. USP employees may be detailed for the reasons given in b. above. Details of USP employees may be made for the following periods and under the following conditions:

(1) Details of 30 calendar days or less. No personnel action will be prepared and the employee will continue to be paid at his assigned grade and step. ...

"4-12. Reduction in force (RIF) policies. When it appears that it may be necessary to transfer, downgrade, or separate employees based on a RIF, the following policies will apply:

a. Downgrade or separation of regular full-time employees will be avoided or held to the minimum.

b. Employees will be given as much notice of RIF as possible.

* * * *

"4-13. RIF determination. No RIF action will be taken until -

a. Formal determination has been made that the work force must be reduced ..., and

b. The affected positions have been identified by job title."

* * * *

"4-15. RIF procedures - USP employees. a. Initial procedures. When USP employees are affected by a RIF, rosters will be prepared of all current employees with the same RIF element in the job title identified as being affected ...

(1) Separate rosters will be prepared of EMP employees and non-EMP employees.

(2) Within each roster, the employees will be listed by grade.

* * * *

c. USP (non-EMP) RIF plan. USP Non-EMP employees will be considered for retention on the basis of their qualification to fill positions.

(1) Starting with the highest grade on the roster, the RIF element will recommend one of the following actions for consideration in the order listed below:

(a) Promotional transfer to a vacant position.

(b) Continuance in the same position.

(c) Lateral transfer to a vacant position.

(d) Lateral transfer to a position occupied by a probationary employee.

(e) Downgrade transfer to any vacant non-EMP position.

* * * *

(3) The completed USP (non-EMP) RIF plan ... will be forwarded to the commander, AAFES for review.

(4) The Commander, AAFES, will review the USP (non-EMP) RIF plan and will -

(a) Approve ...; or

(b) Modify the USP (non-EMP) RIF plan ...; or

(c) Approve separation for RIF. ...

(5) The approved or modified USP (non EMP) RIF plan will be returned to the RIF element with instructions for implementation.

(6) Upon receipt of the approved or modified USP (non-EMP) RIF plan, the RIF element will implement the actions directed ...

(a) All employees to be laterally or promotionally local transferred will be given 15 days written notice of transfer.

(b) All employees to be downgraded local transferred will be given at least 15 days written notice of proposed downgrade local transfer. After expiration of such notice, the employees will be given 30 days notice of downgrade local transfer.

* * * *

"4.18 Simultaneous action. Whenever two or more personnel action relating to one employee are to be effective on the same day, the actions will be processed in the order most advantageous to the employee." (Jt. Exh. 2).

4. Henry M. Pardee, Merchandising Assistant, Catalogue Sales Center, an USP employee (Universal Salary Plan), was interviewed for the position of Chief, Communications, a supervisory position (Exch. Serv. Exh. 1) on December 16, 1974. The position of Merchandising Assistant was abolished by Personnel Manning Document for the Catagogue Sales Center, effective December 14, 1974.

5. The Director, Personnel Division, by letter dated January 28, 1975, advised the Chief, Headquarters, Personnel Branch, that the RIF plan submitted for job title Merchandising Assistant had been approved as modified; that Mr. Pardee had been identified for downgrade transfer pursuant to RIF to the position of Quality Inspector Sepcialist, UA-6, Duty Station Arlington/Fort Worth; that should Mr. Pardee refuse to accept the downgrade transfer he would be separated for refusal to transfer pursuant to RIF; that Mr. Pardee should be provided

a written notice of proposed downgrade transfer; and, thereafter, notice of downgrade transfer pursuant to paragraphs 4-6 and 4-15c of AR 60-21/AFR 147-15 (Jt. Exh. 3).

6. On Friday, January 31, 1975, Mr. Roger DeVall, then Chief, Headquarters Personnel Branch, following receipt of the letter of January 28, 1975, delivered to Mr. Pardee Notice of Proposed Downgrade Transfer (Jt. Exh. 4) and Mr. Pardee consulted with Ms. McDaniel, President of Local 2921. 4/

7. The transfer of Mr. Pardee was a local transfer.

8. By letter dated February 21, 1975, (Jt. Exh. 5), Mr. Pardee was given Notice of Downgrade Transfer effective April 5, 1975, with salary retention to run from April 5, 1975.

9. Articel XXXV of the parties' agreement, Grievance Procedure, provides, in part, as follows:

> "Section 1. The purpose of this Article is to provide for a mutually acceptable method for the prompt and equitable settlement of employees grievances and disputes over the

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4/ Mr. Pardee did not testify. Mr. Pardee admittedly reported at the Arlington Distribution Fashon Center (Arlington/Fort Worth) on Monday, February 3, 1975. Ms. McDaniel denied having been advised prior to January 31, 1975, with respect to the persons and positions affected, of the reduction in force; however, the Daily Log maintained by Mr. DeVall (Exch. Serv. Exh. 3) for Wednesday, January 29, 1975, states "advised Mrs. McDaniel that Pardee had been selected for downgrade transfer to Fashon Center in Arlington". In addition, Mr. DeVall's Daily Log for January 29, 1975, read "coordinated downgrade transfer of H. Pardee from Catalogue Sales to QA - Report 3 Feb, trans eff. 10 Feb - Downgrade to be projected to 8 April". The Notice dated January 31, 1975, did not instruct Mr. Pardee to report at Arlington/Fort Worth on February 3, 1975; nevertheless, his action in reporting clearly indicates that he was so advised in some manner. Mr. DeVall's Daily Log shows a February 3, 1975, reporting date and whether his "coordination" was with Mr. Pardee directly or through Ms. McDaniel, Mr. Pardee was advised to report, and did report, at Arlington/Fort Worth on February 3, 1975.

> interpretation and application of this Agreement, and shall be the exclusive procedure for the processing of such grievances. Grievances arising over the interpretation or application of AAFES Regulations, Directives and published policies will be processed under the procedures in AR 60-21/AFR 147-15.
>
> "Section 2. A grievance shall be defined as a complaint of dissatisfaction and a request for adjustment of a management decision, or some aspect of the employment relationship, which is beyond the control of the employee or the Union, but within the control of the Employer. This includes but is not limited to disputes over the interpretation and application of this Agreement ... except those items specifically excluded as non-grievable pursuant to AR-21/AFR 147-15.
>
> "Section 3. Complaints resulting from the following types of action shall not be grievable under this Article or the AAFES grievance procedure.
>
> * * * *
>
> "(2) Notice of proposed personnel action.
>
> * * * *
>
> "(10) Matters not personal to the employee.
>
> * * * *
>
> "(20) Matters which are properly subject for a request for review.
>
> * * * *
>
> "Section 5. Grievances and complaints arising under any provision not outlined in Section 3 of this Article shall be processed

in the following manner.

Step 1. Complaints normally will be discussed first with the immediate supervisor, and at this discussion the employee may, if he wishes, be represented.

"Section 6. If any matter coming within the scope of this grievance procedure is not settled between the employee concerned and his immediate supervisor, the following procedure applies:

Step 2. If the employee is dissatisfied with the decision of his immediate supervisor, he must appeal said decision within 5 workdays ...

Step 3. If the employee is dissatisfied with the Step 2 decision, it may be appealed by him. ... The Director, AD, shall render a written decision within ten (10) workdays of the hearing and shall provide a copy of the decision to the President of the Union.

"Section 7. If the grievance is not satisfactorily settled at Step 3, it may be referred to arbitration in accordance with Article XXXVI ...

"Section 8. At each and every step of the grievance procedure, the Union shall be permitted to call relevant employee witnesses ...Once the grievance is reduced to writing, the Employer shall, upon request, produce pertinent payroll and other records. ..."

10. Article XXXVI of the parties' agreement, Arbitration, provides, in part, as follows:

"Section 1. If the Employer and the Union fail to settle any grievance processed under the negotiated grievance procedure, said grievance, upon written request by the Union or Employer within thirty (30) calendar

days after issuance of the Director, AD's final decision, shall be submitted to arbitration. Arbitration shall be invoked only with the approval of the Union or Employer. ..."

Conclusions

Pursuant to the Executive Order, it is obligatory to determine whether Applicant's grievance is subject to the negotiated grievance procedure. As the Federal Labor Relations Council has stated:

"Section 6(a)(5) of the Order provides in pertinent part that the Assistant Secretary shall:

(5) decide questions as to whether a grievance is subject to a negotiated grievance procedure ... as provided in Section 13(d) of the Order.

"Section 13(d) provides that 'questions that cannot be resolved by the parties as to whether or not a grievance is a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision.' Section 13(d) further permits a party to refer to the Assistant Secretary questions "... as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement. ...'

"It is clear from the express language in these provisions that in resolving a grievability dispute, if as here, an issue is presented concerning the applicability of a statutory appeal procedure, the Assistant Secretary must decide that question. Further, in any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure ... In making such a determination, the Assistant Secretary must consider

> relevant provisions of the Order ... and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. Further, the Assistant Secretary must also consider '... existing laws and the regulations of appropriate authorities. ..." Department of the Navy, Naval Ammunition Depot, Crane, Indiana and Local 1415, American Federation of Government Employees, AFL-CIO, FLRC No. 74A-19, Report No. 63 (1975).

See, also, Department of the Navy, Naval Ammunition Depot, Crane, Indiana, A/SLMR No. 684 (1976); NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma, FLRC No. 74A-38, Report No. 79 (1975).

As noted in the Preliminary Statement, supra, the issue in this case is whether Applicant, as a Union, can grieve in its own right under the negotiated grievance procedure. It must be emphasized that this case does not involve an employee grievance nor an employee grievance brought by a union on behalf of an employee.

Applicant's reliance on the portion of Section 2 of Article XXIII which provides:

> "It is agreed that downgrade or separation of regular full-time employees will be avoided or held to the minimum. Vacant positions in the unit will be used for placement of qualified employees otherwise to be separated, provided that there is a current need to fill such vacancies." (Emphasis supplied),

presents no justiciable controversy in this case for the reason that, wholly apart from Applicant's standing or lack of standing to grieve in its own right, the position for which Mr. Pardee was interviewed on December 16, 1974, and on which Applicant relies, was not a position "in the unit". To the contrary, the position was Chief, Communications, a supervisory position outside the bargaining unit. It is

recognized that Section 2 of Article XXIII also provides that "... reductions in force will be accomplished in accordance with applicable regulations" and that AR 60-21/AFR 147-15, Section 4-15 C provides that upon a reduction in force USP (non EMP) employees will be considered, inter alia, for "(a) Promotional transfer to a vacant position". Nevertheless, the only contractual obligation on which Applicant's right could be based is the provision of the Agreement that "Vacant positions in the Unit will be used for placement of qualified employees otherwise to be separated". The position of Chief, Communications, not being a position in the bargaining unit, there was no contractual obligation that upon a RIF an affected employee be assigned to such position; nor, of course, was Mr. Pardee separated. Assuming, although the Regulations appear clearly to provide alternatives, that the Regulations provide a right over and above the contractual obligation, such right would be enforceable only in accordance with the Regulations and the collective bargaining agreement as a matter for review.

Section 1 or Article XXIII provides that,

> "It is agreed that prior to the issuance of reduction in force notices affecting any employee in the unit, the Employer will advise the Union. ...",

and Section 4 of Article XXIII provides that,

> "It is agreed that Union representatives may review records of employees, in accordance with applicable regulations, when specifically designated as an employee(s) representative during a reduction in force." 5/

5/ In its original statement of the grievance, February 26, 1975, an allegation was made that the Agency "Failed to prepare a RIF Roster" which Ms. McDaniel, representative for Mr. Pardee, requested on or about February 4, 1975, and was told there was no roster (Jt. Exh. 6). This allegation was omitted from the Application for Decision on Brievability or Arbitrability (Asst. Sec. Exh. 1), although there was still a reference to Section 4 of Article XXIII. At the hearing, the testimony of Mr. DeVall indicated that there may have been a misunderstanding inasmuch as the only name on the roster was Mr. Pardee. Nevertheless, for the purposes of this decision, it will be assumed, but not determined, that Ms. McDaniel was not shown the RIF roster upon request, even though the only name on the roster was that of Mr. Pardee.

Section 3 of Article XXIII privides that the Employer agrees to notify employees prior to involuntary transfer; to give the employee an opportunity to express dissatisfaction with the transfer; and, upon request by the employee who is transferred involuntarily, to explain the reason for the transfer. There is no contention by Applicant that there was any violation of any obligation of Section 3 as to Mr. Pardee. Indeed, Agency meticulously complied with all requirements of the Regulations as to Mr. Pardee and, as Section 3 created no right running to Applicant, Applicant can assert no independent violation, i.e., if there were no violation of Section 3 as to Mr. Pardee, there was no violation of Section 3 as to Applicant.

Applicant asserts that the Notice of Proposed Downgrade Transfer of January 31, 1975, was an "issuance of reduction in force" notice within the meaning of Section 1 of Article XXIII; that it was not advised prior to the issuance thereof; 6/ and that it, as a union, may grieve under the negotiated grievance procedure. For the Reasons stated hereinafter, the grievance of Applicant was not subject to the negotiated grievance procedure.

In this case, the position of Merchandising Assistant, Headquarters AAFES, was abolished by Personnel Manning Document for the Catalog Sales Center, effective December 14, 1974. Section 4-12b of the Regulations provides that "Employees will be given as much notice of RIF as possible". There was, as noted, a sharp conflict in testimony as to whether notice of the RIF was given prior to January 28, 1975, when the RIF plan was approved, as modified, by the Director, Personnel Division. While a notice of proposed downgrade transfer is separate and distinct from a notice of downgrade transfer (See, 4-6c, 4-14f(2) and (3), 4-15c (6)(b)), Applicant's assertion that the Notice of Proposed Downgrade Transfer of January 31, 1975, was the first reduction in force notice to it is sufficient to bring it within the language of Section 1 of Article XXIII. There

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6/ There is evidence that Applicant's President, Ms. McDaniel was advised on January 29, 1975; but there is a sharp conflict as Ms. McDaniel testified to the contrary. In addition, there was a sharp conflict in testimony as to notification of the RIF prior to January 29, 1975, as distinguished from implementation of approved RIF plan. Because the function pursuant to Sections 6(a)(5) and 13(d) of the Executive Order is to determine whether the dispute is or not subject to the negotiated grievance procedure, it is inappropriate to resolve such factual conflicts which go to the merits of the grievance rather than to whether the dispute is subject to the grievance procedure.

is no dispute that Ms. McDaniel had been designated as Mr. Pardee's representative and, as noted above, it is assumed for the purpose of this decision that Ms. McDaniel was not shown the RIF roster even though only the name of Mr. Pardee would have appeared.

Although the activity's chief spokesman in the negotiation of the Agreement, Mr. John W. Bowlin, testified that the Union had sought unsuccessfully in the negotiations to obtain a procedure for union grievances, such contention is but an advocated position, United States Department of Commerce, Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana, A/SLMR No. 665 (1976), and, in the final analysis, determination of the issue is dependent on the provisions of the negotiated agreement "including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved", Department of the Navy, Naval Ammunition Depot, Crane, Indiana, supra, notwithstanding what the activity believed, or even intended, to be the scope of the negotiated grievance procedure.

The tenor of Article XXXV is wholly employee orientated. Although Section 1 refers to "employee grievances and disputes over the interpretation and application of this Agreement" (Emphasis supplied), the definition of "grievance" in Section 2 expressly includes "disputes over the interpretation of this Agreement". Section 5 provides that grievances and complaints not excluded by Section 3 shall be processed in the following manner: Step 1, discussion with the immediate supervisor at which the employee may be represented. Section 6 provides that any matter not settled between the employee and his immediate supervisor as Step 2, if the employee is dissatisfied he must appeal within 5 workdays; Step 3 provides that if the employee is dissatisfied with the Step 2 decision, it may be appealed by him. Section 7 provides that if the grievance is not settled at Step 3 it may be referred to arbitration in accordance with Article XXXVI. Section 8 provides that at each step of the grievance procedure, the Union shall be permitted to call witnesses. Article XXXVI provides that any grievance processed under the negotiated grievance procedure, upon written request by the Union or Employer, shall be submitted to arbitration.

Not only is no provision made for Union grievances; but the provisions of Article XXXV provide for, and permit, only employee action through step three, except that the Union may call witnesses at each step of the grievance procedure.

Only at the arbitration level is the right of the employee limited and even here, while the Union or Employer must request or approve arbitration, Article XXXVI is, by its terms, limited to "any grievance processed under the negotiated grievance procedure" which does not contemplate a union grievance instituted solely under Article XXXVI.

The prohibition of union grievances, as such, is further insured by the exclusions from the negotiated grievance procedure as set forth in Section 3 of Article XXXV which exclusions include,

> "(10) matters not personal to the employee."

A grievance by Applicant, in its own right, obviously is not by its very statement a matter personal to an employee, and is, therefore, excluded from the negotiated grievance procedure. 7/ Less directly, the exclusion of: "(2) Notices of proposed personnel action" and "(20) matters which are properly subject for a request for review", support, but would not mandate exclusion of a union grievance.

Because the negotiated grievance procedure specifically excludes from its scope matters not personal to the employee and by its terms provides for processing of grievances only by an employee, Applicant may not grieve, in its own right as a union, under the negotiated grievance procedure. While creation of a right without a remedy is not favored, it is by no means foreign in the law and where, as here, the terms of the parties' own negotiated grievance procedure excludes Applicant's right to grieve, in its own right, there is no alternative but to conclude that Applicant's grievance is not subject to the negotiated grievance procedure.

7/ It is recognized that the exclusions of Section 3 of Article XXXV of the Agreement are, in substantially identical form, the exclusions from the Agency grievance procedure, Section 3-29 of the Regulations, except the sentence "Employees, may submit grievance on all matters except - ", which appears in 3-29, while the first sentence of Section 3 of Article XXXV reads, "Complaints resulting from the following types of action shall not be grievable under this Article or the AAFES grievance procedure."

Pending implementation of personnel action pursuant to 4-15c, Mr. Pardee was detailed to the same job to which he later was transferred; but this was specifically authorized by, and in accordance with, Regulations (See, 4-10b and c); a detail is not a transfer; is specifically authorized within the local transfer area; and no notice period or personnel action is required for a detail of 30 calendar days or less. The Regulations (4-18) also contemplate and provide for two or more personnel actions relating to one employee at the same time with only the limitation that the actions be processed in the order most advantageous to the employee. The detail of Mr. Pardee was most advantageous to Mr. Pardee (see, for example, 4-8) as he remained at his assigned grade and step pending implementation of the procedures of 4-15c and the date of commencement of salary retention was deferred to April 5, 1975; but even if it were assumed that some right of Mr. Pardee had been violated, the right was Mr. Pardee's, not Applicant's, and his remedy was principally, if not exclusively, by request for review. The negotiated grievance procedure specifically excludes from its scope notices of proposed personnel action and matters which are properly subject for a request for review. Whether an employee, such as Mr. Pardee, could grieve a violation of Sections 1 or 4 of Article XXIII of the Agreement is not before me and no opinion is expressed with regard thereto; but, in any event, Applicant, as a union, has no independent right under the negotiated grievance procedure to grieve asserted violations of an employee's rights .

RECOMMENDATION

In light of the foregoing, it is hereby recommended that the Assistant Secretary of Labor for Labor-Management Relations find that Applicant's grievance in its own right as a union is not grievable under the parties' negotiated grievance procedure.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 10, 1976
Washington, D.C.

February 8, 1977

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

UNITED STATES CUSTOMS SERVICE
A/SLMR No. 792

The subject case involved two challenged ballots which were sufficient in number to affect the results of a self-determination election for professional employees. The two challenged ballots were challenged on the grounds that the individuals involved, a GS-13 Senior Auditor and a GS-12 Auditor, were management officials.

The Administrative Law Judge found, and the Assistant Secretary agreed, that the evidence demonstrated that the aforementioned individuals more closely resembled highly skilled experts or professionals who rendered resource information or recommendations rather than individuals who actively participated in the ultimate determination of policy. In this regard, he noted that while the subject employees performed challenging reorganizational work in an independent work environment and their work products often met with approval, their recommendations were implemented only after review and approval by several levels of management and their role did not extend to the point of active participation in the ultimate determination of policy.

Accordingly, the Assistant Secretary directed that the ballots of the employees herein be opened and counted and that the appropriate Regional Administrator cause to be served on the parties a Revised Tally of Ballots.

A/SLMR No. 792

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES CUSTOMS SERVICE

Activity

and Case No. 22-6409(RO)

NATIONAL TREASURY EMPLOYEES UNION

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Intervenor

DECISION ON CHALLENGED BALLOTS

On September 20, 1976, Administrative Law Judge Edwin S. Bernstein issued his Recommended Decision and Order in the above-entitled proceeding, recommending that the challenges to the ballots of Mr. Alan M. Levit and Mr. Matthew J. Krimski be overruled and that their ballots be opened and counted. Thereafter, the Activity filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order. 1/

1/ Under the particular circumstances herein, and noting particularly that the Activity was granted an opportunity to file a reply brief with the Administrative Law Judge, I find that the latter did not abuse his discretion, or prejudice the Activity, by granting an extension of time to the Petitioner for filing a post-hearing brief and by granting the Petitioner's motion to file its post-hearing brief after the extended due date had passed.

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 Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Activity, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 2/

DIRECTION TO OPEN AND COUNT BALLOTS

IT IS HEREBY ORDERED that the ballots of Mr. Alan M. Levit and Mr. Matthew J. Krimski be opened and counted at a time and place to be determined by the appropriate Regional Administrator. The Regional Administrator shall cause a Revised Tally of Ballots to be served on the parties and take such additional action as required by the Regulations of the Assistant Secretary.

Dated, Washington, D. C.
February 8, 1977

Jack A. Warshaw, Acting Assistant Secretary
of Labor for Labor-Management Relations

2/ The Petitioner filed a response to the Activity's exceptions which response was not considered in the determination of the subject case. It is the policy of the Assistant Secretary that when a reply or answering brief is not filed upon an appropriate request of the party involved, as occurred herein, it will not be considered by the Assistant Secretary when making a determination in the matter. See, in this regard, Section 202.14 of the Assistant Secretary's Regulations which provides, in relevant part, that, "No reply brief may be filed except by special permission of the Assistant Secretary."

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
UNITED STATES CUSTOMS SERVICE	Activity	
and		
NATIONAL TREASURY EMPLOYEES UNION	Petitioner	Case No. 22-6409 (RO)
and		
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO	Intervenor	

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Before: EDWIN S. BERNSTEIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arose under Executive Order 11491 pursuant to a Notice of Hearing on Challenged Ballots issued on May 5, 1976 by the Acting Regional Administrator for Labor-Management Services, Philadelphia Region.

The sole issue is whether or not Mr. Alan M. Levit and

Mr. Matthew J. Krimski are management officials within the meaning of that term as set forth in the Executive Order, as amended.

On January 21, 1976, a secret ballot election was conducted under the supervision of the Washington, D.C. Area Administrator, for a unit consisting of all eligible professional and non-professional employees assigned to the Headquarters Office of the United States Customs Service whose post of duty is within the United States. In that election, the majority of the eligible professional voters voted for a separate unit apart from the non-professional unit. On the question of representation, the National Treasury Employees Union received six votes while seven votes were cast against exclusive recognition. There were three challenged ballots.

The Activity contended that the three employees were "management officials" within the meaning of the term in the Executive Order. The Petitioner disagreed.

By Report and Findings on Challenged Ballots dated April 1, 1976, Acting Regional Administrator Frank P. Willette determined that one employee was properly excluded but found that relevant issues of fact existed concerning the challenged ballots of Alan M. Levit and Matthew J. Krimski and that a hearing should be held to determine these issues.

I conducted a hearing on June 15 and 16, 1976. The Activity and Petitioner were represented by counsel, presented evidence, examined and cross-examined witnesses, and submitted post-hearing briefs. The Intervenor did not appear at the hearing. 1/

Upon the entire record in this case and my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendation:

Findings of Fact

Mr. Alan M. Levit is a Senior Auditor, GS-510-13 and Mr. Matthew J. Krimski is a Staff Auditor, GS-510-12 in the

1/ By letter dated January 28, 1976 to the Acting Area Administrator, U.S. Department of Labor, the Intervenor stated that it had no further interest in this matter.

Regulatory Audit Division ("RAD") of the National Headquarters Office of the U.S. Customs Service ("Customs").

RAD's function is to develop and coordinate plans and programs for audits of importers and other parties who do business with Customs to determine whether or not the information that they submit to Customs is true and accurate.

RAD was established effective March 30, 1975 when it became one of seven divisions in Customs' Office of Operations. Between June 15, 1973 and March 30, 1975, the regulatory audit mission was conducted by a Customs organizational element called "Headquarters Regulatory Audit" and before June 15, 1973 Customs' regulatory audit function was handled by several headquarters divisions.

The witnesses at the hearing were Mr. Krimski, Mr. Levit and Mr. Walter P. Turek. Mr. Turek is RAD's Director. RAD consists of its Director, an Assistant Director, and three audit groups. Each group consists of an Audit Manager, GS-14, one Senior Auditor, GS-13 and two Staff Auditors, GS-12. In Audit Group 3, the Senior Auditor is Mr. Levit and Mr. Krimski is a Staff Auditor.

Within the headquarters regulatory audit function, all final decisions are made solely by the Director. It is the Director who signs all written materials that leave the Division and go to other divisions in the headquarters or to the regional offices. Where, as frequently occurs, a plan or program involves other divisions, it must be circulated among those divisons for review and is issued under the signature of the Assistant Commissioner for Operations.

Audit policies, programs, and plans issued by RAD over its Director's signature in theory need not be followed by a Regional Commissioner who disagrees. In such a case only the Assistant Commissioner can direct the Regional Commissioner to comply. However, this situation has not arisen.

Audit Group 3's subject areas are Drawbacks, Wool Bonds and Insular Possessions. Mr. Krimski and Mr. Levit have worked at RAD for slightly more than one year. During this time, Mr. Krimski has spent most of his time developing an insular possession audit plan and program and Mr. Levit has done the same in the drawback and wool bonds fields. Mr. Levit has also worked on RAD's budget.

The testimony of all three witnesses indicates that projects are assigned to Mr. Levit, Mr. Krimski and other RAD auditors by Mr Turek usually upon consultation with his assistant director and audit managers. The auditor's job is to do research and then develop an audit program. During the course of the auditor's work on the program, the Director would meet with him at least once a week to discuss the program and give the auditor guidance. The auditor would also confer with his Audit Manager. When the programs had been drafted, they would be reviewed by the audit manager who would suggest revisions, circulated among other RAD auditors for suggestions, and finally reviewed by Mr. Turek for his approval and comments.

Mr. Turek found Mr. Krimski and Mr. Levit to be highly skilled and reliable auditors. He testified that he approved 90 percent of their proposals. Mr. Levit testified that 80 to 90 percent of his recommendations were agreed to while Mr. Krimski's estimate was 75 percent.

At the time of the hearing, Mr. Krimski was in the process of including into his insular possession draft revisions made by Mr. Turek. When this is done, it will go back to Mr. Turek for final approval and then to the Commissioner's office for review. If it passes review, it will go to field auditors for their use in conducting audits.

In the field of drawback, Mr. Levit is also revising his draft based on changes made by Mr. Turek. When Mr. Turek approves it, it will be circulated to the Duty Assessment Division whose director will also be able to revise it. Mr. Levit stated that his draft is "a beginning step to making policy."

In the wool bond area, Mr. Levit drafted a document which recommended criteria for auditing of bonded wool importers, based on a survey of audit practices. The draft was submitted to the audit manager, to the Assistant Director and then to Mr. Turek, all for review and comment. Mr. Turek eventually signed the document and sent it to the Regional Commissioners.

With respect to budget development, Mr. Levit has been involved in gathering data and making recommendations for manpower allotment. In this area, Mr. Turek has retained more control and Mr. Levit's influence is less than in the other areas.

Another major portion of Mr. Krimski's and Mr. Levit's

duties involve giving technical guidance and assistance to field auditors in the areas in which they have done research and developed proposals. In this area, they clarify or explain existing policy, check to make sure that policy is being complied with, and sometimes indicate what proposals are being developed. Mr. Turek, Mr. Krimski and Mr. Levit agreed that Mr. Krimski and Mr. Levit have no authority on their own to establish new policy.

Mr. Levit also has represented the Division at meeting of Customs officials from other offices. Similarly, he will state Division policy or procedure if he knows what it is; if not, he will consult with his superiors and provide responses at a later time.

Conclusions of Law

The question of whether or not an employee is a management official has been considered many times by the Assistant Secretary. In the early cases the test utilized was whether or not the functions assigned place the interests of the employee more closely with persons who formulate, determine and oversee policy than with personnel in the unit who carry out the resultant policy. 2/

However, in Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135 (February 28, 1972), the Assistant Secretary set forth the following more precise definition and guidelines:

> "When used in connection with the Executive Order, the term 'management official' means an employee having authority to make, or to influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures, or programs. In determining whether a given individual influences effectively policy decisions in this context, consideration should be concentrated on whether his role is that of

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2/ The Veterans Administration Hospital, A/SLMR No. 3 (December 29, 1970); Veterans Administration, Regional Office, Newark, New Jersey, A/SLMR No. 38 (May 11, 1971); Virginia National Guard Headquarters, 4th Battalion 111th Artillery, A/SLMR 69 (June 30, 1971).

an expert or professional rendering resource information or recommendations with respect to the policy in question, or whether his role extends beyond this to the point of active participation in the ultimate determination as to what the policy in fact will be."

This definition and criteria have been consistently applied in all subsequent cases to determine whether or not an employee is a "management official." 3/

Upon careful consideration of the criteria set forth in A/SLMR No. 135, the above decisions, and the facts herein, I find that Matthew J. Krimski and Alan M. Levit are not management officials within the meaning of that term in the

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3/ These cases include Department of Transportation, National Highway Traffic Safety Administration, A/SLMR No. 193 (August 24, 1972); Federal Aviation Administration, Department of Transportation, A/SLMR No. 173 (July 20, 1972); Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, A/SLMR No. 230 (December 18, 1972); United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266 (May 31, 1973); Defense Mapping Agency Topographic Center, West Warwick, Rhode Island, A/SLMR No. 310 (September 28, 1973); Department of Health, Education and Welfare, Food and Drug Administration, Newark District, Newark, New Jersey, A/SLMR No. 361 (February 28, 1974); National Science Foundation, A/SLMR N. 487 (February 28, 1975); Department of the Army, Western Management Information Systems Office, Military Traffic Management Command, Oakland Army Base, Oakland, California, A/SLMR No. 503 (April 28, 1975); Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, A/SLMR No. 565 (September 30, 1975); Department of Health, Education and Welfare, Office of the Secretary, Headquarters, A/SLMR No. 596 (December 10, 1975); Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota, A/SLMR No. 621 (February 26, 1976); Energy Research and Development Administration, Headquarters, A/SLMR No. 634 (March 30, 1976); Department of Housing and Urban Development, Federal Housing Administration, Fargo Insuring Office, Fargo, North Dakota, A/SLMR No. 645 (May 11, 1976).

Executive Order.

In almost all of the decisions, the employee was highly skilled, did extremely important work and developed highly original and very reliable work products. Nevertheless, in all but a few of the cases, these employees were found to be highly skilled experts, professionals and resource people rather than policy-makers.

Thus in A/SLMR No. 173, the Assistant Secretary found that several categories of employees were not management officials. In the case of Area Specialists and Planning and Procedure Specialists, their duties, which included recommending modifications of procedures, preparing manuals, and recommending alternate routes, were deemed to be those of experts carrying out policy rather than policy makers. Also, Military Liaison and Security Specialists, who developed technical procedures, programs, procedures and routes, conducted liaison with military organizations, and briefed personnel on procedures, were also held to be non-management experts.

In A/SLMR No. 193, Management Analysts who performed management studies and analyses and made recommendations involving original concepts were found to be experts or professionals rendering resource information or recommendations regarding policies. The Assistant Secretary noted that their recommendations underwent close scrutiny and were not necessarily acted upon without change and that they did not participate directly in the ultimate decision-making process. The same conclusion was reached regarding Program Analysts and Program Analysis Officers who developed plans and programs and made policy recommendations. Their recommendations were found to be subject to review and were not necessarily accepted or acted upon without change.

In A/SLMR No. 266, a Staff Officer and Staff Assistant, whose duties in administering health insurance plans included negotiating contracts, determining training needs, assuring that private insurance carriers carried out national and regional policy, coordinating procedures that carriers and district offices must adhere to, and liaison with health organizations, were found not to be management officials. Their duties, which bore a resemblance to those of Mr. Krimski and Mr. Levit, included providing technical guidance to field offices, making comprehensive reviews and preparing evaluations of field office operations. The Assistant Secretary found that they were resource people who worked within agency policies.

By contrast in the same decision, a Program Evaluation Analyst and a Public Affairs Officer were found to be management officials. The Program Evaluation Analyst conducted special studies, the results of which were incorporated into formal reports and recommendations, visited regional offices and sat in on comprehensive reviews to evaluate the programs, and acted as a liaison between the Regional Administrator and various state Health Insurance Commissioners. The Public Affairs Officer oversaw all public affairs activities in the region and evaluated their effectiveness, acted as Chairman of the Regional Public Affairs Counsel, issued press releases for the Regional Administrator, and had the responsibility of informing the news media of inaccuracies in their stories. The Assistant Secretary noted that his recommendations for improvement were usually followed and that he had daily contact with the Regional Commissioners. It can be seen that both of these employees were operating at levels of contact and responsibility substantially higher than those of Mr. Krimski and Mr. Levit.

In A/SLMR No. 310, Project Directors (General Cartographers) also were found to be experts or professionals rendering resource information rather than management officials. Their duties included participating in the development of a quality insurance program and in the preparation of special technical reports, coordinating, expediting, programing, and assisting the Division Chief, and drawing up standard operating procedures. A similar determination was made regarding a Project Director (Cartographic Engineer) whose duties included making an independent determination of technical action necessary in a particular matter, having wide latitude in expressing his professional knowledge, skills and ideas to plan and carry out assignments, acting as technical advisor to the Office Chief, acting as as advisor to the Incentive Awards Committee, and reviewing proposals and making recommendations as to whether or not equipment should be brought. With respect to both categories, the Assistant Secretary noted that their recommendations underwent close scrutiny and were not necessarily acted upon without change and found that their roles did not extend beyond those of experts or professionals rendering resource information or recommendations regarding policy.

In A/SLMR No. 361, Consumer Affairs Officers planned and directed regulatory programs, directed analytical methods procedures and techniques, advised industry and state and local officials on enforcement policies and coordinated enforcement activities. They also were found not to be management officials.

Although their duties somewhat resembled those of Mr. Krimski and Mr. Levit, the Assistant Secretary emphasized that they basically reviewed in accordance with established programs, that when no guidelines existed they submitted their findings to headquarters for evaluation, and any actions that they initiated were by way of recommendation.

In A/SLMR No. 487, the employees in question were found to be highly trained and skilled professionals who exercised a great deal of discretion and independent judgment and whose advice was usually heeded. However, they were found to be advisory personnel rather than management officials, based upon the finding that their supervisors decided what course of action was to be followed.

In A/SLMR No. 503, Computer Specialists who developed plans and programs and coordinated them in accomplishing program objectives were similarly found not to be management officials. A similar conclusion was reached in A/SLMR No. 596 in which a Budget Analyst GS-14 and a Budget Analyst GS-13 were held not to be management officials. The former employee was responsible for overseeing the effective presentation of HEW's budgets before the Office of Management and the Budget and the Congress. He also drafted budget format guidelines which were followed by HEW agencies, based upon Congressional and OMB instructions. The latter employee developed budget guidelines and served on a management negotiating team, however her recommendations were found to conform to established policy and, standing alone, her membership in a management negotiating team was not sufficient to confer management status upon her.

Similarly in A/SLMR No. 634, several types of employees all were found not to be management officials. One, a chemist, was the only chemist in the division. His supervisors relied upon his expertise in the field of chemistry. He made recommendations regarding the renewal, continuation or change of programs at various universities and laboratories, he participated in budget justification preparation and attended inter-agency and intra-agency meetings. He was found to be a highly trained professional and expert who provided resource information and recommendations.

In A/SLMR No. 645, a Cost Examiner, who developed a cost handbook for the State of North Dakota, who attended management meetings on budget matters, trained employees, and processed and coordinated loan applications was similarly found to be on expert or resource person. The same conclusion was reached regarding a Loan Specialist who acted as a liaison between

developers and their counsel and was responsible for the travel budget in his section.

I have found only three cases in which employees have been held to be management officials under the Arnold test - Arnold itself (A/SLMR No. 135), A/SLMR No. 266, which I have discussed above, and A/SLMR No. 565.

In A/SLMR No. 135, the employee was the sole civilian safety engineer directly connected with the Air Force at the installation. As such, he was a member of the Activity's safety council where his opinions were almost invariably followed. Additionally the final product was circulated over his signature.

In A/SLMR No. 565, Senior Regional Analysts and Regional Analysts were found to be management officials. Their duties included evaluating programs and the performance of management officials. In the performance of these duties, they either initiated corrective action or recommended solutions with respect to personnel, budget, manpower and operations policies. They dealt directly with managers on a "one to one" basis and in most instances their recommendations were put into effect without review or approval. In more complex cases, their recommendations were submitted to the Assistant Regional Commissioner for approval but for the most part his approval was a mere formality.

Comparing the decisions to the facts at hand, I find that the duties of Mr. Krimski and Mr. Levit more closely resemble those of highly skilled experts or professionals rendering resource information or recommendations rather than individuals who actively participate in the ultimate determination of what policy, in fact, will be.

The fact that these auditors are doing challenging reorganizational work does not make them management officials. Nor does the fact that they are highly skilled and that their end products are met with approval 75 to 90 percent of the time. Although they work with independence, they nevertheless confer with Mr. Turek and their other supervisors at least once a week and on these occasions they make sure that they are going in the desired direction. Mr. Turek impresses me as an excellent supervisor. He is able to instill enthusiasm into his employees by emphasizing the challenges of their work. This is as it should be. He encourages their recommendations and appears to gently and tactfully suggest his thoughts rather than to directly order. However, in the last analysis,

they recommend and he alone in the division approves. This applies to all of their efforts. In the words of Mr. Levit, their efforts are but, "a beginning step to making policy." Before their recommendations become policy they are subject to approval by the one individual with real authority in the Division, Mr. Turek and in most cases their recommendations are subject to approval by others such as other Division Chiefs, the Assistant Commissioner of Operations, and the Commissioner of Customs.

Recommendation

I recommend that the challenges to the ballots of Mr. Allan M. Levit and Mr. Matthew J. Krimski be overruled and that their ballots be opened and counted.

EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: September 20, 1976
Washington, D. C.

February 9, 1977

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

COMMISSARY, FORT MEADE,
DEPARTMENT OF THE ARMY
A/SLMR No. 793

This proceeding arose upon the filing of an unfair labor practice complaint by the National Federation of Federal Employees, Local 1651 (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by attempting to interfere with an employee's right to choose his own representative and violated Section 19(a)(1) and (3) by allowing the active solicitation of membership by the American Federation of Government Employees (AFGE) during duty hours in a unit in which the Complainant had exclusive recognition and a valid negotiated agreement.

The substance of the interference allegation was that a management official told a unit employee that he could not be represented by the Complainant's national representative but only by the Complainant local. The Administrative Law Judge found that, in the context of the case, the statement did not constitute a Section 19(a)(1) violation. In this regard, he noted that the national representative was allowed to continue to represent the employee for the rest of the meeting and that the words used constituted only innocuous sparring.

The Assistant Secretary adopted the Administrative Law Judge's finding in this regard and, in doing so, noted that the wording of the parties' negotiated agreement pertaining to the contractual grievance procedure provided that, "Employees who use this procedure may be represented only by the union or by an individual approved by the union." The Assistant Secretary found that management's objection constituted a reasonable and arguable interpretation of the parties' negotiated agreement and, hence, such statement did not constitute a violation of Section 19(a)(1) of the Order.

With regard to the second allegation, the Administrative Law Judge found that the Respondent had violated Section 19(a)(1) and (3) of the Order based on the latter's improper assistance to the AFGE. He noted the absence of evidence that the AFGE had made a diligent effort to contact employees by other means, and that the Respondent had sufficiently inquired as to efforts made by the AFGE before granting the AFGE access to its premises. He noted also that there was no showing that the AFGE could not have reached employees through other channels of communication or contact.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. In doing so, he noted additionally the fact that while the AFGE organizer was a Fort Meade employee, the area of solicitation was a lunchroom restricted for the use of only Commissary employees.

A/SLMR No. 793

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

COMMISSARY, FORT MEADE,
DEPARTMENT OF THE ARMY

Respondent

and

Case No. 22-6722(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1651

Complainant

DECISION AND ORDER

On November 30, 1976, Administrative Law Judge George A. Fath issued his Recommended Decision and Order in the above-entitled proceeding, finding, among other things, that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order, and the entire record in this case, including the exceptions filed by the Complainant, 1/ and noting particularly the absence of exceptions by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

1/ The Complainant's exceptions concerned the Administrative Law Judge's failure to recommend that all signatures gathered from Commissary employees by Local 1622, American Federation of Government Employees, AFL-CIO (AFGE), to support its showing of interest be declared null and void. Issues concerning the adequacy and validity of showing of interest to support a petition are, pursuant to Section 202.2(f) of the Regulations of the Assistant Secretary, within the jurisdiction of the Area Administrator when appropriate challenges are filed. Accordingly, at an appropriate time after the filing of a petition, the Complainant may raise such issues with the Area Administrator in accordance with the Regulations.

The complaint in the instant case alleged, in effect, that the Respondent Activity attempted to interfere with an employee's right to choose his own representative in violation of Section 19(a)(1) of the Order, and also that it allowed active solicitation of membership by the AFGE during duty hours in the unit in which the Complainant had exclusive recognition and a valid negotiated agreement in violation of Section 19(a)(1) and (3) of the Order.

In agreement with the Administrative Law Judge's conclusion as to the first allegation, I find that the Respondent's statement to an employee at a December 9, 1975, grievance meeting between management and the Complainant to the effect that the national representative of the Complainant local "...can't represent you and you must be represented by the local union" did not improperly interfere with the employee's right to choose his own representative in violation of Section 19(a)(1) of the Order. In this regard, it was noted that Article 9.1 of the parties' negotiated agreement pertaining to the contractual grievance procedure states that, "Employees who use this procedure may be represented only by the union or by an individual approved by the union." Further, the preamble of the agreement identifies Local 1651 as the "union." In this context, I find that the statement of the Respondent's representative at the December 9 meeting reflected a reasonable and arguable interpretation of the parties' negotiated agreement 2/ and, therefore, was not violative of Section 19(a)(1) of the Order. 3/

With regard to the second allegation in the subject complaint concerning alleged improper assistance by the Respondent, I find, in agreement with the Administrative Law Judge, that the Respondent violated Section 19(a)(1) and (3) of the Order by allowing Mrs. Davis, a member of the AFGE and an employee at Fort Meade, but not an employee of the Commissary, access to the Commissary lunchroom in order to solicit signatures of employees at a time when the AFGE had not filed a representation petition and, thus, was not in equivalent status with the Complainant, the exclusive representative of the Commissary employees. In this regard, it was noted particularly that the parties stipulated that the Commissary lunchroom is a non-work area restricted for the use of Commissary employees. As Mrs. Davis, the AFGE's representative, was not a Commissary employee and, thus, had no right of access to the restricted Commissary employees' lunchroom, in my view, the Respondent's conduct in granting her the right to solicit in such area at a time when no petition had been filed by the AFGE was violative of 19(a)(1) and (3) of the Order. 4/

2/ Moreover, it appears that the Respondent allowed the Complainant's national representative to continue to represent the employee in question at the subject meeting.

3/ Cf. Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534, and General Services Administration, Region 5, Public Buildings Service, Chicago Field Office, A/SLMR No. 528.

4/ See Department of the Navy, Navy Commissary Store Complex, Oakland, A/SLMR No. 654; Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, A/SLMR No. 263; and U.S. Department of the (Continued)

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Army, Fort Meade Commissary, Fort Meade, Maryland, shall:

1. Cease and desist from:

(a) Assisting the American Federation of Government Employees, or any other labor organization which is not a party to a pending representation proceeding that raises a question concerning representation, in conducting an organizational campaign by permitting noncommissary employee representatives of that labor organization the use of its facilities at a time when the National Federation of Federal Employees, Local 1651, is currently recognized as the exclusive representative of its employees;

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exericise of their 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) Post at its facilities 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 officer in charge of the Commissary Store Complex, Fort Meade, Maryland, 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 officer in charge shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material;

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 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 an independent violation of Section 19(a)(1) based on alleged interference with an employees' right to choose his own representative in a meeting with management, be, and it hereby is, dismissed.

Dated, Washington, D.C.
February 9, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

4/ Interior, Pacific Coast Region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143. Compare Charleston Naval Shipyard, A/SLMR No. 1.

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 assist the American Federation of Government Employees, or any other labor organization which is not a party to a pending representation proceeding that raises a question concerning representation, in conducting an organizational campaign by permitting noncommissary employee representatives of that labor organization to use our facilities at a time when the National Federation of Federal Employees, Local 1651, is currently recognized as the exclusive representative of our Commissary Store complex 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.

_____
(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, Labor Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
COMMISSARY FORT MEADE DEPARTMENT OF THE ARMY Activity	:	
and	:	Case No. 22-6722(CA)
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1651 Complainant	:	

Samuel T. Brick, Jr., Esquire
Attorney-Advisor
Department of the Army
Building 2718
Fort Meade, Maryland 20755

For the Activity

Janet Cooper, Staff Attorney
National Federation of Federal Employees
1016 - 16th Street, N.W.
Washington, D. C. 20036

For the Complainant

Before: GEORGE A. FATH
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Executive Order 11491, as amended (hereinafter called the Order). A Notice of Hearing on Complaint was issued by the Acting Regional Administrator for Labor-Management Services, Philadelphia Region, on May 25, 1976, based on a complaint filed on March 1, 1976, by Local 1651,

National Federation of Federal Employees (hereinafter called Complainant, Local 1651, NFFE, or the Union) against the Department of the Army, Fort Meade, Maryland (hereinafter called the Activity or the Respondent). The Notice of Hearing on Complaint was issued with respect to the alleged violations of Sections 19(a)(1) and 19(a)(1) and (3) of the Order as set forth in the complaint. Briefly stated, the Union complains: (1) that the activity attempted to interfere with an employee's right to choose his own representative in violation of Section 19(a)(1) of the order; and (2) that the activity allowed active solicitation of membership by the American Federation of Government Employees (hereinafter called AFGE) during duty hours in a unit in which local 1651 has exclusive jurisdiction and a valid contract in violation of Section 19(a)(1) and 19(a)(3) of the Order.

A hearing was held on July 7, 1976, at Fort Meade, Maryland. All parties were represented and were given full opportunity to present evidence, examine and cross examine witnesses, argue, and file briefs.

The following findings, conclusions, and recommendations are based upon the entire record including observation and the witnesses, their demeanor, and evaluation of their testimony.

Preliminary Matter

The complainant moved for correction of errors in the record.

The motion is granted and the record is corrected as follows:

1. Page 1-10, line 8, change Section 1903 to Section 19(a)(3).

2. Page 1-42, line 17, change her supervisor to his supervisor.

3. Page 1-58, line 1, change force com to FORCOM. Same change on page 1-95, line 22. FORCOM is the acronym for one of the commands within the Department of the Army.

4. Page 1-79, line 8, change an to and.

Findings of Fact

Fort Meade Commissary is situated in and on Fort Meade, Maryland, an army post. It serves card-carrying active and retired military personnel.

The commissary services are carried on in a main building, commissary annex, four warehouses, and a supply building. Building P43, a part of the commissary complex, is separated from the main commissary by about 50 yards, and it is used by the employees as a breakroom, rest facility, and lunch room.

Local 1651 has had exclusive recognition as the representative of non-supervisory employees of the Fort Meade Commissary since March 7, 1972. There is a collective bargaining agreement between the parties, effective February 6, 1973, for a period of two years which is automatically renewed at the end of that time for an equivalent period. Mr. James Foster, who is now deceased, was President of the Local during the period covered by the complaints.

On December 5, 1975, a petition was filed by the AFGE, Local 1622, with the Department of Labor seeking an election for the unit of commissary employees represented by the NFFE, Local 1651. The petition was voluntarily withdrawn on December 22, 1975.

Violation of Section 19(a)(1)-The Rights of the Employee

On December 9, 1975, there was a meeting between management and the union at the activity, called by Mr. Sam King, a special national representative of NFFE, to discuss the complaint of Mr. Israel Cummins that he was not getting his share of overtime. The meeting was attended by King, Cummins, and Foster for the union, and Charles E. Allen, commissary manager, Mr. Masters, meat market manager, and Mrs. Margaret E. Schwartz, Management-Employee Relation Specialist, for the activity.

As the meeting opened the parties displayed a testiness. Management took the position that Cummins complaint had been resolved informally. Schwartz, noticing that Foster was not present, summoned him from his job, and informed Cummins that King could not represent him and he was to be represented by the local only. She referred to the collective bargaining

agreement and asked King whether this was a grievance, grip, complaint, or what. King replied that he did not give a damn about that little book, and that he was there to discuss a problem going on at the activity.

Schwartz denies that she told Cummins that he could not be represented by King. Cummins was not called as a witness so that his version of the incident and his reaction to Schwartz-King dispute is unknown.

Irrespective of the exact words exchanged by the parties, it is found that management questioned the union's capacity to represent Cummins in his presence. Management placed the union in a defensive position. The colloquy between Schwartz and King, give a reasonable interpretation, supports Kings version that Cummins was told he could not be represented by King but had to be represented by the local.

King, in fact, did represent Cummins, and discussed his complaint at that meeting for one hour and ten minutes.

Violations of Sections 19(a)(1) and 19(a)(3)-Activity Assistance To AFGE

At a union meeting on November 20, 1975, Local 1622, AFGE, decided to move to solicit a showing of interest among the employees of the commissary upon which to base a petition for election. It made an unsuccessful solicitation of the employees on their parking lot on December 3, 1975. There was no significant result from the effort. On the following day, Mrs. Rita Davis, a member of AFGE but not a commisssary employee, went to the commissary. She gained admission on her commissary privilege card as the dependent wife of a retired military man. Once inside, she spoke to officers and members of NFFE, as a matter of courtesy, to inform them of her intention to solicit a showing of interest in the filing of a petition. Mrs. Davis testified that these members of NFFE welcomed her and implied that they endorsed and would aid her efforts.

Davis was directed to see Mr. Chester E. Allen, commissary store manager, for permission to talk to people about membership. Davis told Allen of her unsuccessful parking lot solicitation. Allen called Schwartz for an opinion on the legality of the proposal. He testified that Schwartz immediate reaction was yes, they could, as long as they talked

to the employees in the break area during non-work time. 1/ Thereupon, Allen escorted Davis to building P43, the employee's lunchroom, where he set up a table in the back of the room out of the "normal traffic of people" and in a proper atmosphere to conduct business. He stated he gave AFGE the same accomodations he regularly gave NFFE.

Davis was joined by Mr. Thomas E. Shoff, the President of the NFFE Local, and together they solicited the employees.

Mr. John William Matrau, a commissary employee, witnessed the solicitation by AFGE and testified at the hearing. He stated that Schwartz was present in the lunchroom speaking to Davis, and, after speaking to him about an union posting he had placed on the bulletin board in the lunchroom, she left. 2/ Matrau showed a clear recollection of events in the lunchroom on December 4, 1975. His demeanor was forthright, and on the whole, his testimony is credited. His testimony that Schwartz was in the lunchroom on the day of the solicitation is accepted as the fact.

Other than the parking lot solicitation on December 3, 1975, there is no evidence that AFGE made any effort to contact the employees away from the activity. The evidence deals with the unfeasibility of various options open to the union through which to contact the employees rather than with actual attempts at contact.

The activity adopted the same approach after the fact of solicitation. It too found various avenues of employee contact by the union outside the activity impractical for a variety of seemingly specious reasons.

It is found that the AFGE did not make a reasonable attempts to contact the employees away from the activity prior to the solicitation on December 4, 1975.

Management had no knowledge and made no inquiries

1/ Schwartz testified that after she received the call from Allen, she called FORCOM for a legal opinion and called Allen back "10 to 17 minutes" later.

2/ Schwartz denies being in the lunchroom on that day. She testified that she did not leave her office all day.

calculated to eliciting information as to unaccessibility of the commissary employees prior to allowing AFGE the use of its services and facilities.

Conclusions of Law

Violation of Section 19(a)(1) - The Rights Of The Employee

The Union relies principally on Army Training Center, Infantry Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242 for legal support of the charge that the activity violated Section 19(a)(1) in telling Cummins that he could not be represented by Sam King. That case is clearly distinguishable from this case on the facts.

In the Army Center case, the violative conduct consisted of a supervisor, telling an employee to shut her mouth unless spoken to during a formal meeting. Additionally, the employee was denied a representative of her choice at a meeting called by management. Such obtrusive conduct easily falls within the proscription of Section 19(a)(1).

The conduct complained of in this case does not carry the force or flavor of the prohibitions contained in Section 19(a)(1). The words "King cannot represent you, and you must be represented by the local union" are not harsh or abusive, interferring, restraining, or coercing. In context, the exchange between Schwartz and King is innocuous sparring.

Cummins was represented by King, a representative of his choice, and his complaint regarding his share of overtime was discussed with management on his behalf.

There is no violation of Section 19(a)(1) inhering in the evidence presented in this case, and it will be recommended that the complaint be dismissed.

Violation of Section 19(a)(3) - Activity Assistance To AFGE

Section 19(a)(3) provides:

(a) Agency Management shall not---

(3) Sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under Section 23 of this

Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status.

The AFGE did not enjoy equivalent status with the NFFE on the 4th of December 1975, when it solicited the employees of the Fort Meade Commissary. There was an existing contract between the activity and NFFE. A question of representation had not been raised. NFFE enjoyed a favored position.

The principles stated in Department of the Army, v.s. Army Natick Laboratories, Natick Massachusetts, A/SLMR No. 263 are applicable and controlling in this case. A union which does not have equivalent status may not be given the services and facilities of the agency. The activity should not have the power to pick and choose a rival organization to unseat the incumbent. Labor-management relations stability 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 anytime for campaigning purposes. Under special circumstances a labor organization which does not have equivalent status may be furnished agency or activity services and facilities for an organizational campaign only in circumstances when 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.

The location of the AFGE campaign, Building P43, is on the activity premises at Fort Meade. The building is occupied and controlled by the activity. It is only incidental to the operation of the commissary that it is also used as an employee breakroom and lunchroom.

The activity pridefully gave AFGE the same use of its facilities for campaigning that it gave to the exclusive representative, NFFE. Based on the testimony, it manifested a singular solicitude for AFGE in providing a place on the activity premises, away from people traffic in the lunchroom, which would be a proper place for the transaction of business.

The equivalent treatment offered AFGE by the activity can be justified only where special circumstances exist. It must be shown that it acted upon evidence that the union made

a reasonable but unsuccessful effort to contact the employees away from activity premises and that failure of the union was based on their inaccessibility.

The evidence compels the conclusion that the AFGE launched a crash program to obtain the requisite showing of interest within three days in order to file a petition by December 5, 1975. It made only one effort to reach the employees away from the activity and that was on the parking lot on December 3, 1975. This attempt provided it with the springboard it thought it needed to bound into the activity premises for campaigning on December 4, 1975.

The activity readily accepted the representations of AFGE calculated to show reasonable attempts to contact the employees. Without question, it accepted the proposal, expressed or implied, that the commissary employees were inaccessible away from the premises.

The attempts by the activity and AFGE to justify their actions by methodically finding all traditional outside avenues of employee contact ineffective are not persuasive. These rationalizations, born of necessity, are transparent unrealities and unsupported by evidence. Had such negative attitudes prevailed in union organization from the beginning, the movement would have died with the Knights of Labor.

The activity did not prove the existence of the special circumstances which must underlay the use of activity services and facilities in this case. Based on the evidence it has not been established that the commissary employees were inaccessible outside the activity premises to reasonable attempts by AFGE to contact them.

It is, therefore, found that the activity violated section 19(a)(3), and, accordingly, a cease and desist order is recommended.

A violation of Section 19(a)(3) necessarily tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order, and, where, as here, a violation of that section is found there is also a violation of Section 19(a)(1). See Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454. A cease and desist order is recommended against the activity for violation of Section 19(a)(1) of the Order, as amended.

Prayers For Relief

In addition to praying for relief which naturally flows from violations of Sections 19(a)(1) and (3), the complainant asks for the following:

4. All signatures gathered from Commissary employees by Local 1622 of the American Federation of Government Employees in December of 1975 be declared null and void. No future petition for the Commissary employees at Fort Meade be allowed to use any of the signatures as a part of the showing of interest. Any petition which contains such signatures be dismissed for a defective showing of interest.

5. Management be instructed concerning its duties to keep AFGE Local 1622's representatives out of the commissary area and to deny them the use of any agency facilities while they do not have equivalent status with NFFE Local 1651.

It is recommended that the above prayers for relief be denied on the grounds that the relief prayed is overbroad, anticipatory, and unnecessary to meet the ends of justice in this case.

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 the Department of the Army, Fort Meade Commissary, Fort Meade, Maryland, shall:

1. Cease and desist from:

(a) Assisting the AFGE or any other labor organization, by permitting nonemployee representatives of any such organizations access to its premises for the purpose of conducting an organizational campaign among its employees at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when the employees are represented by the National Federation of Federal Employees, Local 1651.

(b) In any like or related manner, interferring with, restraining, or coercing its employees in the exercise of their rights assured by Executive Order 11491, as amended.

2. Take the following affirmative actior in order to

effectuate the purposes and provisions of the Order:

(a) 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 Commanding Officer 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 material.

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

GEORGE A. FATH
Administrative Law Judge

Dated: November 30, 1976
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 COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
NATIONAL WEATHER SERVICE, WESTERN REGION
A/SLMR No. 794

This case arose upon the filing of a complaint by the National Association of Government Employees, Council of Western Region Locals, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to approve a negotiated supplemental agreement within 45 days, as required by Section 15 of the Order, by disapproving the supplemental agreement and by insisting on the renegotiation of a specific portion of the agreement.

The Administrative Law Judge concluded that May 19, 1975, the day the Respondent's Director for the Western Region forwarded the supplemental agreement to the reviewing authority, should be considered the date he was deemed to have executed the supplemental agreement for the purposes of Section 15 of the Order, although, in the circumstances of the subject case, he concluded such execution of the contract was merely a "ministerial act." He further concluded that the Respondent's verbal notification on July 1, 1975, to the Complainant of disapproval by the reviewing authority of a specific clause was sufficiently specific and timely to meet the requirements of Section 15 of the Order. Consequently, he recommended the dismissal of the complaint.

The Assistant Secretary, although agreeing with the Administrative Law Judge that May 19, 1975, was the appropriate date for determining the time limit for agency review under Section 15 of the Order, found that the constructive execution of the supplemental agreement on that date was not merely a "ministerial act" as, by virtue of the terms of the parties' ground rules for negotiating the supplemental agreement, it was required that the Director execute such agreement as a condition precedent to its being in effect. Further, the Assistant Secretary, in agreement with the Administrative Law Judge, found that the Respondent's verbal notification to the Complainant of disapproval by the reviewing authority of a specific item in the supplemental agreement, and the basis therefor, was sufficient to constitute notification of disapproval within the meaning of Section 15 of the Order.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

A/SLMR No. 794

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
NATIONAL WEATHER SERVICE, WESTERN REGION

Respondent

and

Case No. 61-2870(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, COUNCIL OF WESTERN
REGION LOCALS

Complainant

DECISION AND ORDER

On October 14, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order 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, to the extent consistent herewith.

The evidence establishes that on March 26, 1975, the parties agreed to ground rules governing the negotiation of a supplemental agreement to a multi-unit negotiated agreement between the National Association of Government Employees and the National Weather Service. These ground rules provided, in part, that "...the employer will not be bound by the negotiated agreement or any portion thereof until the Director, Western Region, has signed the Supplemental Agreement." (Emphasis added.) Under these circumstances, I find that the supplemental agreement herein could not be deemed to be executed until the condition precedent set forth in the ground rules-i.e., the execution of the supplemental agreement by the Director of the Western Region-had been met. Further, while I agree with the Administrative Law Judge's conclusion that the constructive execution date of the supplemental agreement for the purpose of determining the time limit for agency review under Section 15 of the Order 1/ was May 19, 1975, the date on which the Director of the Western Region forwarded the supplemental agreement to the reviewing authority 2/, I do not concur in his conclusion that, in the circumstances of this case, such constructive execution was merely a "ministerial act" as, in my view, by virtue of the terms of the ground rules, it was required that he execute such agreement as a condition precedent to its being in effect. 3/ However, in agreement with the Administrative Law Judge, I find that the Respondent's verbal notification to the Complainant on July 1, 1975, of the disapproval by the reviewing authority of a specific item in the supplemental agreement, and the basis therefor, was sufficient to constitute notification of disapproval within the meaning of Section 15 of the Order. Accordingly, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-2870(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 16, 1977

Jack A. Warshaw, Acting Assistant
Secretary of Labor for Labor-Management
Relations

1/ Section 15 states, in pertinent part, with respect to approval of negotiated agreements by an agency head or his designee that: "...An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of law, the Order and the regulations of appropriate authorities outside the agency...."

2/ It was noted that in its brief to the Administrative Law Judge the Respondent stated, in part, "The Director's implied approval by forwarding to NOAA [National Oceanic and Atmospheric Administration] for higher level review constitutes execution of the Agreement in the sense conveyed by Executive Order 11491, as amended, Section 15, and in agreement with the negotiated ground rules...."

3/ Compare Defense General Supply Center, A/SLMR No. 790.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
United States Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Western Region	:	
Respondent	:	Case No. 61-2870(CA)
and	:	
National Association of Government Employees, Council of Western Region Locals	:	
Complainant	:	

HERBERT B. BENNER,
Executive Officer
National Weather Service, Western Region
P. O. Box 11188
Federal Building
Salt Lake City, Utah 84147

For the Respondent

PHILIP COLLINS, Esq.
Counsel, NAGE
285 Dorchester Avenue
Boston, Massachusetts 02127

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arises under Executive Order 11491, as amended, herein called the Order. On November 6, 1975 a complaint was filed by National Association of Government Employees, Council of Western Regional Locals, hereinafter called NAGE Western Region Council, the Union or Complainant, alleging that U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Western Region, hereinafter called the NWS Western Region, the Activity or Respondent, violated Sections 19(a)(1) and (6) of the Order by failing to approve a negotiated supplemental agreement within 45 days as required by Section 15 of the Order, by disapproving the supplemental agreement and by insisting that the parties renegotiate the specific portion of the agreement that had been disapproved. Pursuant to the Regulations of the Assistant Secretary of Labor Management Relations, herein called the Assistant Secretary, a Notice of Hearing on Complaint was issued on May 24, 1976 by the Acting Regional Administrator for the Kansas City Region.

A hearing was held before the undersigned in Salt Lake City, Utah. Both parties were represented at the hearing and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Both parties filed briefs which have been duly considered.

Upon the entire record in this matter, 1/ including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendation.

Findings of Fact

1. At all times material herein the NAGE Weather Region Council bargaining unit consisting of approximately 550 of the NWS Western Region's employees, most of whom occupy the

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1/ The record in this case was closed on September 9, 1976 with the receipt of the corrected deposition of witness Perry Walper.

following positions: electronic technicians, meteorological technicians, meteorologists, hydrologists, and clearical workers.

2. The above-described unit is the only unit within the Activity, and Complainant is the only labor organization.

3. In 1974 the National Association of Government Employees and the National Weather Service entered into a two-year Multi-Unit Agreement which comprehensively governed terms and conditions of employment of employees in four regions of the National Weather Service, including the Activity. Pursuant to Article 3, section 4 and Article 30 of the Multi-Unit Agreement the parties at the Regional level are permitted to negotiate supplemental agreements.

4. On or about March 24, 1975, Lester C. Jordon, Chairman of the NAGE Western Region Council, submitted the Union's original proposals to NWS Western Region management, in compliance with the requirement of Article 3, section 4b of the Multi-Unit Agreement that "Proposals...for the purpose of initiating supplemental agreements shall...be received by each party at least 45 calendar days in advance of the date on which negotiations are to begin." Negotiation of the parties' first supplemental agreement was scheduled for May 14 and 15, 1975.

5. Mr. Jordan also forwarded a copy of the ground rules proposed by management, to which he had agreed on March 26, 1975. These ground rules provided in Article 4 that the employer will not be bound by the negotiated agreement or any portion thereof until the Director, Western Region has signed the supplemental agreement. These ground rules were negotiated before the parties had any knowledge of the amendments to the Order which were signed on February 6, 1975 and which did not become effective until May of 1975.

6. The Union's Article 15, section 3d, 2(c) of the Union's proposed supplemental agreement was the same as Article 15, section 3d, 2(c) of a supplemental agreement between the National Weather Service, Central Region and

the NAGE Central Region Council of NWS Locals, which agreement had not been disapproved by the Department of Commerce (hereinafter called D.O.C.) or the National Oceanic and Atmospheric Administration (hereinafter also N.O.A.A.) and in fact had been implemented. This Union proposal was apparently accompanied by a proposed change in Article 15 Section 3d 2(c).

7. Shortly after receipt of the Union's proposals, the N.W.S. Western Region, forwarded them to the N.O.A.A. Personnel Office in accordance with N.O.A.A. Circular 74-36 which provides for "Review of Labor Management Relations Proposals and Agreements" in order to "assure conformance among negotiated agreements concerning N.O.A.A. and D.O.C. policies, regulations and law." Marked on Article 15, section 3d, 2(c) of the proposal at the review at the national level of N.O.A.A./N.W.S. was the following marginal notation by Mr. Perry Walper - "Do not negotiate" and an additional reference to Section 11(b) of the Executive Order. In addition Mr. Grimm of N.W.S. Headquarters commented that he thought the Union's Article 15 section 3, c, 1(e) proposal countermanded the N.O.A.A. Personnel Handbook. These opinions were forwarded to Respondent's representatives well in advance of the commencement of negotiations.

8. On the first day of negotiation, May 14, 1975, the Respondent refused to agree to some parts of the Union's scheduling proposals because of a directive from Dr. George Cressman, N.W.S. Director, of December 20, 1973 which set forth the official N.W.S. interpretation of N.O.A.A. policies as set forth in the N.O.A.A. handbook. No refusal to discuss the proposal occurred and at no time during the negotiations did the Respondent declare the Union's proposals to be non-negotiable, although the Activity did express its reservations as to whether the Union's proposals with respect to scheduling may violate N.O.A.A. policy. The Union sought and received a counterproposal from Respondent, which in large measure adopted the Union's section 3d proposals, with the notable exception of paragraph 2(c). As a result

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2/ Mr. Walper was Chief of N.O.A.A.'s Labor Management Relations Branch.

of the Union's opposition to this omission, the parties agreed to treat the item as if they had reached impass and it was not again discussed on May 14.

9. On the second day of negotiations, the Union again raised the subject of scheduling, and resubmitted its proposal, which evoked a counterproposal by the management team. The Union proposed certain modifications, to this counter-proposal and agreement was reached on this basis. 3/ Since all other matters had also been settled, the parties had concluded a complete agreement.

10. The Supplemental Agreement was then typed and prepared for the signature of the Director, N.W.S. Weather Region. It should also be noted that the Director, N.W.S. Western Region, had been fully consulted regarding the final management counterproposal and had approved its substance. His review was basically to be confined to form and grammar, and it was expected that he would forward the Agreement right on to N.O.A.A. The prepared Agreement was forwarded to the Director, N.W.S. Western Region, for his signature on or about May 19, 1975.

11. On May 19, 1975, after perusal by the Director, N.W.S. Western Region, the supplemental agreement was forwarded to the N.O.A.A. Personnel Office for review. On June 3, 1975, Mr. Grimm of N.W.S. Headquarters advised Mr. Walper of N.O.A.A. that, in his opinion, the first sentence of the negotiated provision (Section 3(d)(3)) was contrary to N.W.S. scheduling policy contained in a letter issued December 20, 1973. In addition Mr. Husser of N.O.A.A. verbally advised Mr. Walper that the second sentence of the negotiated provision conflicted with Chapter 11-04 of the N.O.A.A. Personnel Handbook.

3/ The agreed upon Section was numbered Article 15, Section 3(d)(3) and the language apparently was: "After posting, the regular agreed upon guidance schedule will not be changed to deny employees premium pay. Supervisors will not work holidays in place of another non-supervisory employee unless they are working a part of a regular shift rotation or unless after reasonable determination by the Officer in Charge there is no one else to fill in for an excused absence."

12. On June 26, 1975, N.O.A.A. Chief of Personnel, Ralph Reeder, with the drafting assistance of Labor Relations Chief Perry Walper, directed a memorandum to the N.W.S. Western Region Chief, Personnel Management Division in which he stated that the "language of Article 15, section 3,d,3 of the Western Region Supplement" was contrary to the Multi-Unit Agreement, the Director's Memorandum, and Chapter 11-04 of the N.O.A.A. Personnel Handbook. Said memorandum was received at Western Region, N.W.S. Headquarters on June 30, 1975, at 4:29 p.m.

13. The next day, Mr. O.R. Warner contracted Mr. John Strauch of the N.A.G.E. Western Region Council by phone and informed him that N.O.A.A. felt that one provision of the agreement, Article 15 Section 3(d)(3), conflicted with Article 15, Section 3 of Multi-Unit Agreement, Chapter 11 of the N.O.A.A. Handbook, and N.W.S. Director Directive of December 20, 1973 and thus would have to be re-negotiated. Mr. Warner subsequently forwarded to both Mr. Strauch and Mr. Jordan a re-draft of the provision in question.

14. On or about July 18, 1975, Mr. Jordan and Mr. Baertsch discussed the matter of signing and distributing the supplemental agreement without the disputed provision, Mr. Jordan indicating that he would not date his signature. Thereafter Mr. Perry Walper of N.O.A.A. advised Mr. Baertsch that Mr. Jordan must sign. On July 19, 1975, Mr. Jordan signed and forwarded the supplemental agreement submitting with it a letter of protest. Said letter stated the Union's position that all parts of the supplemental agreement became effective 45 days after May 15 and that his signature was affixed only as a means of salvaging, as a practical matter, the remainder of the agreement.

15. On July 21, 1975, N.A.G.E. Counsel reiterated the Union's position in a letter to the Director of the N.W.S., Western Region, Jr. Bedke, and further requested that the Agency provide a "specific statement...of the basis of its apparent disapproval." On July 25, 1975, Mr. Walper of N.O.A.A. Labor Relations responded to this request in a three-paragraph letter listing and enclosing the specific documents deemed "preclusive to acceptance of the language of Article 15, section 3,d,3, of the N.W.S./N.A.G.E. Western Region Supplement."

16. On August 8, 1975 the Union demanded more specificity from the N.O.A.A. representative, Mr. Walper, who referred the Union back to the N.W.S. Western Region for further processing of the matter.

17. On September 1, 1975 Mr. Jordan again demanded that the disputed provision be printed, distributed, and implemented. Mr. Bedke responded on September 9, 1975, stating that the provision "as presently written is not negotiable." Informal and formal unfair labor practice procedures were then pursued.

Conclusions of Law

The facts establish that on May 15 the parties 4/ had reached complete agreement on the supplemental agreement and forwarded it to the Director, N.W.S. Western Region, for his signature. In such circumstances the act of executing the contract is merely a ministerial one and the Activity is given a reasonable time to do so. The Director except in some unusual circumstances, was obliged to execute the Agreement. In the instant case the agreement was typed, prepared and forwarded to the Director on or about May 19 for his signature. The Director reviewed the agreement and, without signing it, forwarded it to N.O.A.A. for its review of the Agreement. In such circumstances where the Director acted promptly in forwarding the agreement to headquarters for review, without his signature, the date he forwarded it was the date he was obliged to sign the agreement and therefore must be considered the date he is deemed to have executed the agreement.

Section 15 of the Order provides that an agreement shall be approved by the head of the agency within 45 days from its execution. If it is not timely approved or disapproved, the agreement automatically goes into effect without such approval and shall be binding "subject to

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4/ The parties do not dispute that the negotiating teams had full authority to fully negotiate and reach agreement on behalf of their principals.

provisions of law, the order and regulations of appropriate authorities outside the agency. In light of Section 15 the Director must be deemed to have signed the agreement on May 19, the date he forwarded it for review. To hold otherwise would be to permit the Director to defer the running of the 45 days and to totally frustrate the purposes of Section 15 of the Order, by refraining from doing an act, the signing of the contract, which he was obliged to do; clearly an unacceptable result.

However, on July 1, 1976, by telephone, a representative of the Activity did advise a member of the Union's negotiating team that the specific item of the Agreement had been disapproved because it violated certain specified portions of the N.O.A.A. Handbook and of the Multi-Unit Agreement. He also advised the Union representative that the Activity, was willing to promptly sit down and negotiate a new clause and he offered to send him a proposed clause. It is concluded that the Activity therefore did, within the requirements of Section 15 of the Order, notify the Union, within 45 days and with sufficient specificity, that headquarters had disapproved the supplemental agreement because the provision in question violated the Agency's rules and the Multi-Unit Agreement. Therefore, this is deemed to be in full compliance with Section 15 of the Order. 6/ Section 15 in no way requires that the disapproval be in writing, merely that the Union be advised of it in a timely fashion and presumably with sufficient specificity to render it meaningful notification. In the instant case, however, after the timely telephonic communciation, Mr. Walper on behalf of the Activity, during the latter part of July 1975, and at the Union's request, advised the Union in writing that the clause in question violated the specific N.W.S. Memorandum of December 20, 1973, the Chapter 11 Section 4 of the N.O.A.A. Handbook and particular portions of the Multi-Unit Agreement.

5/ The entire provision was only 2 sentences long.

6/ In this regard it is concluded that the parties did not waive the requirements nor application of Section 15 of the Order by virtue of either the ground rules or the supplemental agreement. Neither document constituted a clear or unequivocal waiver of the requirements of Section 15. It should be noted that the parties were not even aware of the new amendments to the Order in March 1975 when the ground rules were negotiated.

In light of all of the above, it is therefore concluded that the Activity did comply with the requirements of Section 15 of the Order by advising the Union within 45 days that headquarters disapproved the clause in question. It is further concluded that the Activity did so with sufficient specificity to permit the Union to negotiate a new clause or to challenge the disapproval by the procedures provided in Section 11(c) of the Order. 7/

Finally, it is concluded that subsequent to the timely and lawful disapproval of the disputed clause, the Agency did not, in any way fail to bargain in good faith because it made a new counter proposal. In this regard it should be noted that the record does not establish that the Union made a proposal of its own or that the Activity refused to discuss and negotiate concerning any Union proposal.

In view of all of the foregoing, it is concluded that the Activity did violate Sections 19(a)(1) and (6) of the Order.

RECOMMENDATION

Having found that Respondent has not engaged in conduct prohibited by Sections 19(a)(1) and (6) of the Order, I recommend that the complaint herein be dismissed in its entirety.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: October 14, 1976
Washington, D. C.

7/ It is clear that under the scheme of the amendments to the Order, in the type of situation here present, it is not appropriate for an Administrative Law Judge, in an unfair labor practice case to pass upon whether the subject clause of the supplemental agreement did in fact violate the N.O.A.A. Handbook or the Multi-Unit Agreement.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
United States Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Western Region	:	
Respondent	:	Case No. 61-2870(CA)
and	:	
National Association of Government Employees, Council of Western Region Locals	:	
Complainant	:	

ERRATA

The Recommended Decision and Order issued in the subject case by the undersigned on October 14, 1976 is hereby corrected so that the third paragraph on page 9 is corrected so that it reads as follows:

> "In view of all of the foregoing, it is concluded that the Activity did not violate Sections 19(a)(1) and (6) of the Order."

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: November 15, 1976
Washington, D. C.

February 16, 1977

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 DEPENDENTS SCHOOLS,
EUROPEAN AREA (USDESEA)
A/SLMR No. 795

This case involved an unfair labor practice complaint filed by Katherine I. Rector (Complainant) alleging that the Respondent violated Section 19(a)(1) and (4) of the Order when its agent, the Principal of the Sembach Elementary School, conducted an observation of the Complainant's class on May 23, 1975, and made certain statements to the Complainant during the observation and at a post-observation meeting. The Complainant contended that the date, time and manner of the classroom observation was discriminatory and was in retaliation for filing a complaint against the Activity.

Under all the circumstances, the Chief Administrative Law Judge concluded that the Complainant had not met the burden of proving by a preponderance of the evidence that the Principal's conduct violated Section 19(a)(1) or Section 19(a)(4) of the Order and, therefore, he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendations of the Chief Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 795

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPENDENTS SCHOOLS
EUROPEAN AREA (USDESEA)

Respondent

and Case No. 22-6443(CA)

KATHERINE I. RECTOR

Complainant

DECISION AND ORDER

On November 1, 1976, Chief Administrative Law Judge H. Stephan Gordon issued his Recommended Decision and Order 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 with respect to the Chief Administrative Law Judge's Recommended Decision and Order.

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 Recommended Decision and Order, and the entire record in the case, and noting particularly that no exceptions were filed, I hereby adopt the Chief Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6443(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 16, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	:	
UNITED STATES DEPENDENTS SCHOOLS EUROPEAN AREA (USDESEA)	:	
Activity	:	
and	:	Case No. 22-6443(CA)
KATHERINE I. RECTOR	:	
Complainant	:	

Martin L. Frantz
Directorate, USDESEA
APO New York 09164
For the Activity

Peter J. Migliaccio
NSA, P. O. Box 31
FPO New York 09521
For the Complainant

Before: H. STEPHAN GORDON
Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding, heard at Sembach Air Force Base in Sembach, Germany on May 18, 1976, arises under Executive Order 11491, as amended, (hereinafter referred to as the Order) pursuant to a Notice of Hearing issued May 10, 1976 by the Regional Administrator, United States Department of Labor, Philadelphia Region.

The proceeding was initiated by the filing of a complaint by Katherine Rector (hereinafter referred to as the Complainant) against the United States Dependents Schools, European Area (hereinafter referred to as USDESEA or the Activity) on October 10, 1975.

The amended complaint alleged that the Activity violated Sections 19(a)(1) and 19(a)(4) of the Order when its agent, Dr. Timothy Kelley, conducted an observation of the Complainant's class on May 23, 1975 and made certain remarks to the Complainant during the observation and the post-observation conference.

At the hearing both parties were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument.

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

Findings of Fact

Background

Sembach Elementary School, located in USDESEA District III, is one of one-hundred and sixty-seven OEA schools.

The Complainant has been employed by USDESEA for four of her ten years as an educator. From 1972 to June of 1975 she was a teacher at Sembach Elementary School. During the 1974-1975 school year she taught fourth grade.

Mr. Kelley has been a principal for sixteen of his twenty-three years as an educator. At all times relevant to this complaint he was the principal of Sembach Elementary School and, as such, the Activity's agent.

Educator Performance Evaluation Program (EPEP)

In accordance with USDESEA Regulation 690-326, commonly called EPEP, school administrators observe and evaluate teachers' classroom performance. Annually, performance ratings for each teacher are reported on the Standard Federal Civil Service Evaluation Form 1052.

The EPEP provides two methods of observation for use by administrators. One is called the "quick-look observation" which lasts only a minute or two. Its only purpose is to determine what is happening in the classroom. The administrator merely checks off the activity occurring on his AEUE Form 223.

In contrast, the method referred to as the "classroom visitation" lasts as long as thirty minutes and is intended to be evaluative. At least one visit of this type is required each year. Narrative comments are recorded on the reverse side of the AEUE Form 223.

School principals are responsible for explaining the EPEP to educators early in the year, coordinating the application of the EPEP in their schools, promoting post-observation discussions between administrators and teachers, and preparing the official annual performance ratings (DA Form 1052). There is no allegation that Mr. Kelley has not performed these general duties.

Complainant's Merit Promotion

The Complainant filed an application for merit promotion on May 12, 1975 and Mr. Kelley signed an assessment of her potential for merit promotion on May 22, 1975. His final assessment of the Complainant's potential is "average." He marked three of the thirty-seven possible categories "above average" and the remainder "average." No derogatory comments appear on the assessment form.

In April of 1976 the Complainant received a final promotion rating of "Class II Group II." Complainant does not allege that her final rating for promotion is discriminatory.

Complainant's Union Activity

During the 1974-1975 school year the Complainant was faculty union representative. The record establishes that Mr. Kelley was fully aware of the Complainant's active role in the union.

At the time of the alleged discriminatory conduct on May 23, 1975, a prior unfair labor practice charge and a grievance were pending against the Activity.

The unfair labor practice charge had been filed by the Complainant against Mr. Kelley for mentioning her union activities on an official USDESEA transfer form. A settlement was subsequently reached, under the terms of which Mr. Kelley was forbidden to mention any of the employees' union activities on official forms.

The grievance, filed by the Complainant, alleged that the administration was interfering in internal union affairs.

On May 22, 1975, the Complainant received a note from Mr. Kelley dated May 21, 1975. It indicated that Mr. Bean, the Activity's Labor Management Specialist, had called to suggest a time of 10:30 on May 23, 1975 to discuss her unfair labor practice charge. This note also included Mr. Kelly's suggestion of a meeting time on May 27, 1975 to discuss her grievance.

Classroom Observation of May 23, 1975

The following facts are not in dispute. May 23, 1975 was the day before the Memorial Day holiday. Sometime that afternoon, Mr. Kelley, without notice, visited the Complainant's classroom and watched her teach her fourth grade class. They exchanged a few remarks before the class began. Mr. Kelley remained seated in the rear of the room throughout his visit and did not ask to see the Complainant's lesson plan. As he left the classroom he did not speak to the Complainant to arrange a post-observation conference. While such conferences soon after visitations are encouraged, there is no requirement that they be arranged immediately following a visitation.

There is conflicting testimony regarding other aspects of Mr. Kelley's visit. Upon consideration of the testimony relating to the facts and circumstances and my observation of the parties and their demeanor, I find the Complainant's version the more credible recollection of that visit. 1/

Accordingly, I find that Mr. Kelley, upon entering the Complainant's classroom at 2:00 pm, found her alone. As he approached her desk he told her that he was there in order to evaluate her for the merit promotion for which she had applied. The Complainant responded by suggesting that Mr. Kelley refer to previous observations of her performance conducted by Mr. Orlando, the Vice Principal, during the year, the latter being responsible for observing the Complainant, as well as other fourth grade teachers, during the 1974-1975 school year. Mr. Kelley then replied, "Well, I may not make statements regarding your union activities on any form of USDESEA so I must observe you." It is this visit, as well as the quoted statement by Mr. Kelley, which are the gravamina of Complainant's unfair labor practice charge against the Activity. When the bell rang at 2:30 pm signifying the end of the school day, Mr. Kelley left the classroom.

The record indicates that Mr. Kelley and other administrators observed teachers at Sembach Elementary School the entire week of May 19 through May 23 in order to complete the required number of observations before the filing deadline for

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1/ Mr. Kelley's testimony regarding the observation of May 23, 1975 was somewhat hesitant and at times inconsistent, reflecting the fact that his recollection may have been affected by the fact that this was one of a number of observations he conducted during that particular time frame. In contrast, Complainant's recollection is based on this single and, to her, obviously important incident.

the Federal Evaluation Form 1052. Other teachers were also observed on May 23, 1975 by Mr. Kelley and others. At least one other teacher was observed as late as 1:40 pm that day. While these observations were also spontaneous, they lasted no longer than a minute or two.

The Complainant acknowledges that a principal has the right to observe any of his teachers. However, she stresses that Mr. Kelley had assigned his vice-principal, Mr. Orlando, grades four through six to observe during the 1974-1975 school year and that Mr. Orlando had observed the Complainant on numerous occasions. Mr. Kelley had assigned himself grades one through three to observe that year. This was the only time that Mr. Kelley observed the Complainant's fourth grade class during the 1974-1975 school year.

Mr. Kelley offered various reasons for his last minute need to observe the Complainant. For example, he testified that it was his policy to observe all of his teachers at least once a year. He also testified that he wanted to be able to answer questions regarding job references truthfully. On the basis of the entire record, I am persuaded that this last minute observation was an attempt to comply fully and strictly with all possible regulations and avoid any future criticism. Thus, it is noteworthy that just before the observation he had signed an assessment of potential for merit promotion for the Complainant. Aware that he had not personally observed her teach that year and possibly in an attempt to avoid that criticism of his evaluation, he performed one last observation on May 23, 1975, just before the school year ended. On cross-examination Mr. Kelley was asked if he had observed Complainant, as he had other teachers, in order to meet the number of observations required by the Federal Evaluation Form 1052. He credibly testified, "No...I felt ill at ease that I hadn't observed her prior to that date so it was my last chance that year so I thought I would avail myself of it." The fact that an unfair labor practice charge was then pending against him may reasonably have increased his anxieties about any potential criticism of his evaluation of the Complainant and may well have encouraged him to observe all possible procedural formalities.

Post-Observation Meeting of May 23, 1975

I find that the meeting during the afternoon of May 23, 1975, was not a formal post-observation conference, but an informal meeting initiated by the Complainant without an appointment.

Both parties testified that the Complainant was visibly upset.

On the basis of the entire record, I find that in the course of this meeting Complainant requested to see Mr. Kelley's written evaluation of his observation; that Mr. Kelley had not made such a written evaluation since he determined that it was not necessary for Form 1052 purposes; that he therefore denied Complainant's request; that Mr. Kelley asked the Complainant if she had received the previously mentioned written message from him regarding Mr. Bean's (the Activity's Labor Management Specialist) phone call, and what the result of the call was; that the Complainant did not consider the question germane to the meeting and so informed Mr. Kelley; that Mr. Kelley asked Complainant whether the suggested date and time for a meeting on her grievance were acceptable; and that Complainant informed Mr. Kelley that she had already discussed this matter with the Superintendent.

Position of the Parties

The Complainant contends that the observation of her class on May 23, 1975 was in retaliation for filing a Complaint against the Activity and, thus, constituted interference with the exercise of her rights in violation of Section 19(a)(1) of the Order and constituted discrimination in violation of Section 19(a)(4) of the Order.

Complainant further contends that Mr. Kelley's remarks during the observation and post-observation meeting constituted implied threats which foreseeably tended to interfere with the exercise of her rights under the Order in violation of Section 19(a)(1) of the Order and constituted reprisal for filing a complaint against the Activity, and, as such, violated Section 19(a)(4) of the Order.

The Respondent denies that Mr. Kelley violated either Section of the Order and maintains that the observation was but one of many observations conducted on May 23, 1975 and that the Complainant was not singled out for disparate treatment.

The Respondent further maintains that Mr. Kelley's remarks were merely explanatory statements of fact and not implied threats which foreseeably tended to interfere with the Complainant's exercise of her rights under the Order.

Conclusions of Law

Classroom Observation of May 23, 1975

On the basis of the above findings of fact, I conclude that Mr. Kelley's observation of Complainant's classroom activities neither foreseeably interfered with the

Complainant's exercise of any rights under the Order nor discriminated against her in violation of the Order.

The Complainant concedes that Mr. Kelley, as principal, has the right to observe her class but objects to the date, time, manner, type and length of the May 23, 1975 observation as discriminatory.

The record is replete with evidence that the Complainant was not subject to disparate treatment. Thus, while it arguably may not be the best procedure for an administrator to observe a teacher the last half-hour of the school day preceding a holiday, it is not the function of this tribunal to substitute its judgment in such a matter, especially where, as here, there is substantial evidence that other teachers at the school were observed on the same day; that at least one of these teachers was observed as late as 1:40 pm; and the observations on May 23, 1975 concluded a week long effort by Mr. Kelley and his staff to meet the deadline for filing the Federal Civil Service Evaluation Form 1052.

Under these circumstances, I am constrained to find that the classroom observation on May 23 constituted neither disparate treatment nor discrimination against the Complainant.

The Complainant further alleges that Mr. Kelley's manner of conducting the observation was improper and unprofessional. She objects to the fact that he remained seated in the rear of her classroom throughout his observation and that he did not ask to see her lesson plan. I feel constrained to reiterate that it would be an abuse of my function, were I to substitute my judgment in this matter over that of the duly constituted school authority or to rule on the propriety or professionalism of Mr. Kelley's performance of his duties. Absent a showing that the EPEP clearly proscribes such conduct or that this was not Mr. Kelley's usual method of observing teachers, I cannot find that the manner in which Mr. Kelley observed the Complainant's class was discriminatory within the meaning of the Order.

Furthermore, I find that the spontaneous nature of Mr. Kelley's visit was not discriminatory or otherwise objectionable where, as here, other teachers were observed without notice on the same day and the EPEP specifically sanctions this type of observation.

The Complainant objects to the thirty-minute length of her observation when others lasted only a few minutes. I find that this difference is reasonably explained by the fact that this was Mr. Kelley's last and sole opportunity

to observe the Complainant before the 1974-1975 school year ended, and that, as discussed hereinabove, a purpose of Mr. Kelley's last-minute visit may have been the avoidance of any criticism that he had evaluated the Complainant for promotion without having personally observed her classroom performance during the school year.

Under these circumstances, and relying particularly on the fact that Complainant was treated essentially in the same manner as other teachers were treated on May 23, 1975, I must conclude that Mr. Kelley's observation of Complainant's class did not foreseeably tend to restrain, coerce or interfere with the exercise of Complainant's rights in violation of Section 19(a)(1) of the Order, nor did it constitute discrimination against her under Section 19(a)(4) of the Order. 2/

Mr. Kelley's Remarks

While the observation of Complainant's classroom performance did not violate the Order, there remains the issue of whether Mr. Kelley's remarks during the observation and the post-observation meeting on May 23, 1975 violated either Sections 19(a)(1) or 19(a)(4) of the Order.

The Complainant contends that Mr. Kelley's remarks were implied threats directed at her which foreseeably tended to interfere with the exercise of her rights under the Order in violation of Section 19(a)(1) of the Order. She further contends that the remarks constituted discipline and were made to punish her for filing a complaint in violation of Section 19(a)(4) of the Order.

2/ The record contains evidence that Mr. Kelley destroyed not only a Declaration of Intent form, which he was ordered to destroy as part of the settlement of the prior unfair labor practice charge, but also the Complainant's class observation records (AEVE Form 223) and her conference result records (AEVE Form 227). USDESEA regulations require that the AEVE Form 227 be kept in the school's files for three years and transferred with the teacher. The destroyed records also included performance ratings from administrators at Sembach and Mr. Kelley's own ratings of the Complainant for the preceding two years.

In view of the fact that Complainant's rating for promotion is not an issue in this case since she specifically declined to contest the fairness of her final rating for promotion, I find this evidence not material and find it unnecessary to make any findings of fact or conclusions of law based thereon.

I find that Mr. Kelley's remarks during the observation were no more than explanatory statements of fact made to justify his unexpected visit to the Complainant's classroon. The Complainant credibly testified to the following remarks made at the beginning of the observation. Mr. Kelley told her that he had come to observe her for the merit promotion program for which she had applied. After some discussion, not relevant here, he explained, "I may not make statements regarding your union activities on any form of USDESEA so I must observe you." This was Mr. Kelley's single reference during the observation to the subject matter of the unfair labor practice charge then pending against him. While shrouded in some ambiguity and perhaps lacking in diplomacy or social grace, I find that this isolated remark was no more than an ill chosen conversational ploy employed in a situation and setting which, under the circumstances, may well have been somewhat awkward for both parties. I further find that in the total context in which this isolated remark was uttered and in the absence of any evidence to the contrary, Mr. Kelley's remark during the observation did not constitute an implied threat under Section 19(a)(1) of the Order nor did it constitute discipline under Section 19(a)(4) of the Order.

With respect to the post-observation meeting on the afternoon of May 23, 1975, in the course of which Mr. Kelley asked the Complainant if she had received his note regarding a phone call from Mr. Bean, the Activity's Labor Management Specialist, and whether the proposed date and time for a meeting on her grievance were acceptable, I found, hereinabove, that this meeting was not a conference as contemplated by the EPEP. Rather, it was an informal meeting initiated by the Complainant without a prior appointment. Moreover, Mr. Kelley's inquiry in reference to the pending charge and grievance not only involved purely procedural rather than substantive matters, but was, under the circumstances, reasonable, understandable, and wholly innocuous. Accordingly, I find that Mr. Kelley's inquiry during the post-observation meeting on May 23, 1975, did not constitute an implied threat under Section 19(a)(1) of the Order or discipline under Section 19(a)(4) of the Order.

Conclusion and Recommendation

In conclusion, I find that the Complainant has not sustained her burden of proving by a preponderance of the evidence that the Activity violated either Section 19(a)(1) or Section 19(a)(4) of the Order by Mr. Kelley's observation of the Complainant's class on May 23, 1975 or by his remark to and inquiry of her during the observation and the post-observation meeting on the same date.

Recommendation

In view of the foregoing findings and conclusions, I recommend that the complaint herein be dismissed in its entirety.

H. STEPHAN GORDON
Chief Judge

Dated: November 1, 1976
Washington, D. C.

February 17, 1977

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 CONTROL TOWER,
LAS VEGAS, NEVADA
A/SLMR No. 796

This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, (PATCO) alleging that the Respondent violated Section 19(a)(1) of the Order by reprimanding a union representative who, acting with union authority, quoted portions of a facility "briefing sheet" in a letter to a supervisor, copies of which were sent by the PATCO representative to members of the general public. The Respondent contended that the PATCO representative had violated Department of Transportation and Federal Aviation Administration regulations by sending copies of the aforementioned letter to an individual pilot and the Aircraft Owners and Pilots Association (AOPA).

The Administrative Law Judge found that the quoted "briefing sheet" was an internal agency communication not available for dissemination to the general public and that the AOPA and an individual pilot were not appropriate authority to whom public appeals could be made within the meaning of Section 1(a) of the Order. He, therefore, concluded, and the Assistant Secretary concurred, that the protection of Section 1(a) of the Order did not extend to the dissemination of such internal agency communications to the general public. Based on these findings, the Administrative Law Judge recommended that the complaint be dismissed.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation and ordered that the complaint be dismissed.

A/SLMR No. 796

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
LAS VEGAS CONTROL TOWER,
LAS VEGAS, NEVADA

Respondent

and Case No. 72-5388(CA)

PROFESSIONAL AIR TRAFFIC
CONTROLLERS ORGANIZATION,
MEBA, AFL-CIO

Complainant

DECISION AND ORDER

On November 11, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order, and the entire record in the case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

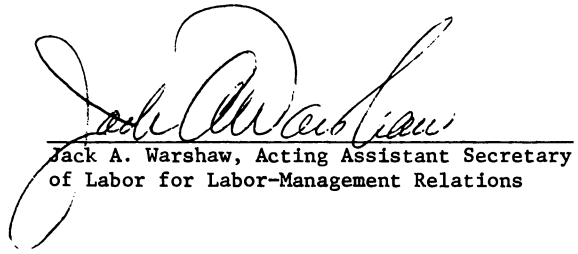
Under the particular circumstances herein, I agree with the Administrative Law Judge that the Respondent did not violate Section 19(a)(1) of the Order by issuing an official reprimand to the President of Local 525 of the Complainant. Thus, the evidence established that the "briefing sheet" quoted from by the PATCO Chapter President in the copies of the letter sent to Mr. Robb and the Aircraft Owners and Pilots Association was part of an internal agency communication. In my view, the protection

of Section 1(a) of the Order does not extend to the dissemination of such non-public information to the general public. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-5388(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 17, 1977



Jack A. Warshaw, Acting Assistant Secretary
of Labor for Labor-Management Relations

1/ This is not to say, as implied by the Administrative Law Judge on pages 13 and 14 of his Recommended Decision and Order, that all appeals to the public are not protected under Section 1(a) of the Order. Cf., in this regard, National Treasury Employees Union v. Paul J. Fasser, Jr., et al., Civil Action No. 76-408 (D.D.C. 1976), Statement On Major Policy Issue, FLRC No. 76P-4, and Internal Revenue Service, A/SLMR No. 783.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

DEPARTMENT OF TRANSPORTATION, :
FEDERAL AVIATION ADMINISTRATION
LAS VEGAS CONTROL TOWER :
LAS VEGAS, NEVADA
Respondent :

and :

PROFESSIONAL AIR TRAFFIC CONTROLLERS :
ORGANIZATION, MEBA, AFL-CIO
Complainant :

Case No. 72-5388(CA)

William B. Peer, Esquire
General Counsel
Professional Air Traffic Controllers
Organization
Barr & Peer
1101 17th Street, N.W., Suite 1002
Washington, D.C. 20036
For the Complainant

Francis L. Baker, Esquire
Labor Relations Specialist
Federal Aviation Administration
Manpower Division
1500 Aviation Boulevard
Hawthorne, California 90261

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as "Order"). It was initiated by a written charge filed on March 20, 1975, and complaint filed on June 20, 1975 (Ass't. Sec. Exh. 1). The complaint

alleged violations of Sections 19(a)(1) and (5) of the Order as the result of an official reprimand of Mr. Lane Benton Brubaker, Jr., President of Professional Air Traffic Controllers Organization (PATCO) Local 525 and PATCO Facility Representative, Las Vegas Tower. By letter dated December 23, 1975, the Regional Administrator dismissed the complaint (Res. Exh. 3); PATCO filed a request for review with the Assistant Secretary; and the Assistant Secretary, by letter dated May 20, 1976 (Ass't. Sec. Exh. 2) granted, in part, the request for review and remanded to the Regional Administrator with directions to reinstate that portion of the complaint alleging a violation of 19(a)(1) and, absent settlement, to issue a notice of hearing on such allegation. The Assistant Secretary stated,

> "In agreement with the Regional Administrator, I find that there is insufficient evidence to establish a reasonable basis for the Section 19(a)(5) allegation contained in the complaint and, consequently, further proceedings on such allegation are unwarranted. However, with respect to the Section 19(a)(1) allegation, I find that a reasonable basis for that portion of the complaint exists inasmuch as, in my view, substantial questions of fact have been raised with regard to, among other things, the general public's accessibility to the information contained in the facility's reading file binder retained in the Control Tower."

A Notice of Hearing on the alleged 19(a)(1) violation issued July 2, 1976, for a hearing on July 27, 1976, in Las Vegas, Nevada (Ass't. Sec. Exh. 4); on July 26, 1976, at the request of counsel for Complainant and for good cause shown, the hearing was rescheduled from July 27, 1976, to September 14, 1976, and an Order Rescheduling Hearing issued August 4, 1976 (Ass't. Sec. Exh. 5) pursuant to which a hearing was duly held before the undersigned on September 14, 1976, in Las Vegas, Nevada.

All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and briefs were timely filed by the parties which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their

demeanor, I make the following findings of fact, conclusions and recommendation:

Findings of Fact

1. On, or about, November 11, 1974, certain new air traffic control procedures were placed into effect at the Las Vegas Tower, known as Terminal Control Area procedures or, as abbreviated, TCA. The Agency, Federal Aviation Administration (FAA), was mandated by Congress to take action to reduce mid-air collision potential and after intensive study the TCA concept was evolved and FAA directed the establishment of terminal control areas at the major terminals throughout the United States whereby all aircraft operating within a TCA are controlled and positive separation between all aircraft in the controlled area is provided. TCA puts restrictions on aircraft because, when flying within a TCA, they have to be under air traffic control; have to follow instructions; and the aircraft are required to have certain equipment that many did not have prior to institution of TCA. Las Vegas was designated as one of the facilities to have a TCA and public hearings for establishment of the TCA at Las Vegas began in 1972, or earlier. Beginning at the same,time procedures for handling the traffic at Las Vegas were developed through a work group made up of controllers and supervisors with guidance from Regional and National FAA headquarters, together with the Facility Air Traffic Technical Advisory Committee (FATTAC).

2. By letter dated December 10, 1974, addressed to Mr. Lynn L. Hink, Chief, Air Traffic Division, Los Angeles, California (Comp. Exh. 1), Mr. Charles S. Robb, a private general aviation pilot, complained about an incident that occurred at the Las Vegas Airport on December 1, 1974, and in general about TCA. His letter stated, in part, as follows:

> "On Sunday, December 1, 1974, at approximately 1330 hours, I departed the Las Vegas airport and TCA on a VFR clearance. Had I complied with the clearance, (especially if it had been at night) I would have struck rising terrain west of the airport. This clearance endangered the lives of six people and placed the aircraft in a hazardous situation.
>
> "My original clearance was 'right turn off runway 19 to a heading of 290°, climb and maintain 4000' and contact departure control'. I was assigned a

departure frequency and transponder code and complied with these instructions. After becoming airborne on a heading of 290° and level at 4000', I requested a left turn to 240° and was assigned 260°. I complied with this new heading and requested a higher altitude because of rapidly rising terrain. Although this request was acknowledged, no new clearance was issued. Because of the danger of the situation, I informed Departure Control that we were leaving 4000' and climbing, and, if necessary, declaring an emergency in order to avoid terrain. The Approach Controller's answer was a classic ATC 'pass the buck'. He completely and obviously, ignored my transmission and came back with a 'contact Departure Control on frequence ----.' At this point we were climbing at 'best rate of climb' speed to avoid a mountain ridge directly in front of us and I switched frequency to the new controller. I informed him that 'we had vacated 4000' and were climbing to avoid terrain and would declare an emergency if necessary.' The new controller immediately cleared us to 'climb through the TCA.' I informed him that our aircraft had, in complying with a VFR, ATC clearance, been placed in a very dangerous situation, and he suggested that I call the next time I was in Las Vegas so that they could pass the information to the people who set up the TCA.

"Everyone in aviation knows that all comments against TCA's are completely ignored by the FAA. ... On this particular day, I sat on the ramp for 5 minutes waiting for clearance, then waited for some time at the runway for takeoff, which has never happened before in Las Vegas. At this time when fuel is supposed to be in short supply, I wonder how many gallons are wasted in TCA's? With the confusion to pilots and increased workload on controllers, how can this procedure be safer?

"Going back to earlier in the day ... when I arrived in Las Vegas, I was kept up at 4000' until I was within a mile of the runway threshhold. This made it necessary to descent 1500' at a rate which is extremely uncomfortable to passengers in an unpressurized aircraft, and also against recommendations for handling of two engines worth approximately $16,000.

"In fairness to Las Vegas, how have I found other TCA's? At San Francisco on clear and unrestricted days and evenings, it has taken up to 30 minutes from my initial call before I can get off the ground because of clearance delays. ... At Los Angeles, I have flown through the VFR corridor over the airport twice because of the large volume of traffic which is compressed into such a small lane, the experience was terrifying. I now insist on radar vectors through the TCA rather than risk the possibility of a mid-air collision in what can best be described as "Slaughter Alley."

"... Controllers and pilots should not have to be subjected to such basically idiotic regulations. How much more precious fuel should we waste for what the FAA calls safety but can, in fact, be just the opposite?" (Comp. Exh. 1).

3. The Regional FAA office contacted Mr. Stuart A. Hayter, Chief of the Airport Traffic Control Tower at Las Vegas, about the Robb letter; requested that he investigate the matter; advised him that the letter was being forwarded; and requested that Mr. Hayter prepare a response for Mr. Hink's signature. Mr. Hayter investigated the incident and prepared three documents: First, a response to Mr. Robb for the signature of Mr. Hink (Comp. Exh. 4). Second, a document entitled "AWE - 500 - Briefing Sheet" (Comp. Exh. 3). Third, a memorandum dated January 15, 1975, to "All Personnel".

The Briefing Sheet was a report from Mr. Hayter to his boss, Mr. Hink, explaining to Mr. Hink the facility's rationale in answering the letter and giving him some background on the complaint of Mr. Robb.

Mr. Hayter put a copy of the Robb letter, his "All Personnel" memorandum, the Briefing Sheet and his draft reply to Mr. Robb (for Mr. Hink's signature) into the general information binder in the ready room on the second floor of the tower building on January 15, 1975, and on, or about the same date transmitted the draft reply to Mr. Robb and the Briefing Sheet to the Regional Office.

4. The "All Personnel" Memorandum stated, in part, as follows:

> "The attached letters are provided for your info; so you can see what we are saying to others about US. Obviously, we can't tell Mr. Robb all we'd like to, tact and diplomacy, but I think he'll get the message.
>
> . . .
>
> "Keep in mind that Mr. Hink may change any part, or all of it. I hope you can detect the confidence we have in YOU. I know it isn't the easiest job."
>
> "Keep pitchin'! We'll improve." (Comp. Exh. 2)

The paragraph of the "Briefing Sheet" from which Mr. Brubaker quoted reads as follows:

> "...
>
> "We are still improving on our system and will continue until we have the best. We have, however, discovered the two major problems causing lack of complete success with our TCA are: (1) Lack of controller proficiency at working the volume of traffic now required by them. Our operation went from Level III volume to Level IV volume over night (almost double). Our controllers are good but just like any controller who goes to a higher level facility, it takes time to peak up his performance to handle the volume of traffic. We're getting there; and (2) our airport is at the botton of a bowl; we're surrounded by high terrain. ...
>
> ..." 1/

6. Mr. Brubaker read the material referred to hereinabove (Paragraphs 3, 4 and 5) in the "Read and Initial" binder on January 15, 1975, as did other controllers, and attempted to see Mr. Hayter without success. By letter dated January 27, 1975, addressed to Mr. Hayter (Comp. Exh. 5), Mr. Brubaker, as President of Las Vegas Chapter of PATCO, responded "to your letters in the Facility Read File, pertaining to Mr. Charles S. Robb's flight within the Las Vegas TCA on 1 December 1974." The record shows that the letter was the joint product of several members of Local 525's Executive Board and that Mr. Brubaker was acting in his official capacity as President in signing and transmitting the letter. Nevertheless, as President, Mr. Brubaker signed the letter and a copy was sent, inter alia, to Mr. Charles S. Robb and to the Aircraft Owners and Pilots Association (AOPA). 2/ Mr. Brubaker stated in his letter, in part, as follows:

> "In your AWE-500 Briefing Sheet you state: 'We have, however, discovered the two major problems causing lack of

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1/ This was not a public document and it seems inappropriate to set forth any portion other than the single paragraph from which Mr. Brubaker's excerpt was taken.

2/ Mr. Robb had shown copies of his letter of December 10, 1974, to:

> "John Krebbs, 1383 W. Sample Ave., Fresno
> Fresno Gado, J. Patrick, 2401 No. Ashley,
> Fresno AOPA, 7315 Wisconsin Ave;, Bethesda,
> Maryland" (Comp. Exh. 1).

Mr. Brubaker sent copies of his letter to:

> "AWE-500 [FAA Regional Office]
> Mr. Darrell Reazin [PATCO Western Regional Vice President]
> Mr. Charles S. Robb
> Senator Howard W. Cannon
> AOPA" (Comp. Exh. 5).

> complete success with our TCA are: (1) Lack of controller proficiency at working the volume of traffic now required of them. (2) Our airport is at the bottom of a bowl; we're surrounded by high terrain'. I deplore your statement that there is a lack of controller proficiency. Your statement is made without justification or backing." (Comp. Exh. 5).

7. The actual FAA response to Mr. Robb was dated January 30, 1975, and was signed by F. Parry Schriver, Acting Chief, Air Traffic Division (Comp. Exh 6).

8. The Las Vegas Tower is locked and entry requires clearance through someone inside the building. Visitors are required to be escorted while in the facility. The controller's ready room is located on the second floor of the tower building and there is a book rack on one end of the room that has slots in which the operational reading binder and the general reading binders are kept. The operational binder has information that pertains to the day-to-day operation of the facility and controllers are required to review it before going on duty. The general reading binder contains general information, not necessarily timely, and controllers read it at their leisure; however, controllers are required to read and initial both binders.

The ready room is also the "break room" where controllers eat, lounge, and watch television. The access door to the facility is controlled by an electronic combination lock and the combination is changed regularly and a day or two before the combination is changed the new combination is put in the general reading binder.

Mr. Hayter testified that in his 20 years with FAA (Facility Chief at Las Vegas since 1972) he had never seen any non-FAA employee reading the general reading binder at Las Vegas or at any other facility; that if he had seen it he would have taken the binder. Mr. James T. Turner, Deputy Chief Controller, assigned to the Las Vegas facility since 1974, testified that he had never observed any non-FAA person reading the general reading binder and is in the ready room about once an hour while on duty. Mr. Douglas B. Cooper, a Team Supervisor at the Las Vegas Tower also testified that he had never observed any non-FAA employee reading the reading binder and that he is in and out of the ready room about every 15 to 20 minutes when

assigned to the radar room, although only to eat when assigned to the tower cab. Mr. Cooper also has responsibility for security when on duty and this responsibility includes making certain that only authorized persons are allowed in the building; that he provides a key to persons performing janitorial services; that tours are conducted; and that he never showed persons on tours he conducted the reading binders.

Mr. Jerry G. Parrish, a controller and Vice President of Local 525, testified that he had seen uniformed military personnel and radar technicians looking at the reading binder; Mr. Edward E. Howell, a controller, testified that on one occasion he saw two plumbers, who had been working on the sink, sitting in the ready room on their coffee break and one of them was flipping through the reading binder. Mr. Jack F. Lindley, Jr., a controller, testified that he had seen technicians and Air Force personnel reading material in the reading binder. Mr. Brubaker testified that in June or July, 1976, there was a note in the reading binder that the combination to the outside door was to be changed and a couple of days later there was another note stating "that the combination had been given to the girls that clean up or to the janitors in the facility and for that reason it was necessary to change it again."

9. Mr. Brubaker received an "Official Reprimand" dated March 3, 1975 (Comp. Exh. 7). In the Official Reprimand, Mr. Hayter stated, in part, as follows:

> "This is notice that you are officially reprimanded. You, as a government employee, took the liberty to distribute information contained in internal agency memoranda, specifically my briefing sheet addressed to the Air Traffic Division Chief, AWE-500, to parties outside the Agency without proper authorization from me. This unauthorized communication was your letter dated January 27, 1975, addressed to myself, with copies to Mr. Charles Robb, PATCO and AOPA. ..." (Comp. Exh. 7).

10. Mr. Hayter testified that the unauthorized distribution was limited to Mr. Robb and AOPA (Aircraft Owners and Pilots Association); that there was no objection as to Senator Cannon or Mr. Reazin, Regional Vice President of PATCO.

CONCLUSIONS

Although the letter of reprimand contained elements of "an unprotected act by publicly bringing into disrepute the functions of his employer", as noted by the Regional Administrator in his original dismissal of the complaint (Res. Exh. 3), the issue presented by the parties in this proceeding has been limited to the ground stated in the first paragraph of the Official Reprimand, namely, distribution of "information contained in internal agency memorandum; specifically my briefing sheet addressed to the Air Traffic Division Chief, AWE - 500, to parties outside the Agency without proper authorization from me." 3/

The Briefing Sheet was an inter-management communication; was not to be released to the public; and has not been made available to the general public. The Tower itself is not open to the general public. The building is locked and visitors are escorted while in the facility. The reading binder, in which the briefing sheet was placed, is located on the second floor of the Tower in the controller's ready room and the binder's normal place of repose is a slot in the book rack next to the operational binder. The reading binder,as is the operational binder,is for the use of authorized personnel only and the general public is neither authorized nor permitted access to it. I fully credit the testimony of Mr. Hayter that non-FAA personnel are not authorized to read the reading binder; that he had never seen any non-FAA employee reading the general reading binder and that if he saw it he would take the binder from them. I further fully credit the testimony of Messrs. Cooper and Turner, each of whom is frequently in the ready room,

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3/ It is fully recognized that on January 27, 1975, Respondent had not responded to Mr. Robb. Mr. Hayter had prepared a draft response for Mr. Hink's signature, but, as Mr. Hayter stated in his "All Personnel" memorandum, "Keep in mind that Mr. Hink may change any part, or all of it." (Comp. exh. 2). Respondent's actual reply to Mr. Robb was dated January 30, 1975; was signed by F. Parry Schriver, Acting Chief, Air Traffic Division; and differed substantially from Mr. Hayter's draft.

Obviously, therefore, Mr. Brubaker, in sending a copy of his letter of January 27, 1975, to Mr. Robb and to AOPA (Aircraft Owners and Pilots Association), was not responding to anything that had been communicated to Mr. Robb or to AOPA.

that they have never observed any non-FAA employee reading the reading binder. Even if the testimony of Messrs. Parrish and Lindley were accepted, that they had seen military personnel and electronic technicians reading the binders, or even if the testimony of Mr. Howell were accepted, that a plumber, present to work on a sink had flipped through the binder; nevertheless, the general public has no access to the material. Not only is access of the general public to the facility limited but when present visitors are escorted and the times when a visitor might be present in the ready room without an escort is extremely limited and even if a visitor on such occasion looked at the binder it certainly cannot be said that such binder, or the information contained therein, was accessible to the general public. To the contrary, such access was not authorized. Mr. Brubaker's testimony "that the combination had been given to the girls that clean up" refutes the inference desired, namely, that janitorial personnel discovered the combination by reading material in the binder; but even if a person authorized to be present for the purpose of cleaning, or for some other authorized activity, and such person has looked at the binder, this does not mean that such information was available to, or accessible to, the general public. Accordingly, I conclude that the general public had no access to material in the general reading binder.

As an employee of Respondent, Mr. Brubaker was subject to the FAA Handbook 3750.4, "Conduct and Discipline" (Res. Exh. 1); to DOT Regulations on Employee Responsibilities and Conduct, 3750.3A (Res. Exh. 2) and 49 C.F.R. Part 99. For example, the Regulations provide,

> "Except as provided in §99.735-11(c) no employee may, for the purpose of furthering a private interest, directly or indirectly, use or allow the use of official information obtained through or in connection with his Government employment, if that information has not been made available to the general public." (49 C.F.R. §99.735-19).
>
> "... However, an employee shall not ... engage in teaching, lecturing, or writing ... that depends on information obtained as a result of his Government employment, except when that information has been made available to the general public or will be made available on request, or when an appropriately designated

> official gives written authorization for use of nonpublic information on the basis that the use is in the public interest. ..." (49 C.F.R. §99.735-11(c)).

Mr. Brubaker obtained the Briefing Sheet through, and in connection with, his Government employment; the information therein reflected the results of Mr. Hayter's investigation of the Robb incident; the Briefing Sheet was a report from Mr. Hayter to his superior; the information contained therein had not been made available to the general public and was not available to the general public on request; and Mr. Brubaker neither requested nor received written authorization to use this nonpublic information. Indeed, Complainant does not deny that Mr. Brubaker's release of nonpublic information was contrary to Respondent's Handbook and Agency Regulations. Rather, Complainant asserts that: a) Section 1(a) of the Executive Order creates a protected right to use such information in appeals to the public; and/or b) Mr. Brubaker's action as a union official immunizes the use of such information. For the reasons set forth hereinafter, Complainant's positions are rejected.

Section 1(a) of the Order, as material, is unchanged from the language of Section 1(a) of Executive Order 10988. In Meehan v. Macy, 392 F.2d 822 (D.C. Cir. 1968), the Court of Appeals had before it the same contention as now raised by Complainant with respect to Section 1(a) and the Court rejected a wholly like contention stating:

> "It suffices in the present case to point out that Executive Order 10988, by its clear language, has no application to appellant's activities. 4/ The pertinent provision, entitled 'Employee-Management Cooperation in the Federal Service' reads as follows:
>
> > Section 1(a) Employees of the Federal Government shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal *** to

4/ Appellant Meehan had been, when the matter arose, President of the Canal Zone Police Lodge 1798, American Federation of Government Employees.

> participat[e] 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. (Emphasis supplied.)
>
> The regulation by its terms provides for presentations within official channels, and establishes no special warrant for appeals to the public." (392 F.2d at 829) (Emphasis by the Court.)

Complainant's contention that Mr. Robb and AOPA were "other appropriate authority" is utterly without basis. As the Court stated in Meehan, supra, the pertinent language of Section 1(a) of the Order provides for presentations within official channels and establishes no special warrant for appeal to the public. Moreover, even if it were assumed that circumstances could arise when an appeal to such members of the public as Mr. Robb and/or AOPA might fall within the warrant of Section 1(a), clearly in the circumstances of this case, when Mr. Brubaker released nonpublic information to Mr. Robb and to AOPA on January 27, 1975, there was no warrant for release of such information as Respondent had made no response whatever to Mr. Robb or to the AOPA. Mr. Brubaker was free to present his views, or those of PATCO, within official channels with regard to the Briefing Sheet 5/ and had he done so, his activity would have been protected by Section 1(a) of the Executive Order.

5/ The merits of Complainant's professed concern are not before me. It is obvious that Mr. Brubaker took out of context the "Lack of controller proficiency ..." statement and, indeed, by his purported quotation, without indication of an ommission, grossly misrepresented what Mr. Hayter had, in fact, stated, including, for example, his express statement that "Our controllers are good but just like any controller who goes to a higher level facility, it takes time to peak up his performance to handle the volume of traffic. We're getting there ..." (Comp. Exh. 3).

Complainant's broader contention that, because Mr. Brubaker acted in his capacity as President of the Local Union, his release of nonpublic information is protected concerted activity must be rejected. Kaiser Engineering v. NLRB, ____F.2d____, 92 LRRM 3153 (9th Cir., 1976) and Roanoke Hospital v. NLRB, ____F.2d____, 92 LRRM 3158 (4th Cir., 1976) cited and relied upon by Complainant are not controlling as those decisions involved rights under the National Labor Relations Act, specifically under Section 7 of the NLRA and the rights created by Section 1(a) of the Order, in particular the portion reading, "including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority," has no counterpart in Section 7 of the NLRA. Consequently, the Courts in Kaiser Engineering, supra, and Roanoke Hospital, supra, did not have before them a limitation comparable to that contained in Section 1(a) of the Order and their decisions, construing a very different provision in the NLRA are not in point. On the other hand, as noted above, the Court in Meehan v. Macy, supra, has directly held that the language of Section 1(a) of the Order provides for presentations within official channels and establishes no special warrant for appeals to the public. Mr. Brubaker's rights and obligations under the Order were no different as a union official than as an employee of Respondent.

Mr. Brubaker in releasing nonpublic information was not responding to any comment made to Mr. Robb or to AOPA. Consequently, Mr. Brubaker did not act in any good faith belief that he, as a union official, was defending in the public a criticism of controllers made to the public. As a matter of fact, Mr. Brubaker made no reference to any portion of the draft response to Mr. Robb prepared by Mr. Hayter.

The reprimand, issued to Mr. Brubaker because of his unauthorized distribution of internal agency memorandum did not interfere with, restrain, or coerce Mr. Brubaker in the exercise of any right assured by the Order. Under the circumstances of this case, Mr. Brubaker, as a union official, was not responding to any public criticism of members of PATCO and, therefore, had no greater, or different rights under the Order as a union official than he possessed as an individual employee of FAA. No opinion is expressed, or is to be inferred, as to whether an employee acting in an appropriate representative capacity could ever properly distribute nonpublic internal agency information contrary to agency Regulations. The instant decision goes no further

than to decide that Mr. Brubaker's disclosure of such information in this case was not protected by Section 1(a) of the Order and because Mr. Brubaker had no protected right, the reprimand did not violate any right protected by the Order. Accordingly, I shall recommend that the complaint be dismissed.

RECOMMENDATION

In light of the foregoing, Mr. Brubaker's distribution of nonpublic information contrary to agency regulation was not a right protected by Section 1(a) of the Order and the Official Reprimand therefor did not violate Section 19(a)(1) of the Executive Order. Therefore, I recommend that the Complaint be dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 11, 1976
Washington, D.C.

February 18, 1977

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 REWORK FACILITY,
ALAMEDA, CALIFORNIA
A/SLMR No. 797

This case involved an unfair labor practice complaint filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (Complainant), alleging that the Respondent violated Section 19(a)(1) of the Order when its supervisor made an obscene gesture and coercive statements during discussions with union representatives.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) of the Order. In this regard, he found that the supervisor's conduct at a meeting with a shop steward and the Recording Secretary of the Complainant did not violate the Order as, under the circumstances, it did not indicate disdain for or a disinclination to recognize the Complainant, bargain, or follow the terms of the negotiated agreement. Nor did the supervisor's conduct interfere with, restrain, or coerce employees in the exercise of rights assured by the Order. Moreover, he found that the supervisor's subsequent conversation with the shop steward was made without threat or promise. Accordingly, he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed.

A/SLMR No. 797

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVAL AIR REWORK FACILITY,
ALAMEDA, CALIFORNIA

Respondent

and Case No. 70-5136(CA)

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Complainant

DECISION AND ORDER

On November 19, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-5136(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 18, 1977

Jack A. Warshaw, Acting Assistant Secretary
of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF THE NAVY
NAVAL AIR REWORK FACILITY
ALAMEDA, CALIFORNIA
Respondent

Case No. 70-5136

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO
Complainant

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For the Respondent

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For the Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor Management Relations (hereinafter referred to as the

Assistant Secretary), a Notice of Hearing on Complaint issued on July 2, 1976 with reference to alleged violations of Section 19(a)(1) of the Order. The complaint, filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the Union or Complainant) alleged that the Naval Air Rework Facility, Department of the Navy, Alameda, California (hereinafter referred to as the Activity or Respondent) violated the Order by an obscene gesture and statements made during discussions with Union representatives.

At the hearing held on September 13, 1976 in San Francisco, California the parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. A brief was received from the Respondent and carefully considered.

Upon the entire record in this matter and from my evaluation of the evidence and observation of the witnesses and their demeanor, I make the following:

Findings of Fact

Since July 1975 the Union's Lodge 739 has been the exclusive collective bargaining representative of various of the Activity's employees. The collective bargaining unit encompass approximately 3000 employees.

Cynthia Waggoner, a warehouse employee, became a shop steward for the Union in the early fall of 1975. On November 25, 1975 while on a mail run from her shop area to another building at the facility, Ms. Waggoner observed an employee working without safety shoes while handling large pieces of sheet metal. Upon inquiry, Waggoner was informed by the individual that he did not have safety shoes but would like to obtain a pair. Waggoner proceeded on her mail run during which she came upon a supply room that stocked safety shoes. The storekeeper informed Waggoner that to get safety shoes an employee must get a requisition from a Mr. Russell. Waggoner contacted Russell and together they obtained the proper requisition form but it was too late in the day for the form to be prepared.

On the following day, November 26, Waggoner presented Russell with the requisition form. Russell had some misgivings about the matter and called Waggoner's branch head, Oliver Smith to obtain approval of the requisition. Smith refused to approve and no further action was taken to obtain the safety shoes.

Later that same day Waggoner received a message from her foreman that Smith wished to talk to her. Waggoner was apprehensive that Smith might view her actions in obtaining the requisition as an attempt on her part to bypass Smith in obtaining the shoes and take disciplinary action against her. Accordingly, Waggoner asked the Union's Recording Secretary, John Minnihan, who was also an employee at the facility, to accompany her to the meeting.

Waggoner and Minnihan then proceeded to Smith's desk which was in an area adjacent to the desks of other supervisory-managerial employees. Waggoner immediately sat at Smith's desk while Minnihan stopped to talk with another person in the room and Smith, quite congenially, asked her what the shoe business was all about. Waggoner fully explained what had transpired and Smith accepted the explanation without any adverse reaction. Smith then inquired as to what Waggoner was doing representing an employee who was not working in Waggoner's assigned union steward area. 1/ Around this time Minnihan came to Smith's desk and introduced himself. Waggoner responded to Smith's question by indicating that the employee requested her to look into the safety shoes matter and it was not a grievance or complaint situation. Minnihan added that under the terms of the collective bargaining agreement Waggoner was free to act as she had. Smith disputed Minnihan's interpretation of provisions of the agreement relating to union representation rights contending that initial contacts by stewards could be made only with employees working in the steward's assigned area. 2/ The disagreement escalated and a heated

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1/ Several weeks previously Waggoner had been involved in another situation which concerned an employee outside of her geographical area of union stewardship.

2/ Apparently, the following provision in the agreement was in question:

> "Section 4. Any bargaining unit employee who alleges and feels that he has a grievance or complaint shall normally take the matter up with the shop steward assigned to that area and shall be allowed the necessary amount of time for this purpose. During the investigative process a different steward may be assigned by the union in lieu of the steward regularly assigned to that area...."

argument ensued over the interpretation of the agreement. The argument continued with both Smith and Minnihan angrily insisting that their interpretation of the agreement was correct when Smith made a gesture to Minnihan by extending upward his middle finger from his fist and exclaiming, "you know what you can do with your contract," or words to that effect. Minnihan commented to Smith that he would be careful about making such a gesture if he were Smith whereupon Smith lowered his hand and Waggoner and Minnihan left the room.

Later that same day, close to quitting time, Smith came to Waggoner in her work area and told her that he did not want her to take personally what had occurred during the discussion earlier that day. Smith indicated that the matter was between Minnihan and himself and had nothing to do with her. Smith asked Waggoner why she brought a union representative to the meeting and remarked that he thought they had an open-door policy where communications would be kept open and they would take care of their own problems. 3/ Waggoner did not respond. Smith told Waggoner not to worry, took her hand in his and told her to have a happy holiday (Thanksgiving) and to "take care".

Discussion and Conclusions

With regard to the meeting between Smith, Waggoner and Minnihan at which time it was found that Smith made an obscene gesture and stated "you know what you can do with your contract," or words to that effect, I conclude that such conduct did not constitute a violation of the Order. The circumstances surrounding the conduct, in my view, disclose that Smith was not indicating his disdain for or disinclination to recognize the Union, bargain or follow the terms of the agreement or interfer, restrain or coerce employees in the exercise of rights assured by the Order. Rather, Smith, was merely carried away in vigorously maintaining and advocating his position and rejecting Minnihan's interpretation of the agreement.

The use of vulgar expressions, obscenities and the like while not encouraged, is not uncommon during give and take discussions in labor-management relations either in the private

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3/ Smith testified that he was referring to an understanding reached a few months previously in a meeting between Smith, various branch supervisors, Waggoner and another newly named steward and the Union President whereby the parties would attempt to resolve among themselves problems which arose in the branch before they developed into more involved matters. If the problem could not be resolved, then assistance would be sought from higher eschelons. This testimony was undenied.

sector or the public sector. Thus, the Assistant Secretary in U.S. Small Business Administration, Central Office, Washington, D.C. A/SLMR No. 631, while evaluating the effect of the use of profanity and abusive language in that case, noted that the United States Supreme Court has applied to the Federal sector similar standards in this area to those found in the private sector. The Assistant Secretary cited Old Dominion Branch No. 497, National Association of Letter Carriers, AFL-CIO, et. al. v. Austin, et. al., 481 U.S. 264 (1974), 86 LRRM 2740, in which case the Court held, in part:

> In this case, of course, the relevant federal law is Executive Order 11491 rather than the NLRA. Nevertheless, we think that the same federal policies favoring uninhibited, robust and wide-open debate in labor disputes are applicable here....
>
> In light of this basic purpose, we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA. Such evidence as is available, rather, demonstrates that the same tolerance for union speech which has long characterized our labor relations in the private sector has been carried over under the Executive Order.

In my view the above logic is equally applicable to both Union and employer acts and statements especially where the employer's conduct occurred in the context as found above and, as herein, did not take place in a work area in the presence of numerous rank and file employees.

Turning next to Smith's conversation with Waggoner at the close of the day, I conclude that the facts do not establish a violation of the Order. Thus, Smith was not attempting to dissuade Waggoner from seeking union assistance in the matter but merely attempting to discover why agreed upon procedures, whereby stewards in his branch would attempt to resolve disputes without recourse to higher authority, were not followed. Moreover, the inquiry was made without threat or promise. Accordingly, under all the circumstances herein Smith's conduct did not undermine the Union as alleged by Complainant nor in any other manner violate Section 19(a)(1) of the Order.

Recommendation

In view of the foregoing, I recommend the complaint herein be dismissed in its entirety.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 19 NOV 1976
Washington, D.C.

February 18, 1977

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, PUBLIC HEALTH SERVICE,
INDIAN HEALTH SERVICE, PHOENIX
INDIAN MEDICAL CENTER
A/SLMR No. 798

This case involved an unfair labor practice complaint filed by Frank Johnson (Complainant) alleging, in effect, that the Respondent Activity violated Section 19(a)(1) and (2) of the Order by separating him from employment when he was a Trial/Probationary employee because of his union activities and thereby interfering with, restraining, and/or coercing him in the exercise of his rights assured by the Order, as well as discouraging membership in a labor organization by discrimination in regard to hiring, tenure, promotion or other conditions of employment.

The Chief Administrative Law Judge found that the Complainant's separation from his job during his trial employment period was not motivated by the Complainant's union activities in violation of the Order. In this regard, he concluded that the Complainant was not treated disparately and was terminated because of his unsatisfactory work performance. He concluded also that two of the Respondent's supervisors did not make the anti-union remarks which the Complainant attributed to them. Accordingly, he recommended that the complaint be dismissed in its entirety.

The Assistant Secretary adopted the Chief Administrative Law Judge's findings, conclusions, and recommendation and ordered that the complaint be dismissed.

A/SLMR No. 798

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE, PUBLIC HEALTH SERVICE,
INDIAN HEALTH SERVICE, PHOENIX
INDIAN MEDICAL CENTER

Respondent

and Case No. 72-5747(CA)

FRANK JOHNSON

Complainant

DECISION AND ORDER

On December 3, 1976, Chief Administrative Law Judge H. Stephan Gordon issued his Recommended Decision and Order 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 Recommended Decision and Order. 1/

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 Recommended Decision and Order and the entire record in the subject case, I hereby adopt the Chief Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-5747(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 18, 1977

Jack A. Warshaw, Acting Assistant
Secretary of Labor for Labor-Management
Relations

1/ The Complainant's request for an extension of time in which to file exceptions was denied as untimely, and its request for reconsideration of this denial also was denied.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, INDIAN HEALTH SERVICE, PHOENIX INDIAN MEDICAL CENTER, Activity	:	
and	:	Case No. 72-5747
FRANK JOHNSON, Complainant	:	

John Egan and Kenneth Cromley
Public Health Service, Labor Relations Branch
Room 18A31 Parklawn Building
5600 Fishers Lane
Rockville, Maryland 20852
For the Activity

Homer R. Hoisington
Regional Business Agent
National Federation of Federal Employees
2923 Joyce Street
Santa Rosa, California 95405
For the Complainant

Before: H. STEPHAN GORDON
Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding, heard in Phoenix, Arizona, on September 2 and 3, 1976, arises under Executive Order 11491, as amended, (hereinafter referred to as the Order) pursuant to a Notice of Hearing issued July 21, 1976 by the Regional Administrator, United States Department of Labor, San Francisco Region.

The proceeding was initiated by the filing of a complaint on December 2, 1975 by Frank Johnson (hereinafter referred to as the Complainant) against the Phoenix Indian Medical Center (hereinafter referred to as the Hospital or the Activity).

The amended complaint alleged that the Activity violated Sections 19(a)(1) and 19(a)(2) of the Order when it separated the Complainant from his position as a janitor and violated Section 19(a)(1) of the Order when its agent, Irwin Lomay, made certain remarks to the Complainant.

At the hearing both parties were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument. Post-hearing briefs, received from both parties, have been given close consideration.

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

Findings of Fact

Background.

The Phoenix Indian Medical Center is organizationally a part of the Indian Health Service within the Public Health Service, Department of Health, Education and Welfare. The Center provides total health services to Indian people residing within the area served.

The Center is part of the Phoenix Service Unit which, in addition to the Hospital itself, includes a number of outlying clinics. The Hospital, which employs some 500 persons, is a 191-bed general medical and surgical hospital, with teaching and research activities.

Under the direction of Dr. Nairn, the Hospital is organizationally divided into three primary sections: Hospital Services, Clinical Services, and Administrative Services. The Hospital's Housekeeping Unit is organizationally a part of Administrative Services.

The Complainant, at all times pertinent to this case, was employed in the Hospital's Housekeeping Department as a janitor.

The Complainant was hired on September 15, 1974, subject to a one-year trial period. He worked under the immediate supervision of Mr. Lomay for approximately seven months. Thereafter, from early April 1975 until September 11, 1975 when he was discharged, he worked under the immediate supervision of Mr. Webb, except for weekends when he continued to work under Mr. Lomay.

Complainant's Union Activity.

In April 1975 the Complainant became Chief Steward of Local 1468 of the National Federation of Federal Employees, the exclusive representative of a unit of employees at the Hospital. Except for a few weeks in March 1975, when he was a union steward, the Complainant had not previously held a union position.

The record establishes that the Activity was fully aware of the Complainant's union activities.

The Complainant, by his own admission, never requested nor used official time for union activities until he was transferred to the ground floor. Thereafter, the Complainant requested and was granted approximately two hours of official time a week to perform his official union functions. Supervisor Webb testified that he did not consider the Complainant's requests for official time excessive and added that the President of the Local, who was also under his supervision, used approximately the same amount of official time per week.

Mr. Kulhman, Associate Director of Hospital Services, who has been the principal contact in dealings between the Activity and the Union, testified that he had never received a report from any supervisor regarding a problem with the granting of official time to union stewards.

The Activity presented uncontroverted evidence that the Union and the Hospital management have enjoyed an excellent relationship in recent years with successive contracts in force and frequent informal adjustments of grievances.

Complainant's Job Performance.

On the basis of the entire record, I find a clear pattern of unsatisfactory job performance both before and after April 1975, when the Complainant was appointed Chief Steward.

Prior to April 1975, the Complainant was transferred twice upon the request of Supervisor Lomay. Mr. Lomay credibly testified that the Complainant was first transferred in December 1975 from the fifth floor research area to the fourth floor pediatrics area, "Because of his job performance, it was very poor, and he would talk to a lot of the employees, fellow workers, and he'd get behind in his work. That's the only reason we had to change him."

The record is replete with complaints regarding the Complainant's job performance on the fourth floor. By his

own admission the Complainant received an oral reprimand from Mrs. Nez, the Chief Housekeeping Officer, because of the poor condition of rooms he had cleaned on January 14, 1975; used a dust mop in an isolation room on February 7, 1975; left dirty equipment in the janitor's closet on February 8, 1975; and used a telephone in a prohibited area while on duty March 2, 1975.

In addition, Mr. Lomay testified that the Complainant, even after repeated warnings, continued to waste time socializing with fellow employees and a number of children who were patients at the hospital; allowed these children to push his cart of contaminated trash; and continued using the telephone while on duty.

Finally, in early April 1975, the Complainant was transferred from the pediatrics area to the ground floor, because Mr. Lomay feared he was a hazard to the children patients.

The record establishes that specific complaints of the same general nature regarding the Complainant's performance continued during the approximately five months after he became Chief Steward and worked under Supervisor Webb on the ground floor.

Specifically, Mr. Webb testified that he sometimes had to assign other janitors to complete the Complainant's work assignments; he saw the Complainant sitting and talking to a woman who owned the snack bar for thirty minutes one day during working hours; he had received more complaints about the Complainant's work performance than that of any of his other janitors; he was unable to locate the Complainant on several occasions when emergencies arose on his floor; he found the Complainant repeatedly using the telephone while on duty; and he found areas uncleaned, even after he had specifically directed the Complainant to clean them.

While Mr. Webb was not able to specify all of the instances where the Complainant performed poorly by time and date, he did specifically explain them.

On June 26, 1975, the Complainant was informed by Don Davis, Director of Administrative Services, that his job performance was unsatisfactory and if it did not improve he would be discharged during his trial period. Thereafter, Mr. Webb sent a memorandum to Mr. Bell, the Acting Chief Housekeeping Officer 1/, citing a number of specific complaints regarding the Complainant's performance during August 1975.

1/ Mr. Bell succeeded Mrs. Nez in this position after she retired about May 1975.

On September 11, 1975, the Complainant was discharged. Mr. Davis based his decision upon the recommendations of Mr. Webb and Mr. Bell and his consultations with Mr. Lomay and Mrs. Nez. Their consensus was that the Complainant had performed more poorly than other employees under their supervision after as much or more training. The Complainant alleged that he received inadequate training but I find no evidence that he received disparate treatment in this regard.

Evaluation and Separation Procedure.

The Complainant was evaluated in June and July 1975, because hospital regulations (Federal Personnel Manual, Chapter 315, Subchapter 8-3) require that a trial employee's performance be certified as satisfactory or unsatisfactory between the ninth and tenth months of his employment. The Complainant began his ninth month of employment on June 15, 1976.

The record reveals that the granting of career tenure to trial employees is not automatic. In the last two years four other trial employees have been discharged for similar reasons.

On the basis of the entire record it would appear that the Activity failed to follow certain procedural formalities in separating the Complainant from his position. Specifically, the Complainant's recommendation and performance rating report were neither signed nor dated; Mr. Davis made a verbal separation request, rather than the usual written request, to Mr. Cromley, Personnel Officer of the Phoenix Indian Health Services; the separation document (Notification of Personnel Action) was not signed by civil service authorities as required; Mr. Cromley's office failed to inform the Complainant of his appeal rights in its letter of separation; and Activity personnel added two hours of annual leave to the Complainant's record which may not have been justified.

It is, however, also apparent from the record that these procedural errors and deficiencies were in no way related to Complainant's union activities. In the absence of other credible evidence which would, at least in some measure, warrant an inference of union animus or discriminatory motive, these procedural shortcomings are not cognizable under the Executive Order. The question whether such procedural errors may have fatally tainted or invalidated Complainant's discharge should properly be addressed to the Civil Service Commission or such other Governmental entity which is legally authorized to rule and rectify such matters. In and of themselves they do not fall within the ambit and cannot be rectified through the means of the Order.

Mr. Lomay's Alleged Remarks.

There is conflicting evidence regarding alleged remarks made by Mr. Lomay to the Complainant on June 10, 1975 and August 12, 1975.

On June 10, 1975, while on their way to work, the Complainant allegedly told Mr. Lomay how much he liked working with the union and employees' problems. Complainant testified that Mr. Lomay told him he "shouldn't ruffle too many feathers." Mr. Lomay denied ever making such a remark. Rather, Mr. Lomay testified that the Complainant asked him how he could improve his work and that he told the Complainant to utilize his time better and do better work.

On August 12, 1975, while the Complainant and Mr. Lomay were travelling to Sells, Arizona for the funeral of a fellow employee, the Complainant allegedly told Mr. Lomay that Mr. Webb was giving him more work than one person could possibly handle. The Complainant testified that Mr. Lomay told him that "if I [the Complainant] resigned as Chief Steward I wouldn't have the problem and that I'm rocking the boat, so to speak, or causing waves with the management and my situation." In contrast, Mr. Lomay testified that he didn't respond to the statement regarding the Complainant's workload because "I couldn't say anything about that because I'm not his supervisor anymore."

Upon consideration of the facts and circumstances and my observation of the witnesses and their demeanor, I find Mr. Lomay's version the more credible recollection of their conversations on those two occasions. In this respect it is also noteworthy that the Complainant had several opportunities to raise Mr. Lomay's alleged remarks as issues, yet failed to do so. Thus, there was no mention of these alleged remarks in a letter from the Complainant to the Activity dated September 2, 1975 which charged the Activity with an unfair labor practice; nor were they mentioned during a four-hour meeting on October 8, 1975, which was held for the specific purpose of discussing the Complainant's unfair labor practice charge; or were they even alluded to in the complaint filed December 2, 1975 by the Complainant. Furthermore, the Complainant's explanation for not raising these alleged remarks as issues prior to his interview with a Management Services Administrator several months later was most unconvincing.

Mr. Webb's Alleged Remarks.

The Complainant alleged that Mr. Webb made a statement to Mrs. Alice Boring, Secretary to the Director of the Center,

which established a nexus between the Complainant's union activities and his separation.

Mrs. Boring testified that she had heard about the Complainant's bad performance reports from Mr. Davis. Accordingly, she testified, that when she inadvertently met Mr. Webb, the Complainant's supervisor, in the Xerox room, she asked him whether the Complainant's union activities had anything to do with his bad performance reports. She testified that Mr. Webb replied, "Well, it could be, but he wasn't doing his work and all these various reports, but it could have something to do with the union."

In contrast, Mr. Webb testified that, while he may have run into Mrs. Boring in the Xerox room, he did not recall her questioning him about the Complainant's union activities nor did he ever volunteer the alleged remark "because I know, subconsciously, that it has nothing to do with the union as far as his rating was concerned."

There is no evidence in the record to suggest a possible motivation for Mr. Webb's alleged statement. In fact, uncontradicted evidence in the record establishes that Mr. Webb, like Mr. Lomay, was a former union member; Mr. Webb never denied the Complainant's requests for official time; and Mr. Webb invited the Complainant, in his capacity as union steward, to address the employees and recommended him to others for that purpose.

On the other hand, Mrs. Boring's testimony regarding Mr. Webb's alleged remark was somewhat hesitant and inconsistent, reflecting the fact that her recollection was vague and may have been colored by her bad experiences as a union member under an old Hospital administration many years ago.

Under all the circumstances, having considered the testimony of the witnesses and observed their demeanor, I find that Mr. Webb did not make the alleged remark.

Position of the Parties

The Complainant alleges that his separation was discriminatory and motivated by his union activities in violation of Sections 19(a)(1) and 19(a)(2) of the Order.

The Complainant argues that he received poor ratings because of his effectiveness as Chief Steward. The Complainant further argues that his absence from his work site while he was engaged in legitimate union duties provided the basis for a claim by management that he did not utilize his time properly and, therefore, did not perform satisfactorily.

The Complainant primarily relies upon alleged remarks by Supervisors Lomay and Webb regarding his union activities as evidence that his separation was motivated, at least in part, by his union activities.

In contrast, the Activity argues that the Complainant's separation resulted solely from his unsatisfactory job performance. The Activity relies heavily upon its argument that the Complainant demonstrated a pattern of unsatisfactory job performance well before he became chief steward, suggesting that he was discharged for work-related reasons.

Finally, the Activity argues that the Complainant has failed to establish that either Mr. Lomay or Mr. Webb made the statements attributed to them and that without such evidence the Complainant has offered no proof that the separation was motivated by his union activities.

Conclusions of Law

On the basis of the above findings of fact, I conclude that the Complainant's separation from his job as a janitor during his trial period neither foreseeably interfered with the Complainant's exercise of any rights under the Order nor was it motivated by the Complainant's union activities in violation of the Order. I further conclude that Mr. Lomay did not make the remarks attributed to him by the Complainant.

The evidence as a whole establishes a clear pattern of unsatisfactory work performance by the Complainant prior to April 1975 when he was appointed Chief Steward. During that time he was reassigned twice to new floors in an effort to stimulate his performance. Even after the Complainant's final transfer to the ground floor in April 1975, the record establishes that complaints of the same or a similar nature regarding his job performance continued. On June 26, 1975, the Complainant was formally warned that he would be discharged if his performance did not improve. It was only after recommendations from Mr. Webb and Mr. Bell in August 1975 and further consultations with Mr. Lomay and Mrs. Nez that Mr. Davis decided to discharge the Complainant.

The record is replete with evidence that the Complainant was not subject to disparate treatment. The Complainant's performance was evaluated between the ninth and tenth months of his employment because regulations so required, not because of his union activities during the last five months of his employment. The regulations also required that a trial employee's separation be based upon the subjective evaluations of his supervisors, as it was here. Furthermore, the evidence establishes that it is the practice of the Activity to deny career tenure to employees who have not performed satisfactorily during their trial periods.

In addition, I have found that neither Mr. Lomay nor Mr. Webb made the anti-union remarks attributed to them by the Complainant. On the contrary, I have found that labor-management cooperation in recent years has been excellent; that both Mr. Lomay and Mr. Webb are past union members; that the Complainant was never denied official time to perform his representational duties; and that Mr. Webb invited the Complainant in his capacity as a union steward to address the employees and recommended him to others for that purpose.

In this regard, I must reiterate that it is not the function of this tribunal to decide whether the Complainant's separation was justified but only whether it was discriminatory or not. Regarding the latter, I find that the Complainant has failed to meet the required burden of proof.

Conclusion

In conclusion, I find that the Activity did not violate either Sections 19(a)(1) or 19(a)(2) of the Order by separating the Complainant from his position on September 11, 1975 or by reason of Mr. Lomay's alleged remarks to the Complainant.

Recommendation

In view of the foregoing findings and conclusions, I recommend that the complaint herein be dismissed in its entirety.

H. STEPHAN GORDON
Chief Judge

Dated: December 3, 1976
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

DEFENSE CIVIL PREPAREDNESS AGENCY,
REGION I,
MAYNARD, MASSACHUSETTS
A/SLMR No. 799

This case involved an unfair labor practice complaint filed by the National Association of Government Employees, Local R1-84 (NAGE) alleging that the Respondent violated Section 19(a)(3) and (6) of the Order by stalling and failing to meet and bargain concerning a new negotiated agreement with the NAGE and thereby permitting another labor organization, the American Federation of Government Employees, AFL-CIO (AFGE), a party to the instant proceeding, to file a representation petition for an election in the unit then represented exclusively by the NAGE.

The Administrative Law Judge, while finding no evidence of a violation of Section 19(a)(3) of the Order, concluded that the Respondent, by delaying the start of negotiations for several months without good reason, and by thereafter failing on two occasions to meet the bargaining obligations it itself had set, had not met its obligation under Section 11(a) of the Order to meet and confer at reasonable times with the NAGE. Therefore, he found the Respondent had violated Section 19(a)(6) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and issued a remedial order. With regard to remedy, the Assistant Secretary concluded that, where, as in the instant case, an Activity has been found to have failed to meet at reasonable times for the purpose of consummating a negotiated agreement and, therefore, has been ordered to bargain with the incumbent exclusive representative, such a bargaining order must be carried out for a reasonable time thereafter without regard to whether or not there are fluctuations in the majority status of the incumbent exclusive representative. In his view, such a policy is necessary to give the order to bargain its fullest effect, i.e. to give the parties to the collective bargaining relationship a reasonable time in which to conclude a negotiated agreement free from rival claims. Accordingly, and as it was noted further that the Respondent's improper conduct occurred prior to the filing of the AFGE's representation petition, the Assistant Secretary found also that dismissal of the AFGE's representation petition by the appropriate Regional Administrator would be warranted.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE CIVIL PREPAREDNESS AGENCY,
REGION I,
MAYNARD, MASSACHUSETTS

Respondent

and

Case No. 31-9693(CA)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-84,
BOSTON, MASSACHUSETTS

Complainant

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO
DORCHESTER, MASSACHUSETTS

Party

DECISION AND ORDER

On November 16, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations.

1/ On page 4 of his Recommended Decision and Order, the Administrative Law Judge inadvertently indicated that the second event specified in the Respondent's June 30, 1975, schedule for negotiations was to take place on July 25, 1975, rather than on July 11, 1975. This inadvertence is hereby corrected.

ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.26(a) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Defense Civil Preparedness Agency, Region I, shall:

1. Cease and desist from:

(a) Failing and refusing to meet at reasonable times with representatives of National Association of Government Employees, Local R1-84, for the purpose of negotiating a collective bargaining agreement.

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

(a) Upon request, meet at reasonable times with representatives of the National Association of Government Employees, Local R1-84, for the purpose of negotiating a collective bargaining agreement. 2/

(b) Post at all of 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 Regional Director, or other appropriate official in charge of the Region I Office, and they 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 Regional Director, or

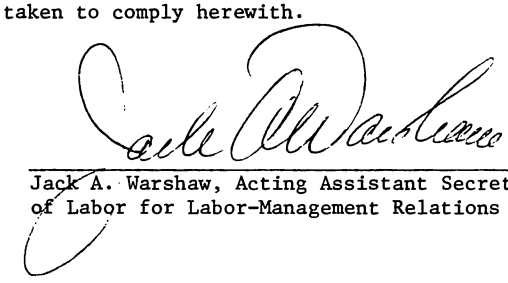
2/ In reaching the disposition herein, it was noted that in Case No. 31-9582(RO), the American Federation of Government Employees, AFL-CIO, hereinafter called AFGE, a party to the instant proceeding, filed a representation petition in August 1975 seeking an election in the unit currently represented exclusively by the Complainant, which petition was not consolidated for hearing with the instant unfair labor practice complaint. In my view, where, as here, an activity has been found to have failed to meet at reasonable times for the purpose of consummating a negotiated agreement and, therefore, has been ordered to bargain with the incumbent exclusive representative, such a bargaining order must be carried out for a reasonable time thereafter without regard to whether or not there are fluctuations in the majority status of the incumbent exclusive representative. Such policy is considered necessary to give the order to bargain its fullest effect, i.e. to give the parties in the collective bargaining relationship a reasonable time in which

(Continued)

other appropriate official in charge of the Region I Office, shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
February 18, 1977



Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

2/ to conclude a negotiated agreement free of rival claims. Accordingly, and noting particularly the finding of the Administrative Law Judge that the Respondent's improper conduct herein occurred prior to the filing of the representation petition by the AFGE, I find that dismissal of the representation petition by the appropriate Regional Administrator would be warranted.

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 or refuse to meet at reasonable times with representatives of National Association of Government Employees, Local R1-84, for the purpose of negotiating a collective bargaining agreement.

WE WILL upon request meet at reasonable times with representatives of National Association of Government Employees, Local R1-84, for the purpose of negotiating a collective bargaining agreement.

_____
(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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is 1515 Broadway, Suite 3515, New York, New York 10036.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
Defense Civil Preparedness Agency Region One Maynard, Massachusetts	:	
Respondents	:	
and	:	
National Association of Government Employees, Local RI-84 Boston, Massachusetts	:	Case No. 31-9693 (CA)
Complainant	:	
and	:	
American Federation of Government Employees, AFL-CIO Dorchester, Massachusetts	:	
Party	:	

George W. Watson, Esquire
Staff Attorney
Defense Civil Preparedness Agency
Room 1C521, Pentagon Building
Washington, D. C. 20301

For the Respondent

Richard G. Remmes, Esquire
General Counsel
National Association of Government Employees
285 Dorchester Street
South Boston, Massachusetts 02127

For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arose under Executive Order 11491, as amended, (herein called the Order). Notice of Hearing on Complaint was issued on June 26, 1976 by the Regional Administrator for the New York Region on a complaint filed by National Association of Government Employees (herein called NAGE) on October 23, 1975 and an amended complaint filed on November 13, 1975 alleging, in substance, that Defense Civil Preparedness Agency-Region I (hereinafter called the Activity or DCPA-Region I) violated Sections 19(a)(2)(3) and (6) of the Order by stalling and failing to meet and bargain concerning a new contract with the NAGE, Local RI-84 (hereinafter called the Union or NAGE Local RI-84) and by thereby permitting another labor organization, American Federation of Government Employees (hereinafter called AFGE) to file a representation petition. 1/

A hearing was held before the undersigned in Cambridge, Massachusetts. NAGE and the Activity were represented 2/ and afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. No witnesses were called, but the NAGE and the Activity entered into an extensive stipulation of facts and submitted a number of joint exhibits. All parties were afforded the opportunity to argue orally and to file briefs; NAGE and the Activity did file briefs which have been duly considered.

Upon the entire record of this case, which is composed of the stipulations of fact and the exhibits produced at the hearing, I make the following findings, conclusions and recommendations:

1/ The Notice of Hearing on Complaint set the hearing for only the allegations that Sections 19(a)(3) and (6) of the Order were violated.

2/ The Notice of Hearing on Complaint was served on AFGE. No representative of AFGE appeared at the hearing.

Findings of Fact

1. DCPA-Region I has its office in Maynard, Massachusetts. The headquarters of the Defense Civil Preparedness Agency 3/ is at the Pentagon in Washington, D. C.

2. Since 1964, and at all times material herein, NAGE Local RI-84 has been the certified collective bargaining representative of a unit composed of all civilian employees of DCPA-Region I.

3. A collective bargaining agreement was entered into between the Activity and the Union on June 12, 1969 and expired by tis own terms on June 11, 1971. By letter dated June 21, 1972 the Personnel Manager of the DCPA Office of Personnel in Washington, the personnel office serving DCPA-Region I, advised the Union that the contract had expired and inviting the Union to submit plans to modify and continue the agreement.

4. During December of 1974 NAGE Local RI-84 submitted a set of contract proposals to the Activity. These proposals through a clerical error were incomplete because they omitted one article contained on page 9. The Activity brought this omission to the Union's attention and the missing proposal was furnished in March 1975.

5. Mr. Clair Beck, DCPA's headquarters' Labor Management Director for Personnel and Employment Services, retired in February 1975 and was replaced by Mr. David York. During the interim Mr. Leon Konicz, who had become Director of the Personnel and Employment Services in Washington had, on January 29, 1975, distributed copies of the Union's proposals to members of his staff, requesting their comments by February 14, 1975. A copy of this memorandum was sent to John McDonald, Administrative Officer of DCPA-Region I.

3/ This agency was formally called the Office of Civil Defense.

6. In February 1975 John E. Davis, National Director of DCPA in Washington, by a memorandum to Allan Zinowitz, Director of DCPA-Region I, named a four-man negotiating team from DCPA-Region I to represent it in the negotiations. Mr. Zinowitz was instructed to advise the Union of the naming of the negotiating team and that they would be meeting in the near future.

7. DCPA Instruction 5850.1 dated December 18, 1974 requires management representatives to undergo formal training prior to entering into negotiations. The Activity's bargaining team attended such formal training on May 27, 28 and 29.

8. Subsequent to March 1975 NAGE Nation Representative Martin Williamson talked to DCPA-Region I Director Zinowitz on two or three occasions during which the matter of the labor negotiations was discussed. During a telephone conversation on May 26, Mr. Zinowitz advised Mr. Williamson that the negotiations would get underway within two weeks.

9. A memorandum dated June 30 was sent from Mr. McDonald to his negotiating team. On its face the memorandum shows it was to be sent to Mr. Leonard Foley, then president of the Union. This memorandum set forth the following schedule for negotiations:

"July 8, 1975	Complete review of all necessary paper work with contract negotiations.
July 25, 1975	Completion of all management suggestions for inclusion in contract negotiation and forwarding to Mr. York of Army Personnel.
July 25, 1975	Mr. York return our recommendation with his comments.
Aug. 1, 1975	Give to Union, management's proposals for inclusion in contract.

Aug. 15, 1975 — Establish dates of pre-negotiation and negotiating meeting with union officials for sometime in September."

10. On July 1, 1975 Mr. Williamson wrote to Mr. Zinowitz referring to their May 26 conversation and the committment that negotiations would get underway in two weeks. Mr. Williamson stated that the Union had not received any counter proposals and stated later in the letter that they would appreciate any action that will start negotiations. 4/

11. By letter dated July 11, 1976 DCPA-Region I Director Zenowitz advised Mr. Williamson that the schedule had been furnished to Mr. Foley. The letter stated "We are trying to expedite negotiations and we are flexible as to earlier dates being established."

12. On August 8, 1975 the comments from the DCPA Washington office on the Activity's proposals were received by DCPA-Region I. The Activity's proposals have not, at any time, been given to the Union.

13. Union President Foley broke his leg during the weekend of August 2 and 3, 1975 and was out of work until at least September 1, 1975.

14. After August 3, but prior to August 18, 1975 Mr. McDonald telephoned Mr. Foley at home and suggested a possible meeting at a motel near Mr. Foley's home. A motel was suggested for negotiations originally scheduled for August 15. The meeting of August 15 as set forth in the schedule was not held.

15. By letter dated August 15 and received August 20 Mr. Williamson complained about the Activity's failure to provide its proposals and the fact that by that day, the day scheduled for a meeting, the Union had no word from the Activity.

4/ Mr. Williamson did not receive a copy of the schedule described above in paragraph 9 until July 11, 1976. He received it from a Union representative, who already had a copy of it.

16. On August 18, 1975 the Activity received a copy of an AFGE representation petition filed in case No. 31-9582(RO) in which AFGE seeks to represent the Activity's employees. It involves the same collective bargaining unit as the one represented by NAGE-RI-84. The signatures of employees in support of AFGE's petition were signed prior to August 12, 1975.

17. Mr. Foley contacted Mr. McDonald periodically from December 1974 to August 1975 inquiring of the status of the contract proposals.

18. On August 21, 1975 a letter was sent which constituted the unfair labor practice change in the subject case.

Conclusions of Law

In Army and Air Force Exchange Service, Kessler Consolicated Exchange, A/SLMR No. 144 the Assistant Secretary stated that the obligation to bargain as provided in Section 19(a)(6) of the Order must be construed in conjunction with Section 11(a) of the Order which provides that the bargaining obligation on the part of both agencies and labor organizations includes an obligation "to meet at reasonable times" and to confer in good faith. In the Army and Air Force Exchange Case, supra, the Assistant Secretary concluded that the respondent's excuses for delaying negotiations in that case, a busy holiday season and an annual inventory, were not sufficient to justify a four month delay in getting meetings started. The Assistant Secretary, in analyzing the bargaining obligation, stated that the objectives of the Order would not be well served where an exclusive collective bargaining representative submitted a complete proposed collective bargaining agreement to the Activity and then had to wait four months for the Activity to decide that it is convenient to start negotiations. Thus he concluded, absent more plausible excuses for this kind of delay, such conduct by the respondent would amount to a refusal to meet at reasonable times and would thus constitute a violation of Section 19(a)(6) of the Order. The Assistant Secertary went on, however, and concluded that in the circumstances there present, "noting particularly that...the Union did not press for immediate negotiations, and once negotiations began they were transacted with sufficient diligence..." there had been no violation of the Section 19(a)(6) of the Order.

The instant case involves a delay on the Activity's part of some nine months and negotiations never did start because of the intervening representation petition filed by AFGE on or about August 18. The issue then basically presented is whether the Activity's delay in starting negotiations from December 1974, when the Union submitted its contract proposal to the Activity, 5/ until about August 18, when AFGE filed its representation petition 6/, constituted a refusal "to meet at reasonable times," as required by Section 11(a) of the Order, and thus constituted violation of Section 19(a)(6) of the Order.

It is concluded that the Activity's excuses for its delay; that it had to train its negotiators, prepare counter proposals, vacations, etc., were not sufficient to justify this type of lengthy delay in starting negotiations. It is true, as present in the Army and Air Force Exchange Service Case, supra, that during the period soon after the proposal was submitted the Union did not press for immediate negotiating. It is very important to note, however, that the Union's president Mr. Foley did periodically call and inquire as to the status of negotiations and NAGE's representative Mr. Williamson called to get negotiations started and finally got a committment in May that negotiations

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5/ It is concluded that the Union had submitted a complete proposal contract. The fact that one clause was clerically omitted is deemed insignificant, was not given as reason for any delay, and this ommission was promptly remedied in March 1975, when the Union became aware of the ommission.

6/ The filing of a valid representation petition would, at that time have privileged the Activity's refusal to meet with the Union, until the question concerning representation had been resolved.

would get underway within two weeks. The Activity did not meet this deadline, and the record does not establish any acceptable reason for this delay, nor does it establish that it notified the Union in advance of the change of plans. Further, it must be noted that the Activity unlaterally set a new schedule which was apparently acceptable to the Union in its June 30, 1975 memorandum and then, with no prior notification, failed to comply with its own schedule, i.e., failed to provide the Union with its counter proposals by August 1.

The Activity, in its July 11 letter states that it desires to expedite the negotiations and is flexible as to earlier dates, but the letter was written and received before the Activity failed to meet its own scheduled obligation to provide the Union with counter proposals. Now perhaps, the Union would have been letter advised to more clearly and precisely state its demands that the Activity meet with it to negotiate. However, as discussed above, the Union did keep in contact with the Activity and indicated its continuing interest in the status of negotiations. Thus the Activity can hardly use as an excuse for the long delay, the Union's acquiescence.

It is therefore concluded based on the nine month delay for no good reasons, and the Activity's failure on two occasions at the end of the nine month period to meet bargaining obligations, that it itself set, that the Activity did, prior to the filing of the representation petition by AFGE, fail to meet at reasonable times with the Union and therefore did violate Section 19(a)(6) of the Order.

Section 19(a)(3) of the Order provides that no Activity shall sponsor, control or otherwise assist a labor organization. The Union contends that the Activity violated Section 19(a)(3) of the Order because its delaying and stalling over negotiations aided AFGE in filing its petition. There is no evidence the Activity even knew AFGE was soliciting signatures or organizing; thus the allegation is found to be without merit.

Recommendation

In view of my findings and conclusions stated above, I recommend that the Assistant Secretary of Labor for Labor-Management Relations find that Respondent did not violate Section 19(a)(3) of the Order and that the allegation of the complaint be dismissed and further that Respondent engaged in conduct which violated Section 19(a)(6) of Executive Order 11491, as amended, with respect to its failure to meet at reasonable times to negotiate a new collective bargaining agreement with NAGE Local RI-84.

I further recommend that the following Order, which is designed to effectuate the policies of Executive Order 11491, as amended, be adopted:

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 Defense Civil Preparedness Agency, Region I, shall:

1. Cease and desist from:

(a) Failing and refusing to meet at reasonable times with representatives of National Association of Government Employees, Local RI-84, in order to negotiate a collective bargaining agreement.

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

(a) Upon request meet at reasonable times with representatives of the National Association of Government Employees, Local R I-84, in order to negotiate a collective bargaining agreement.

(b) Post at all of 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 Regional Director or other appropriate official in charge of the Region I Office, and they 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 District Director shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: November 16, 1976
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, AD AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT fail or refuse to meet at reasonable times with representatives of National Association of Government Employees, Local RI-84 in order to negotiate a collective bargaining agreement.

WE WILL upon request meet at reasonable times with representatives of National Association of Government Employees Local RI-84 in order to negotiate a collective bargaining agreement.

_____
(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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is 1515 Broadway, Suite 3515, New York, New York 10036.

February 18, 1977

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

U.S. PATENT AND TRADEMARK OFFICE,
WASHINGTON, D.C.
A/SLMR No. 800

This case involved an Application for Decision on Grievability filed by the Patent Office Professional Association (POPA). The POPA contended that the exclusion of an employee from various formative meetings, which were held in regard to the automation of certain functions of the Scientific Library, was grievable under the parties' existing negotiated agreement. The Activity denied the grievance because, in its view, the grievance was not subject to the negotiated grievance procedure inasmuch as it did not involve the interpretation or application of the negotiated agreement's provisions, and the grievance did not cite the specific agreement provisions allegedly violated.

The Administrative Law Judge found that the grievance herein was not actionable under the negotiated grievance procedure since it did not involve the interpretation or application of the provisions of the negotiated agreement. His finding was based on the restrictive language used in defining the scope of the grievance procedure, the prohibitions contained in Section 13(a) of the Order in 1972 when the parties negotiated the agreement, and the matters which had been processed through the negotiated grievance procedure since 1972. The Administrative Law Judge noted, however, that the failure to cite the specific contractual provisions allegedly violated was insufficient basis for refusing to process the grievance under the negotiated grievance procedure.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge.

A/SLMR No. 800

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. PATENT AND TRADEMARK OFFICE,
WASHINGTON, D.C.

Activity

and Case No. 22-6551(AP)

PATENT OFFICE PROFESSIONAL ASSOCIATION

Applicant

DECISION ON GRIEVABILITY

On September 24, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision on Grievability in the above-entitled proceeding, finding that the grievance involved herein was not on a matter subject to the grievance procedure set forth in the parties' negotiated agreement.

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 Recommended Decision on Grievability and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation. 1/

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 22-6551(AP) is not on a matter subject to the parties' negotiated grievance procedure.

Dated, Washington, D.C.
February 18,1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

1/ The evidence established that the instant Application for Decision on Grievability was filed by the Applicant at a time when arbitration, provided for in Article 6, Section 10 of the parties' negotiated agreement, had not been invoked. In this regard, it was noted that the Report on a Ruling of the Assistant Secretary, No. 61 states, in pertinent part, "Where one of the parties to an existing negotiated agreement has filed a grievance, all steps of the grievance procedure provided for in that agreement, including the invocation of arbitration where an arbitration provision exists, must be exhausted before the Assistant Secretary will consider an Application filed pursuant to Section 205.2(a) or (b) of the Regulations." (Emphasis added.)

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
U.S. PATENT AND TRADEMARK OFFICE, WASHINGTON, D.C.	Activity	Case No.
and		
PATENT OFFICE PROFESSIONAL ASSOCIATION	Labor Organization/ Applicant	22-6551(AP)

John C. Jones
Gary D. Wahlert
Room 9C06, Building 2
U.S. Patent and Trademark Office
Washington, D.C. 20231
For the Activity

Ronald J. Stern, Esquire
Edward S. Bauer
Patent Office Professional Association
U.S. Patent and Trademark Office
Washington, D.C. 20231
For the Labor Organization/
Applicant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION ON GRIEVABILITY

Statement of the Case

Pursuant to an Application for Decision on Grievability Or Arbitrability filed on December 9, 1975, under Section 13 of Executive Order 11491, as amended, by the Patent Office Professional Association, hereinafter called the Union or Applicant, concerning whether or not a particular grievance is on a matter subject to the grievance procedure in the existing negotiated agreement between the Union and the U.S. Patent and Trademark Office, hereinafter called the Activity, a Notice of Hearing on Application was issued by the Regional Administrator for the Philadelphia, Pennsylvania Region on July 19, 1976.

The issue to be decided by the undersigned Administrative Law Judge is the scope of the negotiated grievance procedure, i.e. whether it encompasses all grievances or only those grievances predicated on matters and/or subjects included in the negotiated collective bargaining agreement between the parties.

A hearing was held in the captioned matter on August 24, 1976, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issue involved herein.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The Union and the Activity are parties to a collective bargaining agreement which contains in Article VI a grievance procedure. Section 1. Article VI, - Definition reads as follows:

a. Any matter which affects a member of the Unit personally, which is not resolved to his satisfaction, may be the subject of a grievance under this procedure. Said matters must involve interpretation or application of this agreement and may not cover other matters including those for which statutory appeals procedures exists. Said matters within this agreement include, but are not limited to the following matters:

(1) working conditions and environment;

(2) relationships with supervisors and with other employees and officials;

(3) management decisions in the application of established procedures;

(4) interpretation or application of personnel policies and of employee-management agreements (i.e., application of established policies to an individual employee or to groups of employees); and

(5) personnel policies and practices.

Section 7(b) of Article VI provides as follows:

b. The written grievance as filed by the grievant should contain the following information:

(1) Title and grade of grievant;

(2) Nature of grievance

(3) Corrective action requested and reasons;

(4) Name of designated representative;

(5) A copy of the written response received....

Prior to the execution of the 1972 currently applicable contract between the parties which contained the above quoted grievance provisions the parties followed the grievance provisions set forth in a collective bargaining contract dated July 28, 1966. The grievance provision in the 1966 contract read in pertinent part as follows:

Section 1. - Definition

a. Except as indicated in subsection b., below, any matter which affects a member of the Union personally, which is not resolved to his satisfaction, and which is within the administrative discretion or control of the Office, may be the subject of a grievance under this procedure. Such matters include, but are not limited to the following:

(1) working conditions and environment;

(2) relationships with supervisors and with other employees and officials;

(3) management decisions in the application of established procedures; and

(4) implementation of personnel policies and of employee-management agreements (i.e., application of established policies to an individual employee or to groups of employees).

b. The following matters are not covered by this procedure:

(1) policies, criteria and procedures established by the Federal Government, the Department of Commerce or the Office

(2) personnel actions and other matters which are subject to appeal procedure (e.g. "Appeals from Adverse Action," Administrative Instructions 3-2.9.); and denial of "in-grades," Department of Commerce Administrative Order 202-531.

At the time of the 1972 renegotiation of the contract between the parties the Union sought to incorporate the identical broad grievance procedure provisions contained in the expired 1966 agreement. The Activity declined the Union's proposal to this effect, pointing out the then existing language in Executive Order 11491 which limited the scope of negotiated grievance procedures to the interpretation and application of the provisions of the negotiated agreement. Thus, the Activity proposed that the grievance procedure provision of the contract read as follows:

Section 1. - Definition

a. any disagreement over the interpretation or application of this agreement may be the subject of a grievance under the procedure set forth below.

b. no other matter may be the subject of a grievance under this procedure. ....

Thereafter the Union which wanted language as broad as the language appearing in the 1966 contract finally agreed to incorporate the language quoted above. According to the record the five examples cited in Section 1. a. (1) - 1. a. (5) were taken from the 1966 expired contract and were inserted in the 1972 contract to indicate that the grievance procedure was to be as broad as permitted by the Executive Order.

Mrs. Joan Mavity, the grievant involved herein, was removed from the position of Head, Technical Processes Branch in the Scientific Library on or about July 22, 1974. Thereafter, according to the grievance, Mrs. Mavity has been excluded from various formative meetings which preceded the Library's joining the OCLC network, the initial step in the automation of some of

the Library's functions. Mrs. Mavity's grievance was filed under the negotiated grievance procedure contained in the collective bargaining contract between the Activity and the Union and seeks as a remedy authorization to participate actively in such meetings.

The Activity in November 1975, denied the grievance stating in pertinent part as follows:

> As you know, any grievance under the negotiated grievance procedure contained in the agreement between the Office and the Patent Office Professional Association (POPA) must involve interpretation or application of that agreement. Other matters not involving interpretation or application of this agreement may properly be the subject of a grievance under the agency procedure. Mrs. Mavity's June 27, 1975 memorandum neither cites violations of specific parts of the POPA agreement nor cites specific parts of this agreement for which interpretation or application issues require resolution.

In support of its position that is is incumbent upon a grievant to cite specific provisions of the collective bargaining agreement the Activity relies solely on Section 7(b) of Article VI quoted above.

With respect to past practice under the 1972 contract, the record is barren of any evidence indicating that a grievance was ever denied since 1972 because of the failure to cite specific contract provisions. The record is also barren of any evidence indicating that a grievance involving other than interpretation or application of the collective bargaining contract has ever been processed since 1972 under the negotiated grievance procedure.

Discussion and Conclusions

The Activity contends that inasmuch as the grievance does not (1) involve the interpretation and application of the provisions of the collective bargaining agreement, and (2) cite the specific sections of the collective bargaining agreement allegedly violated that the grievance is not actionable under the negotiated grievance procedure.

The Union on the other hand takes the position that any grievance, save those specifically excluded by Executive Order 11491, falls within the scope of the negotiated grievance procedure and that there is no requirement that a grievance set forth the specific contractual provisions allegedly violated in order for the grievance to be actionable under the negotiated grievance procedure. According to the Union it was the parties intention to make the grievance procedure as broad as possible.

With regard to the Activity's second contention relative to the necessity of citing the specific contractual provisions allegedly violated in order to make a grievance actionable under the negotiated procedure, I find insufficient evidence in the record before me to support such contention. Section 7(b) of Article VI relied upon by the Activity in support of its position in this regard makes no mention of such requirement. Indeed all that is required under this section is information concerning the nature of the grievance and corrective action required. Accordingly, and in the absence of any evidence indicating an agreement or practice to the contrary, I find that the omission of citations to the specific contractual provision allegedly violated to be an insufficient basis for refusing to process a grievance under the negotiated grievance procedure.

I do however, find merit in the Activity's first contention, namely, that in order for a grievance to be actionable under the contract grievance procedure such grievance must involve the interpretation and application of the provisions of the agreement. In reaching this conclusion I rely on the negotiations leading up to the execution of the 1972 contract and a literal reading thereof. Thus, the record discloses that prior to 1972 the Union and Activity were parties to a collective bargaining agreement containing an extremely broad grievance procedure. The Union attempted during the 1972 negotiations to retain the broad language of the grievance procedure, but the Activity objected, pointing out the then restrictive language of the Executive Order. In line with the restrictive language of the Order the Activity proposed language that without a doubt made it clear that only disagreements over the interpretation and application of the agreement would be subject to the negotiated grievance procedure. Thereafter the parties compromised on the language contained in the 1972 contract. As noted above such language specifically states that "the matters affecting unit members personally which are made the subject of the negotiated grievance procedure must involve interpretation or application of this agreement and may not cover other matters including those for which statutory appeals procedure exists." In view of this restricted language, the prohibitions contained in the then existing Executive Order and the absence of any evidence indicating that grievances concerning matters outside the negotiated agreement had been processed under the negotiated grievance procedure since 1972, I find that the instant grievance is not actionable under the negotiated grievance procedure since it does not involve an interpretation or application of the provisions of the collective bargaining contract. 1/

1/ While a literal reading of the five examples set forth in Article VI, Sect. 1(a)(1) - 1(a)(5) might possible support an argument to the contrary, such an interpretation would be contrary to the express provisions of the then existing Executive Order.

Recommendation

It is hereby recommended that the Assistant Secretary of Labor for Labor-Management Relations find the grievance not actionable under the negotiated grievance procedure.

BURTON S. STERNBURG
Administrative Law Judge

Dated: September 24, 1976
Washington, D.C.

February 18, 1977

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,
GSA REGION V,
PUBLIC BUILDINGS SERVICE,
MILWAUKEE FIELD OFFICE
A/SLMR No. 801

This case arose upon the filing of an unfair labor practice complaint by the General Services Administration, Region V Council of NFFE Locals, National Federation of Federal Employees (Complainant) alleging that the Respondent violated Section 19(a)(2) and (3) of the Order. The complaint, as amended, alleged essentially that the Respondent improperly assisted the American Federation of Government Employees (AFGE) in violation of Section 19(a)(3) of the Order by not preventing representatives of the AFGE from performing certain alleged improper campaign activities during an election campaign; by permitting the AFGE, contrary to the GSA Administrative Manual, to post a letter on its bulletin board which contained, among other things, a statement that the NFFE had appealed to racial bigotry during the campaign; and by permitting the posting and distribution by the AFGE of another document in locations where the NFFE was not permitted to distribute literature. The complaint also alleged that the Respondent violated Section 19(a)(2) of the Order by proposing to suspend an employee because of his NFFE activity; by insisting that the employee's appeal of his suspension must be filed by the AFGE (the accredited representative of his unit) instead of by the employee himself or his chosen representative, and that it be filed under the negotiated procedure instead of the agency procedure; by insisting that an employee's grievance over a reprimand based on another incident be filed under the negotiated procedure in the same manner as noted above; and by issuing a memorandum limiting access to the Activity during non-work time for the purpose of discrimination against an employee because of his membership in the NFFE.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. He found that the Respondent had not improperly assisted the AFGE in violation of Section 19(a)(3) of the Order. In this regard, he determined that it had no knowledge of the alleged improper campaign activities until they were completed and did not sanction or approve them. Further, he found that when the Respondent permitted the posting of a letter by the AFGE after the election it was unaware of possible violation of its regulations and promptly removed this letter when one of its officials pointed out that posting such a letter was improper. He also noted that the letter was in response to objections to the election. No evidence was presented in support of the remaining Section 19(a)(3) allegation.

In dismissing the Section 19(a)(2) allegations, the Administrative Law Judge found that there was no evidence to support the allegation that an employee was suspended because of his activities on behalf of the Complainant, or that he was singled out to encourage or discourage membership in a labor organization. Nor was there evidence of union animus. He found that the insistence that the employee appeal his suspension through the negotiated procedure, represented by the exclusive representative of his unit, did not violate Section 19(a)(2) because it was beyond the Administrative Law Judge's jurisdiction to determine whether the Respondent improperly failed to apply the agency appeals procedure. Moreover, if the Respondent improperly interpreted the scope of the negotiated procedure this was not a clear blatant violation of the agreement in violation of the Executive Order and even if it were a clear breach of the agreement, there was no evidence that the application of the agreement was discriminatory. No evidence was presented to support the allegation that an employee was discriminated against by being required to use the negotiated grievance procedure, rather than the agency procedure in filing a grievance over a reprimand. Finally, the memorandum limiting access to the Activity was not shown to have been discriminatorily applied.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendation and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
GSA REGION V,
PUBLIC BUILDINGS SERVICE,
MILWAUKEE FIELD OFFICE

Respondent

and Case No. 50-13094(CA)

GENERAL SERVICES ADMINISTRATION,
REGION V COUNCIL OF NFFE LOCALS,
NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On August 17, 1976, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding 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 Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13094(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 18, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

. . . . . .
In the Matter of :

GENERAL SERVICES ADMINISTRATION :
GSA REGION V
PUBLIC BUILDINGS SERVICE :
MILWAUKEE FIELD OFFICE
Respondent :

Case No. 50-13094(CA)

and :

GENERAL SERVICES ADMINISTRATION :
REGION 5 COUNCIL OF NFFE LOCALS
NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES
Complainant :
. . . . . .

Robert J. Gorman
Chief Union Negotiator
Council of NFFE Locals
GSA Region 5
National Federation of
Federal Employees
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For the Complainant

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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 and filed October 20, 1975 alleging violations of Sections 19(a)(1),(2), and (3)

of the Executive Order. An amended complaint dated November 6, 1975 and filed November 7, 1975 alleged violations of the same Sections of the Executive Order.

As amended, the complaint alleged seven unfair labor practices by the Respondent. It did this by attaching to the complaint copies of two letters, each dated July 5, 1975, one of which was an unfair labor practice charge (see Section 203.2(a)(1) of the Regulations) alleging four incidents of conduct by the Respondent that the Complainant charged were each a violation of Section 19 (a)(2) of the Executive Order. The other attachment to the complaint was an unfair labor practice charge alleging three incidents of conduct by the Respondent that the Complainant charged were each a violation of Section 19(a)(3) of the Executive Order. The amended complaint stated that the charges were discussed with the Respondent and were not resolved (except that one of the seven charges was resolved in part).

The seven alleged unfair labor practices, as stated in the two letters dated July 5, 1975 copies of which were attached to the complaint, were:

I. Alleged Violations of Section 19(a)(3);

A. On May 20, 1975 the Respondent did not prevent representatives of AFGE from entering federal premises (during an election campaign in which an NFEE local was trying to replace an AFGE local as the representative of a unit of Respondent's employees) without clearance and distributing a flyer that contained untrue statements about NFEE, and AFGE made contacts with employees in areas to which NFEE was denied access. In not preventing such AFGE conduct, the Respondent improperly assisted AFGE in violation of Section 19(a)(3).

B. On or about June 5 or 6, 1975 (after the election had been held), Respondent permitted an official of AFGE Local 1346 to post on the AFGE bulletin board a letter that attacked the integrity of NFFE and that accused NFEE of racial bigotry, and this constituted unlawful assistance to AFGE.

C. On or about June 5, 1975 AFGE Local 1346 distributed a bulletin and posted it on the bulletin board. By permitting its distribution in the "Swing Room" (after the election) and placing a slightly different version in the women's lockers (areas in which NFFE was not permitted to distribute literature), the Respondent improperly assisted AFGE.

II. Alleged Violations of Section 19(a)(2).

A. On March 12, 1975 the Federal Protective Service Division proposed to suspend Frank A. Swiatly for five days after singling him out for extraordinary observation because he was an NFFE member and had been acting as an NFFE representative.

B. On May 9, 1975 the Respondent insisted that Mr. Swiatly's appeal of his suspension must be filed by AFGE Local 1346 (the accredited representative of Swiatly's unit) instead of by Swiatly himself or a representative chosen by him, and that it be filed under the negotiated grievance procedure of Local 1346 instead of the agency procedure, thereby discriminating against Swiatly because of his NFFE membership.

C. On June 26, 1975 the Respondent insisted that a grievance based on an official reprimand of Swiatly must be filed by the AFGE Local instead of by Swiatly himself or his chosen representative, and that it be filed under the negotiated grievance procedure instead of the agency procedure, and that this was done to discriminate against Swiatly because of his NFFE membership.

D. On May 27, 1975 the Respondent's Buildings Manager issued a memorandum restricting the hours that "GSA-BMD" employees could have access to or remain in certain areas; that although Swiatly was not a "BMD" employee he "was told" that the memorandum applied to him; that this denied to an NFFE Special Representative access to an NFFE exclusive area in the Federal Building in violation of an NFFE-GSA agreement (covering another unit of employees represented by NFFE for which Swiatly was a Special Representative) and in violation of Section 19(a)(6) of the Executive Order; and that the memorandum was issued to discriminate against Swiatly because of his NFEE membership.

On January 8, 1976 the Respondent filed a response to the amended complaint in some detail in which it denied it had committed any unfair labor practices in violation of Section 19(a)(2) or Section 19(a)(3) of the Executive Order.

On May 10, 1976 the Regional Administrator issued a Notice of Hearing to be held on June 15, 1976 in Milwaukee, Wisconsin. Hearings were held in that City on June 15 and June 16. The Complainant was represented by its Chief Union Negotiator and the Respondent by an attorney. Both sides introduced evidence, examined and cross-examined witnesses,

and made closing arguments. At the conclusion of the hearing the time for filing briefs was extended to July 19, 1976 and was later further extended for good cause to August 9, 1976. Timely briefs were not filed.

FACTS

Local 1346 of the American Federation of Government Employees is the recognized exclusive representative of certain employees of the Respondent, "including guards and Federal Protective Officers, of the Public Buildings Service, Milwaukee Field Office" of the General Services Administration. Frank A. Swiatly is an employee in that Unit. He is a guard in the Federal Protective Division, General Services Administration, Milwaukee Field Office. He is not a member of that Local or of A.F.G.E. He is a member of a Local of the National Federation of Federal Employees. That Local is represented in collective bargaining by GSA Region 5 Council of N.F.F.E. Locals, the Complainant in this case. The NFFE Local is the representative of other units of employees of Respondent in which Swiatly is not employed, but he is a Special Representative of N.F.F.E. for those units.

Prior to May, 1975 A.F.G.E. Local 1346 was the exclusive representative of the unit of Respondent's employees including Swiatly. About March 1975 a local of the National Federation of Federal Employees filed a petition for an election to determine whether it should replace Local 1346 as the exclusive representative of the employees in that unit. The election was ordered and the campaign was conducted from some time in March to the latter part of May when the election was held. The A.F.G.E. local prevailed and continued to be the exclusive representative. The N.F.F.E. local filed objections to the election. The record in this case does not show what disposition was made of those objections but it does show that at the time of the hearings in this case, June 15 and 16, 1976, Local 1346 was still the accredited and recognized exclusive representative of that unit. The grounds of the objection to the election were not the same as the alleged misconduct in this case.

Alleged Violations of Section 19(a)(3)

I, A. The election was held within two or three days after May 20, 1975. On May 20, 1975, at about 11:45 A.M., a representative of the A.F.G.E. came to the building where the members of the unit were employed, and asked to see the building manager. The building was out of the building attending to other duties from 11:30 A.M. to 12:30 P.M. that

day. The A.F.G.E. representative and another A.F.G.E. representative went to the "swing room" 1/ where some members of the unit were congregated and spoke to them and showed them a moving picture. The swing room was not one of the places where campaigning was permitted. The record does not indicate, and I do not find, that any representative of management knew the A.F.G.E. men were in the swing room while they were there. After they left, Swiatly told the building manager they had been there and complained about it. There is no evidence, and I do not find, that N.F.F.E. asked for permission or tried to use the swing room for campaigning.

I, B. On June 5 or 6, 1976, after the election had been held, the Building Manager permitted the President of Local 1346 to post on the A.F.G.E. bulletin Board a copy of a letter from National Vice-President of A.F.G.E Kaplan to the L.M.S.A. Area Director concerning the N.F.F.E. objections to the recent election. The union bulletin board is near the time clock area. In that letter Vice-President Kaplan stated that during the campaign he had been advised by an employee in the unit that N.F.F.E. had been appealing to "racial bigotry" and that A.F.G.E. would like "the N.F.F.E. campaign practice of appealing to racial prejudice looked into."

The posting of such statements was contrary to the GSA Administrative Manual. A day or two after it was posted the Building Manager received a telephone call from a GSA Employee Relations Officer in the Regional office in Chicago telling him that posting such a statement was improper and the posted letter should be removed. The Building Manager promptly removed it.

I, C. No evidence was introduced concerning the allegation concerning improper distribution of literature in the swing room and in the women's lockers. 2/

II, A. On February 11, 1975 Seargeant Karnopp, Swiatly's supervisor, came to work at 7:00 A.M. His tour of duty that day began at 8:00 A.M. but he came early to take care of some preliminary matters. Swiatly's tour of duty as a building guard that day was midnight to 8:00 A.M. Some

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1/ The "swing room" is an area where the male custodial and wage board employees had lockers and changed their clothes and could eat their lunch. There is also a women's locker room.

2/ Tr. 2-9.

time before 8:00 A.M. Karnopp went around to Swiatly's duty station (at the 24-hour entrance) and saw, or thought he saw, Swiatly asleep. Karnopp took a picture of Swiatly. Karnopp customarily carried a small camera with him to take a picture of unusual situations or situations calling for remedy that he thought could be portrayed pictorially more vividly than verbally. It was not unusual for Karnopp to come to the building outside his tour of duty to observe the job performance of those he supervised. There is nothing in the record to indicate any anti-union animus by Karnopp or any anti-N.F.F.E. animus or any anti-Swiatly animus because of his union position or activities.

On March 12, 1975 it was proposed to suspend Swiatly for five days for sleeping on the job on February 11, 1975, and he was in fact suspended.

II, B. Swiatly attempted to appeal his suspension through the agency-prescribed grievance procedure but was told by the Respondent that he could present it only through the negotiated grievance procedure. The negotiated agreement does not contain a provision concerning the procedures for imposing or grieving or appealing from the imposition of discipline; the section entitled "Management Rights" provides that management has the right in accordance with applicable laws and regulations to take disciplinary action against employees. 3/ The negotiated grievance procedure provides that it shall be the exclusive procedure "for the consideration of grievances over the interpretation, or application, of this agreement. ..." 4/

II, C. There was no evidence introduced concerning the conduct concerning a reprimand alleged as described in item II, C above under Statement of the Case.

II, D. On May 27 the Buildings Manager of the Respondent posted a notice concerning "Building Hours". It prescribed a new policy pursuant to which certain described classes of employees, including Swiatly, would not be authorized to enter most portions of the building more than one hour before their starting time or remain more than thirty minutes after their quitting time except when working overtime. The notice concluded with the statement:

> "If for any reason you feel you cannot comply with this Memorandum, please feel free to discuss your reason with Mr. Walsh or myself."

3/ Exh. C-2, p. 2.

4/ Exh. C-2, Sec. 17-2, p. 21.

Swiatly, athough not employed in a unit represented by N.F.F.E., was a Special Representative of N.F.F.E. for two units it represented one of which consisted of employees located in that building. Swiatly was of the belief that because of that notice he was precluded from entering or being in the building, except during the prescribed hours, to discuss union business with employees represented by N.F.F.E. The N.F.F.E. agreement provided in Section 8.5 of C. Exh. 3, p.9:

> "Visitation Rights. To enable the Union to meet and discharge its obligations and responsibilities under this agreement, authorized representatives shall be permitted to visit places of work of the Employer ... providing prior arrangements are made with ... appropriate official."

Swiatly was an authorized representative of N.F.F.E. for employees in the building. There is no evidence that at any specific time or any specific occasion he was inhibited from exercising rights under that provision. At no time did Swiatly or anyone else seek to make "prior arrangements" under that provision and had it denied, and at no time did Swiatly even attempt to discuss relief from the notice under its last paragraph quoted above.

Discussion and Conclusions

The complaint should be dismissed for the following reasons:

Alleged Violations of Section 19(a)(3)

I, A. The Respondent did not sanction, approve, or close its eyes to A.F.G.E.'s use of the swing room for campaigning in the one isolated instance. It was unaware of it until it was over. Perhaps A.F.G.E. acted improperly in visiting an unauthorized area. If so, its misconduct does not constitute an unfair labor practice by the Respondent in the absence of condoning or closing its eyes to such conduct. It did neither.

The Complainant argued that the Respondent had the obligation under the Executive Order to have supervisory personnel available at all times and properly positioned to prevent campaigning in unauthorized places. I find no such obligation in the Executive Order.

I, B. The Building Manager, after the election, permitted A.F.G.E. to post a letter on its bulletin board which contained, inter alia, a statement that N.F.F.E. had appealed to racial bigotry during the campaign. This was contrary to GSA regulation. The Building Manager was unaware such posting was a violation of regulation. A day or two later, when another official of GSA pointed out to the Building Manager the impropriety of A.F.G.E. posting a letter containing such a statement, the Building Manager promptly removed it.

A simple departure by an agency from its own regulations, of itself, would not contravene any of the proscriptions of the Executive Order. The complaint that this incident was a violation of Sections 19(a)(3) which proscribes sponsoring or otherwise assisting a labor organization is insufficient. In this case the posting was after the election had been held, and the letter was in response to the objections to the election. Permitting a letter containing such a statement was not assistance in the election which had already been held. Nor is it perceived how it otherwise assisted A.F.G.E in violation of Section 19(a)(3).

I, C. No evidence, none at all, was introduced or offered concerning this alleged violation.

Alleged Violations of Section 19(a)(2)

II, A. Sergeant Karnopp, Swiatly's supervisior, saw, or believed he saw, Swiatly asleep on duty. As a consequence, Swiatly was suspended for five days. Karnopp had come to the builidng outside his own duty hours to attend to some chores. Contrary to Complainant's assertion, unsupported by probative evidence, it was not unusual for Karnopp to come to the building outside duty hours, and when he did so, to observe the guards he supervised. There was no probative evidence that Swiatly was singled out for observation; there was not even evidence that he was not asleep. And even if Swiatly was singled out, there was no evidence that he was singled out to encourage or discourage membership in a labor organization. There was no evidence of union animus of Karnopp or anyone else, only speculation by Complainant's representative at the hearing. That is not enough.

II, B. The Respondent and A.F.G.E. Local 1346, Swiatly's representative, had an agreement that included a negotiated grievance procedure. There was also an agency-prescribed grievance procedure. Swiatly attempted to present his grievance over his five-day suspension under the agency grievance procedure. The Respondent took the position that the negotiated procedure was applicable and was exclusive.

The Complainant took the position that the negotiated procedure was not applicable.

With respect to the Complainant's contention that the Respondent improperly failed to apply the agency appeals procedure, the resolution of such dispute is beyond our jurisdiction. United States Postal Service, Berwyn Post Office, Illinois and Dennis J. Brodie, A/SLMR No. 272. And if the Respondent incorrectly interpreted the scope of the negotiated grievance procedure, it was simply a disagreement over the proper interpretation of the agreement and not such a clear, blatant violation of the agreement as to constitute a unilateral change in the agreement in violation of the Executive Order. General Services Administration Region 5, Public Buildings Service, Chicago Field Office and Local 739, N.F.F.E., A/SLMR No. 528; Aerospace Guidance and Metrology Center, Newark Air Force Station and Local Union 2221, American Federation of Government Employees, A/SLMR No. 677. And even if it were a clear breach of the agreement, it would not be a violation of Section 19(a)(2), encouragement or discouragement of membership in a labor organization by discrimination, the only direct violation alleged. There was not a semblence of evidence that the application of the agreement in the manner involved here was discriminatory.

II, C. No evidence, none at all, was introduced or offered concerning this alleged violation concerning a grievance over a reprimand.

II, D. The Building Manager posted a notice restricting access of employees to most parts of the building to the time between one hour before starting time and thirty minutes after quitting time with the proviso that if any employee for any reason could not comply, "please feel free to discuss your reason with Mr. Walsh or myself." Swiatly, a building guard, was told the notice applied to him.

Swiatly was also a Special Representative of N.F.F.E. for a unit of Respondent's employees employed in the building although he was not employed in that unit. The collective agreement between the Respondent and N.F.F.E. covering that unit provided that authorized representatives of N.F.F.E. shall be permitted to visit places of work "providing prior arrangements are made with ... appropriate official." Swiatly felt inhibited by the notice from visiting employees in the unit he represented except during the hours prescribed by the notice. The unfair labor practice charge alleged that the notice was a violation of Sections 19(a)(6) and 19(a)(2) of the Executive Order.

The complaint does not allege that the notice was a violation of Section 19(a)(6) and so such contention is not properly before us. United States Air Force, 380th Combat Support Group, Plattsburg Air Force Base and Mary J. Pemberton, A/SLMR No. 557. But even if it had so alleged, the facts fall far short of sustaining it. Swiatly did not, as the notice suggested, take up with the Building Manager or Mr. Walsh his need for access at other than the prescribed hours. Nor did he or his union ever seek arrangements to visit the building and been denied them. There appears to have been no breach of contract at all, and even if there were it did not remotely resemble the kind of breach described in the GSA Region 5 case, supra, A/SLMR No. 528 or the Newark Air Force Station case, supra, A/SLMR No. 677.

With respect to the contention that the notice constitutes a violation of Section 19(a)(2), there was no evidence it was discriminatorily applied or was otherwise discriminatory.

Since each of the seven alleged unfair labor practices was either factually unsupported or where factually supported did not constitute an unfair labor practice in violation of the cited subparagraph of Section 19(a) of the Executive Order, the complaint should be dismissed.

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: August 17, 1976
Washington, D.C.

February 18, 1977

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

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
A/SLMR No. 802

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2667 (Complainant) alleging, in substance, that the Respondent had violated Section 19(a)(1) and (2) of the Order by: (1) an annual appraisal of a union official designed to intimidate him and discredit his activities in Local 2667; and (2) a failure to promote the union official because of his union activities.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety on the basis that the Complainant had failed to prove the allegations of its complaint by a preponderance of the evidence. The Administrative Law Judge found the Complainant had shown only that the union official involved, an alternate union steward, had not been selected for promotion to a newly created position for which he and a number of other individuals had been found to be qualified. In this connection, the Administrative Law Judge found no evidence of anti-union animus based principally on his finding that the supervisory personnel involved in the selection process for the newly created position were not aware that the individual involved was a union official during the period in question. With respect to the individual's annual appraisal, the Administrative Law Judge credited the testimony of the supervisor involved that the reference to "employee associations' activities" in the appraisal was not in any way related to union activities.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 802

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Respondent

and Case No. 22-6503(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2667

Complainant

DECISION AND ORDER

On September 29, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above entitled proceeding, finding 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 Recommended Decision and 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 Recommended Decision and Order 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.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6503(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 18, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Respondent		
and	:	Case No. 22-6503(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2667 Complainant		

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For the Complainant

LeRoy B. Curtis
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Equal Employment Opportunity Commission
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For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 18, 1975, under Executive Order 11491, as amended, by American Federation of Government Employees, Local 2667 (AFL-CIO), (hereinafter called the Union or Complainant), against the Equal Employment Opportunity Commission, (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Acting Regional Administrator for the Philadelphia, Pennsylvania Region on August 3, 1976.

The Complaint alleges that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its actions in failing to select employee DAvid Butler for promotion and making references to Mr. Butler's union activities in his annual job performance appraisal.

A hearing was held in the captioned matter on August 26, 1976, in Washington, D.C. 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 findings of fact, conclusions and recommendations.

Findings of Fact

Mr. David Butler, the alleged discriminatee herein, was hired by the Respondent as a GS-4 Voucher Examiner on August 29, 1973. Mr. Butler received a within grade increase to a GS-4, Step 2 on February 3, 1974, and was promoted to a GS-5 Voucher Examiner on April 14, 1974. Subsequently, Mr. Butler was given a within grade increase to a GS-5, Step 2 on April 13, 1975.

In accordance with a collective bargaining agreement in effect between the Union and the Agency, Mr. Butler was designated alternate steward for the Financial Documents Examining Branch, Financial Services Division, Office of Management, on January 9, 1975. Mr. Butler became the regular union steward on May 31, 1975, upon the resignation of Mary Kinzer. According to the record, the only union activity participated in by Mr. Butler as a union official occurred on January 28, 1975, when he accompained temporary employee Gloria Elmore and acting union president Alicia Columna to the Deputy Director's office to inquire about the failure of Miss Elmore to receive a certain paycheck.

On February 26, 1975, Mrs. Willie King, Supervisor, Financial Documents Examining Branch prepared a SF 52, a request for the establishment of a new position entitled GS-6 Voucher Examiner. Following approval of supervisor King's action by the Acting Executive Director, the matter was forwarded to personnel management specialist Harvey Lee for further action. Thereafter, Mr. Lee prepared a vacancy announcement with an opening date of April 7, 1975, and a closing date of May 2, 1975. Anticipating that there would not be available many qualified applicants among the Respondent's

employees, 1/ Mr. Lee concurrently prepared a form SF 39, which requested the Civil Service Commission to prepare and submit a list of eligibles from other Government Agencies.

Subsequently, between May 2, 1975, the closing date of the vacancy announcement, and May 23, 1975, the names of three eligible qualified employees were forwarded to the selecting official. Two from the Respondent's installation and one from the Civil Service roster. (Although six names were included on the Civil Service Commission's certification of eligibles, five either declined or failed to respond). Mr. Butler, the alleged discriminatee herein, was one of the two employees from Respondent's installation who was certified as qualified for the announced position. Due to the small number of eligibles available for selection, a second certification was requested and subsequently received from the Civil Service Commission. A Mr. Daniel Dinnin, whose name appeared on the second certification list submitted by the Civil Service Commission, was eventually selected over Mr. Butler for the newly created position, GS-6 Voucher Examiner. The selection was made by Mrs. King. 2/

With respect to employee performance appraisals, the Collective Bargaining Agreement requires that each employee receive an annual performance appraisal. The appraisal is usually given by the employee's immediate supervisor on EEOC Form 173. Supervisor King gave Mr. Butler an appraisal for the period May 1, 1974, to April 30, 1975. In the narrative comment section of the appraisal Supervisor King wrote the following:

1/ According to the credited testimony of Mr. Lee, since most of the employees of Respondent are equal opportunity specialists it is difficult to generate interest in positions such as Voucher Examiner. It is for this reason that Respondent utilized the Civil Service Commission's resources.

2/ The record indicates that the Respondent has in the past made selections for vacancies from list of eligibles containing as few as two names.

Tardiness - Early Morning Leave. Outside influence employee sometimes involve official time and employee associations' activities.

Employee is very orderly with his work.
Employee is very thorough.
Employee has very good writing skills.

When questioned about the meaning of "employee associations' activities" in the appraisal, Mrs. King, whose testimony I credit, stated that she was referring to the continual discussions at Mr. Butler's desk concerning sports and taxes. Other employees, who had admittedly participated in such discussions, ceased such participation upon the request of their respective supervisors.

Both Mrs. King, Mr. Lee and other officials of the Respondent who were involved in either the appraisal of Mr. Butler or the selection for the GS-6 voucher examiner position denied any knowledge of Mr. Butler's union position or activities prior to June or July 1975.

The record is barren of any evidence of union animus. In this latter regard, Mrs. King further testified that it had been her practice to discuss employee problems with both Steward Kinzer and Chief Steward Hilda Davis. According to Mrs. King, Steward Kinzer usually sat in with her when she counseled an employee.

Discussion and Conclusions

Section 203.15 of the Rules and Regulations of the Assistant Secretary for Labor Management Relations imposes upon a complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. The Complainant has failed in this endeavor.

All that has been shown by the Complainant is that Mr. Butler, who had been an alternate union steward, had not been selected for promotion to a newly created position for which he and a number of other people had been found qualified. In the absence of any evidence of union animus or union activity on Mr. Butler's part calculated to meet with

disfavor by responsible supervisory representatives of the Respondent insufficient basis exists for a 19(a)(2) finding. This is particularly true where, as here, there is no probative evidence indicating that the supervisory personnel involved in the selection for the newly created position were even aware of Mr. Butler's union position as alternate steward prior to the filing of the charges underlying the instant complaint. Accordingly, and since I credit Mrs. King's denial that the reference to "Associations' activities" in Mr. Butler's annual appraisal was in any way related to union activities, I shall recommend that the complaint be dismissed in its entirety.

Recommendation

It is hereby recommended to the Assistant Secretary that the complaint be dismissed in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: SEP 29 1976
Washington, D.C.

February 18, 1977

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 HEALTH, EDUCATION,
AND WELFARE, U.S. OFFICE OF
EDUCATION, HEADQUARTERS
A/SLMR No. 803

This case involved a petition for clarification of unit (CU) filed jointly by the American Federation of Government Employees, Local 2607, AFL-CIO (AFGE) and the Activity seeking to clarify the status of the employees of the Activity's Equal Employment Opportunity Office. The Activity took the position that the employees in the EEO Office classified as EEO Specialist and EEO Assistant should be excluded from the unit because they are engaged in Federal personnel work in other than a purely clerical capacity and that the two clerical employees be excluded from the unit because they are confidential employees by virtue of their typing of and access to confidential EEO matters. The AFGE contended, on the other hand, that all of the employees in question should be included in its exclusively recognized unit.

The Assistant Secretary found, in agreement with the Activity, that the employees classified as EEO Specialist and EEO Assistant should be excluded from the exclusively recognized unit. Thus, he noted that the employees in these classifications have unrestricted access to the Activity's personnel and other confidential files; they assist the Activity's managers in the formulation of the affirmative action plan; they regularly monitor the Activity's personnel actions; and they are involved in training concerning EEO. With respect to the two clerical employees alleged to be confidential, the Assistant Secretary noted that mere access to and typing of confidential material does not warrant excluding an employee from an exclusively recognized unit. However, the Assistant Secretary found that the senior clerical employee should be excluded from the exclusively recognized unit as a confidential employee based on her duties as the personal secretary to the EEO Officer who is responsible for the formulation of agency labor relations policy with respect to EEO matters.

Accordingly, the Assistant Secretary ordered that the unit be clarified consistent with his findings.

A/SLMR No. 803

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, U.S. OFFICE OF
EDUCATION, HEADQUARTERS

Activity-Petitioner

and Case No. 22-6825(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2607, AFL-CIO

Labor Organization-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 Bridget Sisson. 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:

The Activity and the American Federation of Government Employees, Local 2607, AFL-CIO, herein called AFGE, seek to clarify the status of the employees of the Equal Opportunity Office of the Headquarters, U.S. Office of Education, Department of Health, Education and Welfare through the subject jointly filed petition. The Activity takes the position that the three Equal Employment Opportunity (EEO) Specialists and the EEO Assistant employed in the EEO Office are engaged in Federal personnel work in other than a purely clerical capacity and, therefore, should be excluded from the exclusively recognized unit. It also contends that the two clerical employees of the EEO Office should be excluded from the unit as they are confidential employees. The AFGE contends, on the other hand, that there is no basis for excluding the employees in question from its exclusively recognized unit.

The record reflects that the AFGE was certified as the exclusive representative for all General Schedule employees of the Office of Education, Headquarters, on August 24, 1970. 1/ The Activity, which is one division of the Department of Health, Education and Welfare, is headed by a Commissioner. Under the Commissioner, and responsible to him, are several staff offices, among which is the EEO Office where the employees in question are located. The Director of the EEO Office is responsible for administering the Activity's total EEO Program which is mandated by Executive Order 11478 and the provisions of the Federal Personnel Manual (FPM), Chapter 713. In this regard, the EEO Office oversees the EEO complaint procedure, coordinates and finalizes the Activity's affirmative action plan, monitors the Activity's personnel program, generally with respect to EEO, and provides technical assistance and training to the Activity's employees and management with respect to EEO matters.

As one of its specific functions related to allegations of discrimination, the EEO Office appoints, trains and supervises EEO Counselors, which employees serve part-time as the initial point of contact for EEO allegations and attempt to resolve such charges informally. The EEO Office also appoints and gives assistance to employees who serve part-time as EEO Investigators after a formal complaint alleging discrimination has been filed. 2/ In this regard, at least 30 percent of the investigations are conducted by the EEO Specialists as there is a shortage of EEO Investigators. The EEO Investigators have complete access to the Activity's confidential personnel files and other related confidential records of the Activity in connection with the investigations, and they are responsible for developing a formal investigative file in which there is restricted employee access, but from which much of the confidential information has been sanitized. Based on this investigative file, copies of which are provided to the complainant and his representative, the EEO Officer, with the participation of the EEO Specialists and the EEO Assistant, formulates his recommendations to the Commissioner regarding disposition of the complaint. The record reflects that such recommendations are generally accepted, including recommended discipline of managers who were found to have been engaged in discrimination. While the clerical employees in the EEO Office type, and have access to, both the investigative files and the recommendations made, they do not participate in the decision making process.

In its function of coordinating the Activity's affirmative action plan, the EEO Office assists lower level organizational components in developing their plans and checks such plans upon their submission for procedural and regulatory correctness. Thereafter, the EEO Office compiles the plans and makes the overall recommendations of affirmative action to the Commissioner, which recommendations historically have been accepted. In this regard, the EEO Office is the only Activity function that has access to EEO employment statistics in connection with the development of the affirmative action plan.

1/ The certified unit is described as all General Schedule and professional employees in the Office of Education, Washington, D.C., excluding supervisors, managerial officials, temporary employees, employees engaged in Federal personnel work in other than a purely clerical capacity, Wage Board employees and guards.

2/ Such complaints may be filed by third-parties such as labor organizations, as well as by employees under the FPM Regulations.

As noted above, the EEO Office also monitors personnel matters generally as well as other Activity actions with respect to EEO. In this connection, the EEO Office receives copies of all promotion actions and plans to receive copies of all personnel actions in the future for monitoring purposes. In addition, all proposed changes in regulations are reviewed by the EEO Office, and the record reflects that it has recommended changes in proposals which have been implemented. Moreover, the EEO Office will occasionally initiate an EEO complaint action based on evidence of discrimination that has been adduced in connection with its general monitoring of personnel.

With respect to training, the record reflects that the EEO Office periodically holds training sessions for new supervisors. Additionally, it participates in the orientation of new employees and it assists in the hiring of minorities by maintaining a minority application file, by making appearances at various minority institutions and by assuring that the areas of consideration for the filling of vacancies are broad enough so as not to discourage minority application. The EEO Office also assists the Activity's Training Office in connection with the upward mobility portion of the affirmative action plan.

The record reflects that all three of the EEO Specialists involved herein spend at least a portion of their time involved in each of the functional areas of EEO. Moreover, the EEO Assistant is being trained in each of the functional areas of EEO and is being given increased responsibility as she progresses in her training. The foregoing responsibilities require that all four of these employees have broad access to the Activity's confidential personnel information and that they be involved in monitoring personnel actions.

With regard to the two clerical employees, the record reveals that they have no access to the Activity's confidential personnel files and they have no responsibility with respect to the Activity's affirmative action plan or its personnel policies and procedures. Both employees spend the majority of their time typing investigative files which are restricted as to access and which contain sanitized documents involving confidential information with respect to employees other than the complainant involved. The record further discloses that the senior clerical (GS-7) also serves as the personal secretary to the EEO Officer. In this connection, she is responsible for typing all memoranda between the EEO Officer and the Labor Relations Officer regarding the EEO Officer's recommendations as to the negotiated agreement and labor relations policies in general. In addition, she types all performance appraisals and keeps the EEO Officer's personal files, which include records of internal grievances, minor discipline concerning members of the EEO staff, and copies of the EEO staff's performance appraisals. Finally, unlike the other clerical, who is a GS-5, she is responsible as the EEO Officer's personal secretary for typing all final recommendations regarding EEO complaints and the affirmative action plan submitted to the Commissioner.

Based on the foregoing circumstances, I find that the EEO Specialists and the EEO Assistant are engaged in Federal personnel work in other than a purely clerical capacity. Thus, as noted above, the employees in these classifications have unrestricted access to the Activity's confidential personnel files and to other confidential information that may be related to EEO matters. Moreover, they assist the Activity's managers in the formulation of the Activity's affirmative action plan, which affects all of the Activity's employees, and they are responsible for monitoring the Activity's day-to-day personnel actions with respect to EEO. They also regularly participate in the training of the Activity's supervisors, in the orientation of new employees, and in assisting the Activity's Training Officer with respect to the upward mobility portion of the affirmative action plan. Under these circumstances, I shall exclude these employees from the exclusively recognized unit. 3/

With respect to the two clerical employees in the EEO Office, it has been found previously that mere access to, and typing of, investigative files does not warrant the exclusion of an employee from an exclusively recognized unit. 4/ However, with regard to the senior clerical employee in the EEO Office, I find that this employee should be excluded from the unit as a confidential employee based upon her duties as personal secretary to the EEO Officer. Thus, as noted above, the record shows that she serves in a confidential capacity to the EEO Officer, who is responsible for the formulation of agency labor relations policy with respect to EEO matters, and who also is responsible for internal labor relations matters within the EEO Office itself. 5/ Under these circumstances, I shall exclude the clerical employee serving as the EEO Officer's personal secretary from the exclusively recognized unit. However, I shall not exclude the other clerical employee from the exclusively recognized unit as the record does not support a finding that she is a confidential employee. Thus, noting that she merely has access to certain investigative files, I find that she does not act in a confidential capacity to an official engaged in the formulation or effectuation of management policies in the field of labor relations.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 2607, AFL-CIO, was certified on August 24, 1970, be, and it hereby is, clarified by excluding from the unit employees assigned to the Equal Employment Opportunity Office and classified as Equal Employment Opportunity

3/ Cf. U.S. Department of Agriculture, Farmers Home Administration, Colorado, A/SLMR No. 752.

4/ See Virginia National Guard, Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

5/ See U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, A/SLMR No. 428.

Specialist, Equal Employment Opportunity Assistant and the Secretary-Steno, GS-7, who serves as personal secretary to the Equal Employment Opportunity Officer, and by including in such unit the employee in the Equal Employment Opportunity Office classified as Secretary-Steno, GS-5.

Dated, Washington, D.C.
February 18, 1977

Jack A. Warshaw, Acting Assistant Secretary
of Labor for Labor-Management Relations

February 18, 1977

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

SOCIAL SECURITY ADMINISTRATION,
GREAT LAKES PROGRAM CENTER,
CHICAGO, ILLINOIS
A/SLMR No. 804

This case arose as a result of an unfair labor practice complaint filed by Local 1395, American Federation of Government Employees, AFL-CIO (Complainant) alleging essentially that the Respondent violated Section 19(a)(1), (2) and (6) when it did not inform a probationary employee of her right to representation at interviews regarding her conduct, by discriminating against such employee, and by denying the Complainant a right to be represented at interviews between the employee and her supervisor. The complaint also alleged that the Respondent violated the negotiated agreement between the parties.

The Administrative Law Judge recommended dismissal of the complaint on the basis that the record in the instant case showed no evidence of discrimination and that Section 10(e) of the Order had no application to the informal discussions between the above-mentioned employee and her supervisor. With respect to the alleged breach of the parties' negotiated agreement, he concluded that the interviews herein were simply discussions between an employee and her supervisor concerning day-to-day functions and, therefore, were not covered by the negotiated agreement. But even if said discussions were governed by the agreement, the Respondent's contrary view and conduct would amount only to a simple breach of contract not rising to the level of an unfair labor practice.

The Assistant Secretary deferred his decision in the subject case pending the Federal Labor Relations Council's Statement On Major Policy Issue concerning the representational rights of employees under the Order. The Council's statement was issued on December 2, 1976.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, noting also that the parties' disagreed as to whether the agreement is applicable to the probationary employee and that the proper forum for such disagreement is within the grievance machinery of the parties' negotiated agreement, rather than through the unfair labor practice procedures. Consistent with the major policy statement by the Council, he ordered that the complaint be dismissed.

A/SLMR No. 804

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
GREAT LAKES PROGRAM CENTER,
CHICAGO, ILLINOIS

Respondent

and

Case No. 50-13023(CA)

LOCAL 1395, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On March 12, 1976, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order 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 Recommended Decision and Order.

On June 30, 1976, the Assistant Secretary informed the Complainant and the Respondent that it would effectuate the purposes and policies of the Order to defer his decision in the subject case pending the Federal Labor Relations Council's resolution of a major policy issue which has general application to the Federal Labor-Management Relations program:

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

On December 2, 1976, the Council issued its Statement On Major Policy Issue, FLRC No. 75P-2, Report No. 116, finding, in pertinent part, that:

> 1. An employee in a unit of exclusive recognition has a protected right under the last sentence of Section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and
>
> 2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigation meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with Section 11(a) 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations as modified herein.

The amended complaint alleged essentially that the Respondent violated Section 19(a)(1) and (2) of the Order when it did not inform a probationary employee of her right to representation at interviews regarding her conduct and by discriminating against such employee. At the hearing in this matter, the Complainant amended its complaint to allege that the Respondent also violated Section 19(a)(6) of the Order by denying the Complainant the right to be represented at formal discussions, within the meaning of Section 10(e) of the Order, between the Respondent and the employee herein, and that such conduct also violated Article 27, Section b of the parties' negotiated agreement.

The Administrative Law Judge concluded, and I concur, that the record in this case shows no evidence of discrimination and that Section 10(e) of the Order has no application to the informal discussion between the subject employee and her supervisor. With respect to the alleged breach of the negotiated agreement, he further concluded, and I agree, that the interviews herein regarding the aforementioned employee's conduct appear to have been simply discussions between an employee and her supervisor in the course of day-to-day operations of the unit, not covered by Article 27, Section b of the negotiated agreement and that even if they were governed by such Article, the Respondent's contrary view and conduct would constitute a simple breach of the agreement not rising to the level of a flagrant and deliberate breach constituting a unilateral modification of the negotiated agreement. Moreover, the record also demonstrates that the Complainant and the Respondent

disagreed whether Article 27, Section b of the agreement is applicable to a probationary employee. In my view, the proper forum for resolving this issue lies within the grievance machinery of the parties' negotiated agreement, rather than through the unfair labor practice procedures. 1/

Accordingly, and for the reasons set forth by the Council in FLRC No. 75P-2, I agree that the Respondent was not obligated to afford the employee herein union representation or to afford the Complainant the opportunity to be represented at the nonformal meetings herein, and, therefore, its conduct in this regard was not violative of Section 19(a)(1) and (6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13023(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
February 18, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

1/ See Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

SOCIAL SECURITY ADMINISTRATION
GREAT LAKES PROGRAM CENTER
CHICAGO, ILLINOIS
Respondent

and

LOCAL 1395, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
Complainant

CASE NO. 50-13023(CA)

Francis X. Dippel
Labor Relations Branch
Bureau of Retirement and Survivors Insurance
Social Security Administration
516 Altmeyer Building
Baltimore, Maryland 21235
For the Respondent

Maralyn G. Blatch
Staff Counsel
American Federation of Government Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
For the Complainant

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated March 31, 1975 and filed April 1, 1975 alleging violations of Sections 19(a)(1), (2), and (6) of the Executive Order. The complaint was

superseded by an amended complaint dated and filed April 16, 1975. The amended complaint alleged additional facts and alleged that they constituted violations of Sections 19(a)(1) and (2) of the Executive Order. The Respondent filed a Motion to Dismiss dated April 23, 1975; the Complainant filed an Opposition to the Motion to Dismiss dated April 30, 1975; and the Respondent filed a Response to the Opposition dated May 14, 1975. On July 21, 1975, the Regional Administrator issued a Notice of Hearing on the Amended Complaint that alleged violations of Sections 19(a)(1) and (2). The Notice specified that the hearing would be held on October 22, 1975, in Chicago, Illinois.

The Complainant filed with the Regional Administrator a motion dated October 8, 1975 to amend the Amended Complaint and the Notice of Hearing to add violations of 19(a)(6). On October 16, 1975, the Regional Administrator referred the Motion to Amend to the Administrative Law Judge.

The hearing was held as scheduled on October 22, 1975. Both parties were represented by counsel. At the beginning of the hearing the Motion to Amend was granted. At the end of the hearing the time for filing briefs was extended to November 25, 1975. The time for filing briefs was thereafter further extended for good cause to December 12, 1975. Both parties filed timely briefs.

Facts

The National Office of the American Federation of Government Employees, AFL-CIO (National Council of Social Security Payment Center Locals) is and at all relevant times has been the exclusive representative of a unit consisting of non-supervisory employees in the Social Security Administration Program Centers. The individual locals at the Program Centers act for the Council at their respective Program Centers. Local 1395, AFGE is the local at the Great Lakes Program Center. Miss Joan M. Jeter was a member of the unit employed at that Program Center.

The National Council of Social Security Payment Center Locals of A.F.G.E. and the Bureau of Retirement and Survivors Insurance of the Social Security Administration (which includes the Payment Centers), have had collective agreements for some time. The current agreement, applicable at all

relevant times, became effective March 15, 1974. Article 27, Section b of that agreement provides:

> Whenever the conduct of an employee requires that an interview be conducted which may lead to an official reprimand or more serious action, the supervisor shall inform the employee of his or her right to have a representative present.

Joan M. Jeter was employed as a control clerk by the Respondent in a unit of the Post Entitlement Section of a branch of the Respondent. She was employed on August 5, 1974 as a probationary employee. There was one control clerk in each unit of a Section. From the inception of her employment there were problems about her use or abuse of leave.

After two other supervisors of Jeter's unit, Patricia Ann Spade became her supervisor on December 23, 1974. Prior to January 15, 1975, while Miss Jeter was under the immediate supervision of others than Mrs. Spade, Jeter had had counselling and other meetings concerning her leave. After Spade became Jeter's supervisor, and also before January 15, 1974, Karen Robinson, a union steward, told Spade that any time Spade and Jeter had a meeting, Jeter would be entitled to union representation.

On January 13, 1975, Spade told Jeter to file a particular case. Jeter said she did not want to do so, and Spade told her to do it anyway, and Jeter did. Later that day Jeter went to Spade's desk and told Spade that the reason she had said that she did not want to file the case was because she was going to do so anyway and resented being told to do something she was going to do anyway.

Jeter was on leave on January 14. On January 15, when Jeter returned to work, Spade called her to Spade's desk to sign for her January 14 leave and reminded her of the January 13 incident, told Jeter she would not tolerate insubordination, and that if Jeter should be insubordinate again Spade would recommend disciplinary action. At no time at or prior to the January 15 discussion did Spade anticipate disciplinary action because of the January 13, 1975 incident.

On January 16, 1975 another Spade-Jeter incident arose, this time with more serious results. Joseph A. Jazwinski ("Joe"), the Chief of the Post Entitlement Section, had told the control clerks of the several units in the Section to do certain work at a location in his Section. Later Spade saw Jeter there and told her to perform some other task. Jeter replied that she could not because "Joe" had told her to do what she was doing. Spade told Jeter that Spade had spoken to Joe and he had said it would be appropriate for Jeter to perform the other task. Jeter said she would not stop doing what Joe had told her to do and do what Spade asked unless Joe told her to do so. Spade told Jeter that she was Jeter's immediate supervisor and Jeter should do what Spade told her to do. Spade then went to Joe, told him what had happened, and he said that since Spade was Jeter's immediate supervisor she had authority to direct Jeter's work. Spade went back to Jeter and told her that Joe had again said Jeter should do what her immediate supervisor directed. Jeter said she would not change what she was doing unless Joe told her to do so. Spade asked whether Jeter was refusing to comply with her direct order, and Jeter replied in the affirmative. Jeter then went to Jazwinski, told him what had happened, and Jazwinski told her to comply with the directions of her immediate supervisor. Jeter ultimately did comply with Spade's direction.

The next day Jazwinski was absent. Spade discussed the incident of January 16 with the Branch Chief, the next level above Jazwinski, and stated that she thought some kind of discipline should be imposed on Jeter. The Branch Chief agreed and suggested that in view of the incidents described above and Jeter's leave record Spade should recommend Jeter's dismissal. Spade did so recommend, and on January 24, 1975 Jeter was advised by the Regional Representative of the Respondent that her employment was terminated effective February 7, 1975, and Jeter's employment was so terminated. There were some subsequent developments irrelevant to this case.

Article 27, Section f of the Master Agreement provides that termination of a probationary employee is not an "adverse action" but that the Program Center would to the extent feasible give such an employee two weeks notice of such action.

Spade did not, at her discussions with Jeter on January 15 and January 16, 1975 narrated above, advise Jeter that she had a right to have a union representative present. Had she done so, Jeter would have requested the presence of a union representative.

Contentions of the Parties

The Complainant contends that the discussions on January 15 and 16, 1975 were each "an interview" which might have led to "an official reprimand or more serious action" and that the Respondent was under contractual obligation and obligation imposed by the Executive Order to advise Jeter of her right to have a union representative. It contends that the failure to do so discriminated against Jeter in violation of Section 19(a)(2) of the Executive Order although it concedes that Jeter was not discriminated against because of her union affiliation or activities. It urges that not only was Spade's failure to notify Jeter of her right to union representation a violation of the contractual provision but so flagrant a breach and deliberate departure from the contract as to constitute a unilateral change in the agreement in violation of Section 19(a)(6) of the Order. And it contends that all this interfered with Jeter's exercise of her rights under the Executive Order in violation of Section 19(a)(1) of the Order.

The Respondent contends that Article 27, Section b of the Agreement does not have blanket application to probationary employees but as to them is limited by other provisions of the Agreement and by federal regulations. It argues also that the discussions of January 15 and 16, 1975 were not the kind of discussions or interviews contemplated by Article 27, Section b of the Agreement or by Section 10(e) of the Executive Order.

Discussion and Conclusions

The contention that this case presents a violation of Section 19(a)(2) must be rejected.

It is conceded that the alleged discrimination here, if there was one, was not predicated on or motivated by union affiliation or union activity or anti-union animus. In Norfolk Naval Shipyard, Case No. 22-5283(CA) and in Norfolk

Naval Shipyard, Case No. 22-5518(CA) I concluded that for discrimination to fall within the proscription of Section 19(a)(2) of the Executive Order there must be some nexus between the alleged discrimination and union conduct or affiliation or activity of relevant animus. The Complainant urges that those decisions are unsound and should be reconsidered. But the latter of those cases has been affirmed by the Assistant Secretary (A/SLMR No. 548) and the former is pending before the Assistant Secretary in limbo pending resolution of other issues in that case by the Federal Labor Relations Council. 1/ In these circumstances I am bound by the decision in A/SLMR No. 548 and a request for reconsideration of its rationale is not properly addressed to me.

But more fundamentally, the record in this case shows no discrimination. There is no evidence of record, but only assertions of counsel, that Miss Jeter was treated any differently than other employees in similar circumstances.

The discussions between Jeter and Spade on January 15 and 16, 1975 appear to have been simply discussions between an employee and her supervisor in the course of day-to-day operations of the functions of the unit, not covered by Article 27, Section b of the Master Agreement. But even if they were governed by that provision of the Agreement, the Respondent's contrary view and conduct would consitute a simple breach of contract not rising to the level of a flagrant and deliberate breach constituting a unilateral modification of the Agreement. Cf. General Services Administration, Region 5, Public Building Service, A/SLMR No. 528, ALJ Decision p. 7.

The Complainant's reliance on National Labor Relations Board v. J.Weingarten, Inc., 95 S.Ct. 959, 43 L. Ed. 2d 171 and International Ladies' Garment Workers Union v. Quality Manufacturing Company, 95 S.Ct. 972, 43 L. Ed. 2d 189 is misplaced for a variety of reasons. First, decisions under the National Labor Relations Act are not binding precedent

1/ See ALJ decision in Case No. 63-5430(CA), Lackland Air Force Base, pp. 9-10.

in cases under the Executive Order. Second, that case was predicated on Section 7 of the National Labor Relations Act; there is no counterpart of that provision in the Executive Order. And third, in those cases the Supreme Court did not hold that the National Labor Relations Board's interpretation and application of that Section involved in those cases was the required interpretation and application but held only that it was a permissible interpretation as had been its contrary interpretation over a period of thirty years. 2/

Finally, the last sentence of Section 10(e) of the Executive Order has no application here. The conversations between Jeter and Spade on January 15 and 16, 1975 were not "formal discussions between management and employees" within the meaning of that section; as observed above they were merely conversations (although probably not ordinary) between an employee and her supervisor in the course of performing the day-to-day operations of their unit. Nor did they concern "grievances, personnel policies and practices, or other matters affecting general working conditions." 3/

It may be that Spade's reactions were officious, that Jeter acted with sincerity, and that the termination of her employment was a rather severe result of her derelictions. I make no findings and reach no conclusions concerning such matters. They are beyond the purview of Executive Order 11491 as amended. That Order is not a panacea for the world's inequities.

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: March 12, 1976
Washington, D.C.

2/ See ALJ decision in Norfolk Naval Shipyard, Case No. 22-5283, p. 16; ALJ Decision in Lackland Air Force Base, Case No. 63-5430, pp. 8-9.

3/ See ALJ decision in Lackland Air Force Base, Case 63-5430 and cases cited in footnote 5 of that decision.

March 1, 1977

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,
NORFOLK NAVAL SHIPYARD
A/SLMR No. 805

These cases involve unfair labor practice complaints filed by the International Federation of Professional and Technical Engineers, AFL-CIO, and the Tidewater Virginia Federal Employees Metal Trades Council (Complainants) alleging that the Department of the Navy, Norfolk Naval Shipyard (Respondent) violated Section 19(a)(1) and (6) of the Order by unilaterally establishing a policy of using radar to enforce the speed limits within the Norfolk Naval Shipyard. The cases were 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 Regional Administrator for Labor-Management Services.

The Respondent took the position that it was not obligated to meet and confer with the Complainants because the new policy did not change an existing condition of employment and that, even assuming there was a change in employment conditions, prior consultation was not necessary because the establishment of the policy involved was a management right under Sections 11(b) and 12(b) of the Order and there was no request for bargaining concerning impact and implementation.

The Assistant Secretary found that the Respondent's conduct was not violative of Section 19(a)(1) and (6) of the Order. In this regard, he noted that the subject policy did not affect or change employee terms and conditions of employment and that the evidence showed that the Respondent's action did not change the existing traffic regulations at the Norfolk Naval Shipyard. Accordingly, he ordered that the complaints be dismissed.

A/SLMR No. 805

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD

Respondent

and Case No. 22-6637(CA)

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL ONE

Complainant

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD

Respondent

and Case No. 22-6690(CA)

TIDEWATER VIRGINIA FEDERAL
EMPLOYEE METAL TRADES COUNCIL

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Kenneth L. Evans' Order Transferring Case to the Assistant Secretary of Labor, dated October 8, 1976, in accordance with Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject cases, including the parties' stipulation of facts, accompanying exhibits and briefs, the Assistant Secretary finds:

The complaints herein allege that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by establishing a policy of using radar to enforce the speed limits within the Norfolk Naval Shipyard without meeting and conferring with the Complainants.

The Respondent contends that it was not obligated to meet and confer with the Complainants because the new policy did not change an existing condition of employment. It further contends that prior consultation was not necessary even assuming that there was a change in employment conditions because the establishment of the policy involved was a management right under Sections 11(b) and 12(b) of the Order.

Moreover, it asserts that the Complainants did not request bargaining on the impact and implementation of the matter. The Complainants, on the other hand, maintain that the Respondent was required to meet and confer concerning the establishment of the new policy in accordance with Section 11(a) of the Order. Further, if the new policy involved was viewed as a management right under the Order, the Respondent was nevertheless obligated to meet and confer concerning the impact and implementation of such policy.

The facts, as stipulated by the parties, are essentially as follows:

The International Federation of Professional and Technical Engineers, AFL-CIO, and the Tidewater Virginia Federal Employee Metal Trades Council are the exclusive representatives of certain employees of the Respondent. On December 1, 1971, the Respondent published NAVSHIPYDNOR INSTRUCTION 5560.1B (Instruction 5560.1B) which contained the regulations and procedures controlling pedestrian and motor vehicle traffic within the Norfolk Naval Shipyard and the penalties which may be assessed for violations thereof. On December 8, 1975, without consulting with the Complainants, the Respondent published a notice, NAVSHIPYDNOR NOTICE 5560, effective on the date issued, informing all motor vehicle operators within the Norfolk Naval Shipyard that radar would be used on a random basis by the Police Protection Branch to enforce posted speed limits. No provision of Instruction 5560.1B relating to speed limits of the penalties for violation thereof was changed in any way by virtue of the December 8, 1975, notice.

FINDINGS AND CONCLUSIONS

As noted above, the Respondent contends that it was not required to meet and confer with the Complainants concerning the establishment of the new policy because such policy did not change an existing condition of employment. The Respondent contends further that the establishment of the policy involved is a reserved management right under the Order and is not subject to bargaining and that there was no request to bargain on the impact and implementation of such policy.

It is undisputed that the Respondent's decision to use radar to enforce the speed limits in the Norfolk Naval Shipyard did not affect or change employee terms and conditions of employment. Thus, the evidence establishes that the Respondent's action did not change Instruction 5560.1B. Nor did it, in any way, change the traffic regulations of the Norfolk Naval Shipyard, including the posted speed limits and the penalties assessed for violation of the speed limits. Under these circumstances, I find that the Respondent was not required to meet and confer with the Complainant concerning the new method of enforcing the existing policy, and that its failure to do so did not constitute a violation of Section 19(a)(1) and (6) of the Order. Accordingly, I shall dismiss the subject complaints.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 22-6637(CA) and 22-6690(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
March 1, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

March 1, 1977

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,
OGDEN SERVICE CENTER, AND
INTERNAL REVENUE SERVICE, et. al.
A/SLMR No. 806

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, et. al. (Complainants) alleging that the Respondents violated Section 19(a)(1) and (6) of the Order by virtue of their unilateral elimination of certain portions of the Multi-Center Agreement (MCA) upon its expiration and, after such elimination, by attempting to deal directly with unit employees through a memorandum sent to all unit employees from the Internal Revenue Service Commissioner concerning the expiration of the agreement. In this regard, the Respondents viewed those portions of the MCA eliminated after its expiration to be "institutional benefits" which terminated upon the MCA's expiration, while the Complainants asserted that such benefits, once negotiated, became personnel policies and practices which survive the expiration of the agreement, and any unilateral changes were, therefore, violative of the Order. With respect to the Commissioner's memorandum, the Respondents, noting the standard enunciated by the Federal Labor Relations Council in Naval Air Station, Fallon, Nevada, FLRC No. 74A-80 (1975), contended that the Commissioner was obligated to inform employees of the status of the agreement; that the memorandum was purely factual in nature; and that the memorandum must be read in context of an earlier letter written to the same unit employees by the President of the National Treasury Employees Union. Moreover, the Respondent asserted that because of a grievance filed at the Detroit Service Center over the memorandum, the Assistant Secretary, under Section 19(d) of the Order, has no jurisdiction. The Complainants contended, on the other hand, that the memorandum constituted an attempt to deal directly with unit employees, thereby subverting the exclusive representative in violation of the Order. Additionally, the Complainants alleged that Section 19(d) should not bar consideration of the unfair labor practice complaint as the grievance in question was filed at only one Service Center under the MCA, and as the issues of the grievance, in Complainant's view, were not the same as the issues of the complaint.

The Associate Chief Administrative Law Judge concluded that the aspect of the complaint alleging improper unilateral termination of certain "institutional benefits" contained in the MCA be dismissed. Thus, he agreed with the Respondents that only those references to the union were eliminated and, therefore, no personnel policies and practices were altered by the Respondents' actions. With respect to the allegations concerning an alleged improper attempt by Respondents to deal directly with unit employees, the Associate Chief Administrative Law Judge recommended finding a violation of Section 19(a)(1) and (6) as, in his view, the Commissioner's memorandum improperly undermined the National Treasury Employees Union. In this connection, he dismissed Respondent's argument that under Section 19(d) the Assistant Secretary had no jurisdiction in this aspect of the complaint, noting that the grievance was filed at only one Service Center covered under the MCA.

Contrary to the Associate Chief Administrative Law Judge, the Assistant Secretary concluded that a violation of Section 19(a)(1) and (6) should be found with respect to the first aspect of the complaint concerning the alleged improper unilateral termination of certain portions of the MCA, and that the aspect of the complaint concerning Respondents' alleged improper attempt to deal directly with unit employees should be dismissed based on Section 19(d) of the Order. Thus, with respect to the first aspect of the complaint, the Assistant Secretary concluded that only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect terminated with the expiration of a written agreement, while all other rights and privileges continue in effect until such time as they are modified or eliminated pursuant to negotiations or are changed after a good faith bargaining impasse has been reached. With respect to the second aspect of the complaint, noted above, the Assistant Secretary found that both the complaint and the issue raised by the grievance filed at the Detroit Service Center concerned the language of the Commissioner's memorandum, and both sought withdrawal of such memorandum. In this regard, the Assistant Secretary concluded that while technically the grievance was filed at only one Service Center under the MCA, any resolution of the grievance would have been applicable to all of the Service Centers under the MCA.

Accordingly, the Assistant Secretary ordered that the Respondents take certain affirmative actions with respect to the violations of Section 19(a)(1) and (6) and that the complaint, insofar as it alleges additional violations of the Order, be dismissed.

A/SLMR No. 806

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE, OGDEN SERVICE CENTER; INTERNAL REVENUE SERVICE, FRESNO SERVICE CENTER; INTERNAL REVENUE SERVICE, AUSTIN SERVICE CENTER; INTERNAL REVENUE SERVICE, KANSAS CITY SERVICE CENTER; INTERNAL REVENUE SERVICE, CINCINNATI SERVICE CENTER; INTERNAL REVENUE SERVICE, ATLANTA SERVICE CENTER; INTERNAL REVENUE SERVICE, MEMPHIS SERVICE CENTER; INTERNAL REVENUE SERVICE, BROOKHAVEN SERVICE CENTER; INTERNAL REVENUE SERVICE, PHILADELPHIA SERVICE CENTER; INTERNAL REVENUE SERVICE, DATA CENTER; INTERNAL REVENUE SERVICE, NATIONAL COMPUTER CENTER; AND THE INTERNAL REVENUE SERVICE

Respondent

and

Case No. 22-6506(CA)

THE NATIONAL TREASURY EMPLOYEES UNION; NTEU CHAPTER NO. 066; NTEU CHAPTER NO. 067; NTEU CHAPTER NO. 070; NTEU CHAPTER No. 071; NTEU CHAPTER NO. 072; NTEU CHAPTER NO. 073; NTEU CHAPTER NO. 078; NTEU CHAPTER NO. 082; NTEU CHAPTER NO. 097; NTEU CHAPTER NO. 098; AND NTEU CHAPTER NO. 099

Complainant

DECISION AND ORDER

On September 3, 1976, Associate Chief Administrative Law Judge Francis E. Dowd issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Associate Chief Administrative Law Judge's Recommended Decision and Order. The Associate Chief Administrative Law Judge further found other allegations of the complaint not to be violative of the Order, and recommended that they be dismissed. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Associate Chief Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Associate 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 Associate Chief Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by the Respondent and the Complainant, I hereby adopt the findings, conclusions and recommendations of the Associate Chief Administrative Law Judge, to the extent consistent herewith. 1/

The Complainant alleged, as one aspect of its complaint, that the Respondent Internal Revenue Service, hereinafter called IRS, and the various IRS Service Centers that are parties to the Multi-Center Agreement (MCA) with the National Treasury Employees Union, hereinafter called NTEU, and its local chapters holding exclusive recognition with such Service Centers, violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by virtue of their elimination of certain portions of the MCA upon its expiration. In this regard, the Respondent contends that it eliminated only those portions of the MCA which were "institutional benefits," that is those benefits which, in the Respondent's view, pertained to the exclusive representative's rights as an organization and, therefore, terminated with the agreement's expiration. The NTEU, on the other hand, asserts that such rights, once negotiated, became personnel policies and practices and other matters affecting working conditions and, therefore, any unilateral changes with respect to such matters were violative of the Order. 2/ In another related aspect of the unfair labor practice complaint, the NTEU charged that a memorandum dated May 29, 1975, from the Commissioner of the IRS to all employees of the Service Centers included under the MCA, in effect, constituted an improper attempt to deal directly with unit employees and, thereby, subvert the NTEU in violation of Section 19(a)(1) and (6) of the Order. The Respondent contends, on the other hand, that all direct communications with unit employees regarding the bargaining relationship of the parties are not violative of the Order under the standard enunciated by the Federal Labor Relations Council in Naval Air Station, Fallon, Nevada, FLRC No. 74A-80 (1975), and that: (1) the IRS

1/ In its exceptions, the Respondent noted several inadvertent errors by the Associate Chief Administrative Law Judge in his Recommended Decision and Order. The name of Respondent's Counsel was inadvertently indicated as "William Myers" rather than "Merle Meyers." On page 4, line 1, "charges" was shown as "changes," and on the same page, line 25, the sections of the Order alleged to have been violated should have been "19(a)(1) and (6)" rather than "19(b)(1) and (6)." On page 5, A/SLMR No. "448" was inadvertently cited as "440." On page 6, line 13, "On" was shown as "In" and, on the same page, lines 19-20, the words "or negotiate directly with unit employees or to threaten" were repeated unnecessarily. Finally, on page 6, A/SLMR No. "395" was cited as "385." Noting the absence of any objections by the Complainant, these inadvertencies are hereby corrected.

2/ The NTEU also complained that a subsequent refusal by the Respondent to bargain over such matters constituted an independent violation of Section 19(a)(1) and (6) of the Order. However, I find that, under the circumstances herein, any such refusal is inseparable from the initial alleged unilateral changes in working conditions.

Commissioner was fulfilling his obligation to inform employees of the status of the agreement; (2) the memorandum was purely factual in nature; and (3) the memorandum must be read in the context of an earlier letter written to the same unit employees by the President of the NTEU. The Respondent also claims that under Section 19(d) of the Order the Assistant Secretary has no jurisdiction in this matter as a grievance was filed under the MCA covering the same issues as are involved in the instant complaint at the Detroit Service Center.

The Associate Chief Administrative Law Judge recommended that the aspect of the complaint alleging improper unilateral termination of certain "institutional benefits" contained in the MCA be dismissed. Thus, he found that, "...a unilateral change of terms and conditions of employment which are mandatory subjects of bargaining would be in violation of the Respondent's duty to bargain in good faith." However, it was his view that "...personnel policies and practices were not eliminated or changed, but that only the reference to the Union in the agreement was eliminated." Therefore, he found insufficient evidence to establish that there was, in fact, a unilateral change in terms and conditions of employment in derogation of the duty to bargain in good faith. With respect to the aspect of the unfair labor practice complaint concerning an alleged improper attempt by the Respondent to deal directly with unit employees, the Associate Chief Administrative Law Judge recommended that a violation of Section 19(a)(1) and (6) of the Order be found. In this regard, he concluded that the dissemination of the IRS Commissioner's memorandum improperly undermined the NTEU as it created the impression that the NTEU was bargaining in bad faith; it directly encouraged bargaining unit employees to sympathize with the Respondent's negotiation position; its basic thrust depicted the NTEU as being unreasonable in negotiations; and it created the impression that unit employees should look to the Respondent alone for benefits.

With respect to the Section 19(d) issue raised by the Respondent, the Associate Chief Administrative Law Judge, noting the Assistant Secretary's finding in Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 488, that Section 19(d) does not apply where the issue of the grievance differs from that raised in the unfair labor practice, found that, "Since the memorandum is only one aspect of the instant case, it is my view that jurisdiction in the matter would be retained by the Assistant Secretary." He also agreed with the NTEU's position that a single grievance filed at the Detroit Service Center would not bar consideration of the unfair labor practice complaint with respect to the other Service Centers under the MCA.

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

With respect to the first aspect of the unfair labor practice complaint noted above, I find, contrary to the Associate Chief Administrative Law Judge, that the unilateral elimination of those agreement

provisions characterized by the Respondent as "institutional benefits" accruing to the union qua union was violative of Section 19(a)(1) and (6) of the Order. Thus, in my view, only those rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges -- in effect, terminated with the expiration of a negotiated agreement. 3/ On the other hand, other rights and privileges accorded to exclusive representatives continue in effect until such time as they are modified or eliminated pursuant to negotiations or changed after a good faith bargaining impasse has been reached. 4/ Under these circumstances, I find that the Respondent Service Centers' unilateral elimination of other agreement provisions related to the NTEU's rights, such as posting privileges, etc., 5/ constituted an improper unilateral change in personnel policies and practices in violation of Section 19(a)(1) and (6) of the Order. 6/

With respect to the second aspect of the unfair labor practice complaint, noted above, I find, contrary to the Associate Chief Administrative Law Judge, that as a grievance was filed under the MCA at the Detroit Service Center over the same issue, I am precluded by Section 19(d) of the Order from consideration of this aspect of the unfair labor practice complaint. 7/ Thus, the issue raised by the grievance clearly was the same as that raised by the instant unfair labor practice complaint, i.e., the alleged improper effect on the NTEU resulting from the distribution of the May 29, 1975,memorandum from the Commissioner of the IRS to unit employees. In this regard, it was noted that both the grievance and the unfair labor practice complaint sought the withdrawal of the memorandum as a remedy. Moreover, although technically the grievance was filed only at one Service Center under the MCA, any resolution of that grievance would have been applicable to all of the Service Centers under the MCA, especially given the remedy sought by the grievant. Accordingly, as this issue in the unfair labor practice complaint has been raised previously under a negotiated grievance procedure, I shall order that this aspect of the unfair labor practice complaint be dismissed.

3/ Cf. Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 155.

4/ In this latter regard, see U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673.

5/ Cf. Internal Revenue Service, Office of the Regional Commissioner Western Region, A/SLMR No. 473, and Los Angeles Air Route Traffic Control Center, Federal Aviation Administration, A/SLMR No. 283.

6/ The parties to the MCA agreed to extend their dues withholding agreement by a special agreement. It appears that other "institutional benefits" contained in the negotiated agreement were, in fact, terminated by the Respondent.

7/ Based on this determination, I find it unnecessary to rule on the merits of this aspect of the unfair labor practice complaint.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; and Internal Revenue Service, National Computer Center, shall: 8/

1. Cease and desist from:

(a) Making unilateral changes in personnel policies and practices after the expiration of a negotiated agreement containing such personnel policies and practices in the absence of a bargaining impasse.

(b) In any like or related manner interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended.

(a) Post at the facilities of the Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; and Internal Revenue Service, National Computer Center 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 Directors of the above-noted activities and shall be posted and maintained by them for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards where notices to employees are customarily posted. The Director of each of the above-noted activities shall take reasonable steps to insure that such notices are not altered, defaced,or covered by any other material. 9/

8/ Any unilateral change herein was made at the level of which exclusive recognition was held. Accordingly, the order herein involves only the various Centers named in the complaint.

9/ The evidence establishes that the parties to the expired MCA executed a new negotiated agreement dated July 18, 1975. Under these circumstances, I find that the remedial order herein adequately remedies the unfair labor practice found to have occurred.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been take 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.
March 1, 1977

Jack A. Warshaw, Acting 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 unilateral changes in personnel policies and practices after the expiration of a negotiated agreement containing such personnel policies and practices in the absence of a bargaining impasse.

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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of THE NATIONAL TREASURY EMPLOYEES UNION; NTEU CHAPTER NO. 066; NTEU CHAPTER NO. 067; NTEU CHAPTER NO. 070; NTEU CHAPTER NO. 071; NTEU CHAPTER NO. 072; NTEU CHAPTER NO. 073; NTEU CHAPTER NO. 078; NTEU CHAPTER NO. 082; NTEU CHAPTER NO. 097; NTEU CHAPTER NO. 098; and NTEU CHAPTER NO. 099. Complainant and INTERNAL REVENUE SERVICE, OGDEN SERVICE CENTER; INTERNAL REVENUE SERVICE, FRESNO SERVICE CENTER, INTERNAL REVENUE SERVICE, AUSTIN SERVICE CENTER; INTERNAL REVENUE SERVICE, KANSAS CITY SERVICE CENTER; INTERNAL REVENUE SERVICE, CINCINNATI SERVICE CENTER; INTERNAL REVENUE SERVICE, ATLANTA SERVICE CENTER; INTERNAL REVENUE SERVICE, MEMPHIS SERVICE CENTER, INTERNAL REVENUE SERVICE, BROOKHAVEN SERVICE CENTER; INTERNAL REVENUE SERVICE, PHILADELPHIA SERVICE CENTER; INTERNAL REVENUE SERVICE, DATA CENTER; INTERNAL REVENUE SERVICE, NATIONAL COMPUTER CENTER, AND THE INTERNAL REVENUE SERVICE Respondent	Case No. 22-6506(CA)

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Before: FRANCIS E. DOWD
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 24, 1975 under Executive Order 11491, as amended, by the National Treasury Employees Union, NTEU Chapters 066, 067; 070; 071; 072; 073; 078; 082; 097; 098 and 099, hereinafter called the Union, against, the Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center, Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Service Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center, Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; Internal Revenue Service, National Computer Center; and the Internal Revenue Service, hereinafter called the Respondent, a Notice of Hearing on Complaint was issued by the Regional Administrator for the Philadelphia Pennsylvania, Region on March 19, 1976.

The complaint alleged in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of the following actions: unilaterally altering and amending existing personnel policies by reinstating selected provisions of a collective bargaining agreement which was to

expire by its own terms; dealing directly with employees in the bargaining unit by the issuance of a directive to employees the language of which violates the neutrality required by the Order and attempts to subvert the Union as the exclusive representative by appealing to employees to look to the agency rather than the Union for rights; by refusing on June 4, 1975 to negotiate concerning the changes in personnel policies announced on May 28, 1975; and by conducting surveillance activities of the Union at its meetings.

A hearing was held in the captioned matter on May 4, 1975, in Washington, D.C. 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. Thereafter, the parties submitted briefs.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions and recommendations:

Statement of Facts

On February 18, 1975, the parties herein began negotiating a multi-center collective bargaining agreement to cover employees working at various IRS Service Centers, the IRS Data Center and the IRS National Computer Center. The agreement covered approximately 30,000 employees, and was to replace a previous agreement due to expire on April 13, 1975.

After approximately 32 bargaining sessions the parties by mutual consent on April 11 and April 26, 1975, respectively signed two separate memoranda extending the agreement. The latter extension provided that the agreement would remain in existence until negotiations were completed or either party declared impasse and that it would terminate at midnight of the fifth (5th) calender day after receipt by either party of notice of termination.

On May 27, 1975 Union President Vincent L. Connery notified the IRS that it considered negotiations at an impasse, thereby terminating the latter memorandum of agreement effective June 2, 1975. On this same date President Connery distributed a letter to all employees at the centers involved announcing that the Multi-Center negotiations had reached impasse. This letter noted that "...since the negotiations have terminated, the existing contract will

expire on June 1, 1975. Once the contract ends all grievances will be processed under the agency grievance procedure and not the negotiated procedure which includes binding arbitration." The letter went on to urge employees who had any problems concerning matters affecting their job to file a formal grievance no later than June 1, 1975 and warned that "[o]nly the contract provides the right to review by an impartial abitrator who issues a decision that is binding on management."

Throughout the week of May 26, 1975 the Union distributed literature, conducted special chapter meetings, picketed, solicited signatures on petitions for Congress, and generally advised employees of their rights once the existing agreement expired.

By letter dated May 28, 1975 the Respondent informed the Union that "your unilateral decision and right to terminate the agreement and thus give up the institutional benefits contained therein will of course be honored. There are other benefits in the agreement which will accrue to individual employees. We wish to advise you that it is our intent to continue these benefits to employees intact." The Respondent attached a detailed list of the provisions which it intended to continue. A review of the list indicates generally that it continued terms of employment which related directly to individual employees and discontinued any provisions of the agreement which ran directly to the Union.

Thereafter, Commissioner Donald C. Alexander sent a memorandum to all employees, IRS Data Center, dated May 29, 1975 which made several observations, including the following:

> "...NTEU is breaking off negotiations for a new Multi-Center Agreement...
>
> * * *
>
> ...even though NTEU has decided to terminate the current Agreement, Service management has no intention of making changes on its own in rights and benefits which you and other employees have enjoyed under that Agreement.
>
> * * *
>
> while NTEU's termination of the Agreement means that the Union gives up certain benefits which it has been entitled to under the Agreement, all contract provisions applicable to you as an employee will be observed by management. (See attached detailed list.)
>
> * * *

> you should not be misled by changes that our current bargaining position means we intend to treat you as anything less than first-class employees.
>
> * * *
>
> Service management stands ready to resume negotiations.
>
> * * *
>
> Finally I want to thank you for the efforts which all of you have made over the years..."

The May 29, memorandum was issued to all 30,000 unit employees without any prior notice to, or discussing with the union.

After learning of Commissioner Alexander's May 29 memorandum the Union promptly demanded to meet with Respondent to negotiate over what it considered changes in working conditions contained in the memorandum. Its June 2, 1975 letter to Mr. Billy J. Brown informed Respondent that it was prepared to meet on June 3, 1975, to negotiate an agreement applicable to all employees for the period necessary to complete the impasse procedure. Thereafter, the parties met on June 4, 1975, at which meeting the Union reiterated its request to negotiate any changes in working conditions during impasse. Respondent informed the Union that it would not negotiate over working conditions during impasse and the meeting ended.

The complaint in this case also involves an allegation of section 19(b)(1) and (6) based upon an incident arising out of a union meeting which was held on May 26, 1975, after work and off IRS property. The result of that meeting allegedly became known to management on the morning of May 27, 1975 when a steward who was present at the meeting told her supervisor what had occurred at the meeting. The Respondent claims that the information it obtained about the meeting was volunteered and at the hearing produced Section Chief Lois Smith to whom the information was given. However, the Respondent refused to produce the identity of the steward who gave such information to Smith. Therefore, the Union asserting that it has established a prima facie case of surveillance moved to have Smith's testimony stricken from the record or in the alternative to have the surveillance issue

remanded for further hearing to require the production of the employee steward who allegedly furnished the information of what accured at the meeting.

Discussion 1/

It well established that once a bargaining representative has been designated by a majority of the employees in an appropriate bargaining unit, an agency is obligated to deal with the elected representative exclusively concerning personnel policies, practices and other matters affecting working conditions. This agency obligation carries with it a correlative duty not to bypass the exclusive representative, and not to treat with others.2/ Agency disregard for the exclusive representative and dealing directly with employees undermines and demeans the elected employee representative, thereby violating rights granted by the Cf. Veterans Administration, V.A. Center, supra; U.S. Army Training Center, supra. For an agency in such circumstances to disregard the

1/ At the hearing Respondent raised the issue of whether under Section 19(d) of the Order the Assistant Secretary has jurisdiction to entertain the instant unfair labor practice complaint since at least one grievance has been filed concerning the distribution of the May 29 memorandum of Deputy Commissioner Alexander. It is established that Section 19(d) does not deprive the Assistant Secretary of jurisdiction where the issues joined differ from those in controversy in an unfair labor practice case. Internal Revenue Service; Southeast Service Center, A/SLMR No. 440 (1974). Since the memorandum is only one aspect of the instant case, it is my view that jurisdiction in the matter would be retained by the Assistant Secretary. Moreover, as the Union argues, the single grievance filed in the Detroit Service Center would necessarily preclude only consideration of whether or not to assume jurisdiction over that aspect of the case and would not bar a determination regarding the remainder of the complaint herein.

2/ Veterans Administration, Wadsworth Hospital Center, A/SLMR No. 388 (1974); Veterans Administration, V.A. Center, A/SLMR No. 385 (1974); Veterans Administration, V.A. Hospital, A/SLMR No. 301 (1973); U.S. Army School Training, A/SLMR No. 42 (1971).

exclusive representative selected by a majority of employees and to communicate with employees directly concerning personnel policies, practices, and working conditions in the unit directly erodes the exclusive representative's status under the Order and violates essential principles of exclusive recognition cf. U.S. Army Training Center, supra.

In Naval Air Station, Fallon, Nevada, FLRC No. 74A-80 (1975) the Federal Labor Relations Council established a two-pronged test to decide when a direct communication between agency management and unit employees violates the Order. In this regard the council stated:

> "On determining whether a communication is violative of the Order, it must be judged independently and a determination made as to whether that communication constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees or to threaten or negotiate directly with unit employees or to threaten or promise benefits to employees. In reaching this determination, both the content of the communication and the circumstances surrounding it must be considered."

Therefore the actual content of the May 29 memorandum as well as the circumstances under which it was transmitted must be weighed to assess its propriety. An analysis based on the Council's test dictates a finding that dissemination of the IRS Commissioner's memorandum undermined the union's bargaining position in violation of the Order.3/

The memorandum on its face creates the impression that the union was bargaining in bad faith and had irresponsibly broken off negotiations. Also, it characterized the Union's appeal to the Federal Service Impasses Panel as "breaking off negotiations...terminating the present Multi Center Agreement..." The use of such language ignored and concealed the fact that the Union was exercising its legal rights pursuant to the April 24, 1975 Memorandum of Agreement and

3/ Veterans Administration, Veterans Administration Data Processing Center, Austin Texas, A/SLMR No. 663.

the Rules of the Federal Service Impasses Panel 4/ to take such action. Similarly, in stating that "NTEU... is terminating the present Multi Center Agreement" Respondent created an appearance that the Union was unilaterally eliminating the existing agreement ignoring the fact that in the April 24, 1975 Memorandum of Agreement the parties agreed that the existing MCA would expire five days after either party notified the other of their intent to appeal to the Impasses Panel. Therefore, the MCA expired on June 2, 1975 as a result of the mutual agreement of the parties. Thus, for the IRS to inform 30,000 unit employees nationwide that "NTEU... is terminating the Multi Center Agreement" placed the Union in a false light, necessarily undermining its status as exclusive representative.

The language of May 29 memorandum could also be construed to mean that the Union was bargaining in bad faith. On the second page of his memorandum Commissioner Alexander states:

> "Where Center employees have special problems and concerns, they deserve-- and as far as management is concerned, will receive-- contract provisions tailored to fit their situation. Service management stands ready to resume negotiations."

This statement clearly implies that the Respondent was fully willing to negotiate a fair and appropriate agreement for Center employees, and that the delay and controversy was totally the product of the Union's unreasonable refusal to negotiate. Such a direct message to employees, regardless of its truth, demeaned the Union in the eyes of the employees it was elected to represent. Moreover, it implies that the Union in its negotiations has evidenced a contrary position, namely, a lack of interest in the special problems and concerns of center employees and an unwillingness to tailor contract provisions to fit the situation.

Further, the May 29 memorandum violated the Order by directly encouraging all bargaining unit employees to sympathize with Respondent's negotiation position, and to pressure the Union to alter its negotiation position at the bargaining table. In Naval Air Station, Fallon, Nevada, supra the Council ruled that the activity violated the Order

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4/ 5 C.F.R. Section 2471.1 (a) states:
§2471.1 who may initiate.
(a) When an impasse occurs during the course of labor agreement negotiations, either party, or the parties jointly, may request the Panel to consider the matter, by filing a request as hereinafter provided.

by posting a letter without prior union approval, critical of actions taken by the union President. In finding a violation of the Order the Council stated:

> "...the content, intent and effect of the letter can reasonably be equated with an attempt to bargain directly with employees and to urge them to put pressure on the union to take certain actions." Id at 4.

The basic thrust of the May 29 memorandum is to depict the Union as unreasonable, bad faith negotiators who unilaterally terminated the existing Agreement, misrepresented Respondents bargaining position to employees, and stalled negotiations, despite the fact that "service management stands ready to resume negotiations." By contrast the Union was pictured with the image of irresponsibility while Respondent is portrayed as a reasonable, generous, and appreciative employer charitably reinstating"...rights and benefits which you and other employees have enjoyed under the Agreement..." Moreover, the memorandum reassures all 30,000 unit employees that Respondent regards them as "first class", that the Union has misrepresented management's bargaining position, that management is sensitive to the "special problems and concerns" of Center employees, and that it "stands ready to resume negotiations". Such an obvious attempt to gain employee support and to influence employees into pressuring the union to alter its negotiation stance violates the Order and the recent dictates of Naval Air Station, Fallon, Nevada supra.

In addition, the May 29 memorandum creates the obvious impression that employees should look to Respondent alone for benefits, and that the Union is not needed. The memorandum stated:

> While NTEU's termination of the Agreement means that the Union gives up certain benefits which it has been entitled to under the Agreement, all contract provisions applicable to you as an employee will be observed by management. (See attached detailed list.)

The total impact of the Commissioner's message to unit employees could not have been more clearly articulated that, as IRS employees, there is no need to join the Union and pay dues; and, although the Agreement will soon expire we will maintain all the provisions that apply to you as an employee. In selectively eliminating those provisions characterized as

"union...benefits", while reinstating "employee...rights and benefits", Respondent created the obvious appearance of conferring benefits directly on employees, at the same time informing all unit employees that they could enjoy these benefits without the assistance and expense of the Union. Such a direct communication to every unit employee constitutes,6/ in my view, a direct message in violation of the Order.

It is a well settled principle in both federal and private sector labor law that an employer may not lawfully change personnel policies, practices, or working conditions without first providing the collective bargaining representative with advance notice of the proposed changes, and allowing it an opportunity to negotiate concerning the proposed change. A failure to comply with these requirements constitutes a violation of Section 19(a)(1) and (6) of the Order.7/

It is equally well settled in the private sector that once a collective bargaining agreement has expired an employer must give notice and a opportunity to negotiate prior to changing any of the established conditions of employment. This principle it would appear applies with the same force in federal sector situations.

6/ NASA, Washington, D.C. and Lyndon B. Johnson Space Center, Houston, Texas, A/SLMR No. 457 (1974), cited by Respondent in its brief is clearly distinguishable from the instant case for in the instant case, the question is not one of bargaining but agency interference with an established bargaining relationship.

7/ Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87 (1971; National Labor Relations Board, A/SLMR No. 246 (1973); California National Guard, State Military Forces, A/SLMR No. 348 (1974); Veterans Administration, Veterans Administration Center, Hampton, Virginia, A/SLMR No. 395 (1974); Veterans Administration Hospital, Wadsworth Hospital Center, A/SLMR No. 388 (1974); Army and Air Force Exchange Service, A/SLMR No. 451 (1974); Department of the Army, Rock Island Arsenal, A/SLMR No. 527 (1975); Department of Agriculture, A/SLMR No. 555 (1975); General Services Administration, Region 3, A/SLMR No. 583 (1975); U.S. Army Electronics Command, Fort Monmouth, N. J., A/SLMR No. 653 (1976).

In the instant case the Union argues that Respondent radically altered twenty-four separate working 8/ conditions without giving notice to the Union and that the resultant effect of this action was to demean the Union in the eyes of the bargaining unit employees in violation of Section 19(a)(1) of the Order. On the other hand, the Respondent claims that the May 29 memorandum appropriately maintained "employee benefits" contained in the expired MCA, and properly eliminated union "institutional benefits". Thus, it contends that it could lawfully continue or discontinue all provisions in the expired MCA based upon the above-stated theory without notifying the Union in advance, and without any obligation to negotiate.

While not all benefits contained in the expired agreement survive its termination, there are, of course, those which do. Nowhere, in case law have I been able to find an analogy to the institutional benefit characterization used by Respondent. However, contractual items which are mandatory subjects of bargaining clearly survive the hiatus which sometime exists between the expiration of one agreement and arrival at a new one. The Union argues that the abolition of twenty-four personnel policies no matter how they are characterized is unlawful. I am inclined to agree that such a unilateral change of terms and conditions of employment which are mandatory subjects of bargaining would be in violation of the Respondents duty to bargain in good faith. The threshold question then becomes..what mandatory subjects of bargaining without notice have been changed? In the instant case the Union conceded in its May 27 letter that the grievance and arbitration procedure did not survive the expiration of the agreement, leading one to believe that the terms or conditions of employment which were allegedly unilaterally changed had been the subject of some discussion at one of the earlier 32 bargaining sessions.

8/ Examples of provisions eliminated by Respondent include: Article 5 Section 3(A)-(D) provisions for administrative time to union representatives and affected employees to prepare grievances; Article 5 Section 2(C), which required the posting of Union Steward rosters on Center Bulletin Boards; Article 12 Section 1 and 2(A) concerning grievance preparation for meeting with management; Article 12 Section 7, the abolition of Respondent's promise to distribute copies of the Agreement; Article 12 Section 6 which allowed the Union to address new employees and training classes; portions of Article 19 Section 3 dealing with employee health and safety; and portions of Article 30, Section 4(C), 6(B) and Article 32, Section 8 allowing employee appeals of disciplinary actions, adverse actions, and grievances to arbitration.

A review of the changes shows that personnel policies and practices were not eliminated or changed, but that only the reference to the Union in the agreement was eliminated. Further, there was no visible change as predicted by the Union regarding the use of the grievance procedure, for indeed, at least one grievance was filed and has been processed, although not to the complete satisfaction of the Union. Furthermore, even relying on the cases cited by the Union, it could not be established that the elimination of the arbitration machinery of the contract was an unlawful unilateral change during the hiatus in the agreement. Accordingly, I find that there is insufficient evidence to establish that by the May 29 memorandum the Respondent unilaterally changed terms and conditions of employment in derogation of its duty to bargain in good faith.

Based on the above rationale I also reject the Union's contention that Respondent violated Section 19(a)(1) and (6) of the Order in refusing to negotiate on June 4, 1975 over a change in working conditions during impasse. Moreover, the record evidence is in my view insufficient to establish that Respondent refused to bargain in good faith over working conditions in effect during the impasse.

Also based on the record evidence, Complainant's contention that Respondent independently violated Section 19(a)(1) of the Order by engaging in surveillance activities is rejected. With respect to establishing a violation, Complainant has the burden of proof and must do more than to simply allege that whenever an agency receives knowledge about what was said at a Union meeting, it must be inferred that such knowledge was obtained illegally, thus shifting the burden to the agency to explain how it obtained such knowledge. I do not accept this theory and I do not believe it was incumbent upon the Respondent herein to offer a witness, as it did, to explain how it obtained such knowledge. Therefore, I would recommend dismissal without even relying on the testimony of Smith. I have, however, evaluated her testimony and I accept it fully. Indeed, I found Smith to be an entirely credible witness who honestly testified that one of her employees, who also was a Union steward, voluntarily came to her not to report on what happened at a Union meeting but, rather, to apologize in advance for what she was going to have to do as a Union steward, i.e., file a large number of grievances before the contract expiration date--such instruction incidentally having been given at the Union meeting. In these circumstances, and as I ruled at the hearing,

I believe no useful purpose would be served by requiring the witness to reveal the name of the employee.9/ Contrary to Complainant's assertion that it established a prima facie case of surveillance, I find that on the contrary that no evidence of surveillance or of any attempts to create the impression of surveillance were established on this record.

In summary, I have concluded that Respondent has not engaged in conduct violative of Section 19(a)(1) of the Order with respect to surveillance of Union meetings. I have further concluded that Respondent has not engaged in conduct violative of Section 19(a)(1) and (6) of the Order by unilaterally changing working conditions or by refusing to bargain in good faith over working conditions during the existing impasse. However, I have concluded that Respondent has engaged in conduct violative of Section 19(a) (1) and (6) by issuing the May 29th memorandum undermining the Union's bargaining postion.10/

Recommendations

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the purposes of Executive Order 11491, as amended. In respect to other conduct alleging surveillance and lack of good faith bargaining in violation of Section 19(a)(1) and (6) of the Order, it is recommended that the Complaint be dismissed.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.23(b) of the Regulations of the Assistant Secretary of Labor for Labor-Management Relations

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9/ Complaint's motion to have the surveillance issue remanded for further hearing and Respondent directed to produce the employee who supplied Respondent with information concerning the May 26, 1975 meeting is therefore denied.

10/ Attached hereto as Appendix "B" are errata sheets showing changes in the transcript of items which the Complainant and Respondent submitted for required correction which are approved.

hereby orders that the Internal Revenue Service, Ogden Service Center; Internal Revenue Service, Fresno Service Center; Internal Revenue Service, Austin Service Center; Internal Revenue Service, Kansas City Center; Internal Revenue Service, Cincinnati Service Center; Internal Revenue Service, Atlanta Service Center; Internal Revenue Service, Memphis Service Center; Internal Revenue Service, Brookhaven Service Center; Internal Revenue Service, Philadelphia Service Center; Internal Revenue Service, Data Center; Internal Revenue Service, National Computer Center; and the Internal Revenue Service, shall:

1. Cease and desist from:

a. Directly communicating with employees by any memorandum undermining the bargaining position of the exclusive representative of its employees;

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 facilities at the Ogden Service Center, Fresno Service Center, Austin Service Center, Kansas City Service Center, Cincinnati Service Center, Atlanta Service Center, Memphis Service Center, Brookhaven Service Center, Data Center, National Computer Center, and the Internal Revenue Service, Washington, D.C., copies of the attached notice marked Appendix "A" 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 Commissioner 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 Commissioner 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.

Francis E Dowd

FRANCIS E. DOWD
Administrative Law Judge

DATED: September 3, 1976
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 IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT communicate with employees by memorandum undermining the bargaining position of 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 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: 14120 Gateway Building, 3535 Market Street, Philadelphia, PA. 19104.

March 1, 1977

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
A/SLMR No. 807

These cases involve unfair labor practice complaints filed by the National Federation of Federal Employees (Complainant) and the American Federation of Government Employees, AFL-CIO (Complainant) alleging that Respondent violated Sections 19(a)(1) and (6) of the Order by unilaterally issuing and implementing Personnel Manual Circular 752-8 (Circular) which temporarily suspended agency hearings for adverse action proceedings resulting from position classification determinations. Specifically, the Complainants contend that, although they have been accorded national consultation rights under Section 9 of the Order, the Respondent substantively changed a personnel policy by issuing the Circular without first notifying the Complainants, or giving them an opportunity to comment thereon. The Respondent, on the other hand, contends that there was no change in the personnel policy with the issuance of the Circular, but rather an application of the existing personnel policy.

The Complainants held national consultation rights within the Agency. Effective September 4, 1974, HEW Personnel Instruction 752-1 afforded employees the right to a pre-decision hearing in adverse action proceedings based upon position classification determinations, except in certain circumstances. Among other exceptions, the Personnel Instruction contained the following exception: "When a hearing is impracticable by reason of unusual location or other extraordinary circumstances." On July 16, 1975, without prior consultation with either Complainant, the Respondent issued a Circular announcing the determination that, "an extraordinary circumstance has developed which warrants invoking, on a temporary basis and until further notice, the exception to the provision of a ... hearing ... for all proposed changes to lower grade resulting from position classification determinations...."

Under all of the circumstances, the Administrative Law Judge found that the Respondent's actions did not constitute a substantive change in personnel policy, and, therefore, the Respondent was not obligated to consult with the Complainants concerning the issuance of the Circular. The Administrative Law Judge noted that the agency regulation at issue clearly gives the Respondent the authority to deny a hearing by merely declaring the existence of extraordinary circumstances. Accordingly, he recommended that the complaints be dismissed.

Noting particularly the absence of exceptions by either Complainant, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations.

A/SLMR No. 807

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE

Respondent

and Case No. 22-6344(CA)

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES

Complainant

DEPARTMENT OF HEALTH,
EDUCATION AND WELFARE

Respondent

and Case No. 22-6584(CA)

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On October 28, 1976, Administrative Law Judge John H. Fenton issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject cases, and noting particularly that no exceptions were filed by either Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 22-6344(CA) and 22-6584(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
March 1, 1977

Jack A. Warshaw, Acting Assistant Secretary
of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE		
Activity		CASE NOS.
and		
		22-6344(CA)
NATIONAL FEDERATION OF FEDERAL EMPLOYEES		22-6584(CA)
Complainant		
and		
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO		
Complainant		

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For the Activity

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For the Complainant

Before: JOHN H. FENTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

The claimed violations of Sections 19(a)(1) and (6) of Executive Order 11491 were submitted to the undersigned by a joint stipulation of facts.

Complainants held national consultation rights at all relevant times. HEW Personnel Instruction 752-1, effective September 4, 1974, gave employees the right to a pre-decision hearing in adverse action proceedings based upon position classification determinations, except in certain circumstances. The exception here at issue is: "when a hearing is impracticable by reason of unusual location or other extraordinary circumstance" (752-1-20.B. 6a(1)(a)). Personnel management evaluation surveys conducted by HEW and/or CSC led to a determination that, at 14 HEW locations involved, 322 of 1061 positions reviewed were overgraded. From 60% to 70% of these positions were at GS-12 and above. As of July 14, 1975, HEW employed 13 examiners for the conduct of hearings on grievances and adverse actions. Five of these regularly handled pre-decisions hearings in adverse actions. 1/

Without prior consultation with either labor organization, HEW on July 16, 1975, issued Personnel Manual Circular No. HEW 752-8. An "advance copy" of the Circular was made available to each union on July 18. It announced the determination that "an extraordinary circumstance has developed which warrants invoking, on a temporary basis and until further notice, the exception to the provision of a...hearing...for all proposed changes to lower grade resulting from position classification determinations for which the advance notice of adverse action is issued (i.e. dated) on or after July 21, 1975." This was the first occasion on which that exception was used at the Departmental level.

As grounds for this determination, the Circular observed that there existed an unusual number of classifications requiring corrective action, and that the corps of examiners was already working under a heavy grievance caseload, making it impossible for them to conduct adverse action hearings for such a number of cases on a timely basis, thus creating unreasonable delays in the decision-making process of both the classification and grievance systems. The Circular also noted that assignment of examiners to grievance cases is required by Civil Service regulations, whereas Department hearings on proposed changes to lower grades resulting from classification determinations are not mandated by statute, Civil Service regulation or executive order. In addition, a decision to downgrade remained appealable to the Civil Service Commission, with provision for a Commission hearing.

1/ The Stipulation indicates that only four adverse actions were held in Fiscal Years 1974 and 1975. It also stated that no inference should be drawn that only four changes to lower grade were proposed during that period.

Neither labor organization sought consultation respecting the Circular. NFFE filed a charge alleging violation of Sections 19(a)(1) and (6) on July 25, 1975, and a complaint on August 28. AFGE filed a similar charge on September 29 and a complaint on December 24. In essence, the Unions contended that HEW's issuance of Circular 752-8 constituted a substantive change in personnel policy which was accomplished without prior notice to, or consultation with, the labor organizations it had accorded national consultation rights. HEW's response was that its decision to suspend such hearings was merely an application of current published personnel policy, which provided for denial of a hearing in extraordinary circumstances, rather than a substantive change in policy.

The Issue Presented

Whether Respondent's decision that "extraordinary circumstances" existed so as to warrant suspension of the right to a pre-decisional hearing in adverse actions based on position classification determinations was a substantive change in personnel policy requiring consultation, or simply an application of published policy which recognized such an exception.

Contentions of the Parties

The thrust of the Unions' argument, taken from the text of the regulation, is that the "extraordinary circumstances" exception is directed to the employee, in the particular circumstances of his/her case, and is not intended to permit wholesale abrogation of the right of all employees to such hearings. NFFE argues, in addition, that the phrase at issue should be restricted in its permissible application to unpredictable and uncontrollable "acts of God", and ought not be permitted to cover the predictable and controllable acts of HEW management. In essence, it contends that such wholesale and unprecedented use of the exception constitutes, in fact, a substantive change in personnel policy.

Conclusion

National consultation rights is a virtually unexplored concept. Section 9(b) of the Order gives a labor organization accorded such status the right to be notified of "proposed substantive changes in personnel policies" that affect employees it represents, and to submit comments for the agency's consideration. It further grants such a labor organization the the right to suggest changes in personnel policies, whether in meetings or in writing, and to have its views carefully considered. At the outset it is clear that the scope of an

agency's duty to consult on a national basis is severely circumscribed: it must only give notice of proposed changes in substantive personnel policies, and it must, with respect to any personnel policy matter, always be prepared to re-receive and consider carefully the views of the labor organization.

Section 2412.1 of the Rules of the Federal Labor Relations Council (5 CFR 458) defines substantive personnel policy as a "standard or rule which (a) creates and defines rights of employees..., including conditions relating to such rights; (b) sets a definite course or method of action to guide and determine procedures and decisions of subordinate organizational units on a personnel or labor relations matter; and (c) is formulated within the discretionary authority of the issuing organization and is not merely a restatement of a course or method of action prescribed by higher authority." (emphasis mine). The right to a pre-decision hearing outlined in HEW Personnel Instruction 752-1, including the exceptions listed in 752-1-20 B6(a)(1), meets this definition and thus constitutes a substantive personnel policy. The fact that the Council's definition explicitly includes a reference to the conditions relating to such right supports the Agency's argument that it simply applied the existing personnel policy and did not alter it. On the face of the Order and the Rules it would appear that the Agency was free to announce the presence of those extraordinary circumstances which were always recognized as potential cause for denying employees whose positions it proposed to downgrade the pre-decision hearing to which they were otherwise entitled.

The decision in this case did, in fact, represent a massive change from past practice under that regulation. It was provoked by an unprecedented set of circumstances. The Unions correctly argue that wholesale deprivation of the "right" to a hearing which had been consistently honored in the past was underway on July 21, 1975. The past practice of uniformly providing pre-decision hearings was totally scuttled for an indefinite term. It does not follow, however, that this sharp change in practice was a change in policy.

As I read the scheme of the Order, exclusively recognized labor organizations have the right to be notified of, and to bargain about, changes in employment practices. 2/ On the

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2/ Section 11 of the Order provides an effective means for an exclusive representative to deal with regulations which an Agency may assert are a bar to negotiations. Such disputes can be taken to the Council, which has published criteria for determining whether "compelling need" for such regulations.

other hand, national consultation rights attach to personnel policies, i.e., the standard or the rule. It may be argued that HEW, under the regulation at issue, has carte blanche to provide or deny a hearing, depending upon whether, in given circumstances, it finds it convenient or inconvenient, advantageous or disadvantageous. It simply declares the existence of extraordinary "circumstances" when it is disinclined to go through a hearing.Where the regulation is so drafted as to give it a free hand it has a free hand. Its actions are not circumscribed. The published policy clearly gives it great latitude; in fact there are no fetters on its discretion. Nothing in the Order requires that there be constraints. That is a matter to be resolved by consultation or, in other circumstance, collective bargaining. Here the Agency's decision to abandon its practice of affording pre-decision hearings conformed to its published personnel policy, which always permitted escape from that practice when a hearing was "impracticable by reason of..... extraordinary circumstance. "

Recommendation

Having concluded that HEW's action did not constitute a substantive change in personnel policy, it follows that there was not duty to notify the Complainants of the proposed issuance of HEW Personnel Manual Circular No. HEW 752.8. I therefore find that no violation of Sections 19(a)(1) and (6) occurred, and I recommend that the complaints be dimmissed. 3/

John H. Fenton

JOHN H. FENTON
Administrative Law Judge

DATED: October 28, 1976
Washington, D.C.

3/ The issue framed by the pleadings is confined to the question whether HEW had, in the circumstances, a duty to notify the Unions of the action it proposed to take and to afford them an opportunity for prior consultation. HEW, in addition to answering this contention, broadly argues that it was not otherwise required to consult about this subject matter. Although unnecessary to my decision, I feel constrained to observed that Section 9(b) confers on Complainant the right at anytime to present its views on personnel policy matters, and to have them carefully considered. Thus no substantive change in personnel policy was necessary as a precondition to consultation. Rather it was necessary to trigger the requirement of notice of proposed changes and opportunity to comment on those proposals. Duty to consult with respect to existing, published policies existed at all times.

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY OF 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 THE INTERIOR,
BUREAU OF RECLAMATION,
YUMA PROJECTS OFFICE,
YUMA, ARIZONA
A/SLMR No. 808

On June 21, 1974, the Assistant Secretary issued his Decision and Order in A/SLMR No. 401 in which he found that Respondent violated Section 19(a)(1) of the Order based upon its conduct in unilaterally changing the competitive areas for reduction-in-force during the pendency of an RA petition. In the remedy, the Assistant Secretary ordered the Respondent to, among other things, reinstate the areas of competition for reduction-in-force to that which existed prior to the unilateral change, reevaluate all layoffs made subsequent to the unilateral change, reinstate any employee incorrectly laid off, and reimburse any such employee for any loss of pay occasioned by his layoff.

On September 17, 1976, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 74A-52, remanding the case to the Assistant Secretary for reconsideration and appropriate action consistent with its decision. In remanding the case to the Assistant Secretary, the Council enunciated certain principles which it believed properly controlled in the subject case. Thus, in the Council's view, during the pendency of an RA petition in the reorganization circumstances here involved, an agency is obligated to continue recognitions and adhere to the terms of existing agreements to the maximum extent possible until the representation matter is resolved. Further, the Council found the remedy ordered by the Assistant Secretary, insofar as it pertained to the requirement that the Respondent reestablish the previous areas of consideration for reduction-in-force and reevaluate all layoffs subsequent to the unilateral change in such areas of consideration, was precluded by the provisions of Section 19(d) of the Order as such remedies were attendant upon the appeals procedures before the Civil Service Commission.

Upon reconsideration of the above case, the Assistant Secretary found, consistent with the guidelines established by the Council, that the Respondent violated Section 19(a)(1) and (6) of the Order by, during the pendency of an RA petition, unilaterally establishing new competitive areas for the purpose of reduction-in-force without affording the exclusive representative an opportunity to meet and confer concerning the procedures involved and the impact resulting from the decision to alter the areas of consideration for the reduction-in-force. The Assistant Secretary, consistent with the Council's decision, also found that a status quo ante remedy was inappropriate herein. Accordingly, the Assistant Secretary required the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions.

A/SLMR No. 808

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
A/SLMR No. 401
FLRC No. 74A-52

LOCAL 1487, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES, BLYTHE,
CALIFORNIA

Complainant

SUPPLEMENTAL DECISION AND ORDER

On January 7, 1974, Administrative Law Judge Burton S. Sternburg issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices. In essence, the complaint in the instant case alleged 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, by refusing to confer with the Complainant for purposes of discussing the latter's pending complaint without the presence of rival union representatives.

On June 21, 1974, in A/SLMR No. 401, the Assistant Secretary found that Respondent violated Section 19(a)(1) of the Order based upon its conduct in unilaterally changing the competitive areas for reduction-in-force during the pendency of an RA petition. In this regard, the Assistant Secretary noted that prior decisions of both the Assistant Secretary and the Federal Labor Relations Council (Council) held 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. It was the Assistant Secretary's view that absent evidence of overriding exigency (not present in the instant case), 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 conditions of employees who are covered by its RA petition. Further, under the particular circumstances of this case, the Assistant Secretary rejected the finding of the Administrative Law Judge that Respondent's conduct violated Section 19(a)(6) of the Order. In this regard, noting that the basis for the RA petition was the asserted inappropriateness of the existing units due to the reorganization and that the petition was filed in good faith, the Assistant Secretary found that during the pendency of such petition, 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. Finally, in fashioning a remedy for the violation found, the Assistant Secretary ordered the Respondent to, among other things, reestablish the areas of competition for reduction-in-force to that which existed prior to the unilateral change, and re-evaluate all layoffs made subsequent to the unilateral change, reinstating any employees who were incorrecly laid off. The Respondent also was ordered to reimburse any such employee for any loss of pay occasioned by his layoff.

On September 17, 1976, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 74A-52 remanding the case to the Assistant Secretary for reconsideration and appropriate action consistent with its decision. In remanding the case to the Assistant Secretary, the Council enunciated certain principles which it believed properly controlled in the subject case. Thus, in the Council's view, during the pendency of an RA petition in the reorganization circumstances here involved, an agency is obligated to continue recognitions and adhere to the terms of existing agreements to the maximum extent possible until the representation matter is resolved. Further, the Council found the remedy ordered by the Assistant Secretary, insofar as it pertained to the requirement that the Respondent reestablish the previous areas of consideration for reduction-in-force and re-evaluate all layoffs subsequent to the unilateral change in such areas of consideration, was precluded by the provisions of Section 19(d) of the Order as such remedies were attendant upon the appeals procedure before the Civil Service Commission.

The essential facts, which are not in dispute, have been fully discussed in the earlier decisions in this matter. Therefore, I shall repeat them only to the extent deemed necessary for the following discussion.

Prior to August 20, 1972, the Lower Colorado River Projects Office, Blythe, California, and the Yuma Projects Office, Yuma, Arizona, were two of the several sub-regional or field office components of Region III of the Bureau of Reclamation of the Department of the Interior. The Complainant was the exclusive representative of the nonprofessional employees of the Lower Colorado River Projects Office and was party to a negotiated agreement covering such employees. Local 640, International Brotherhood of Electrical Workers (IBEW) was, at all times material herein, the exclusive representative of the employees of the Yuma Projects Office (with the exception of those involved in the engineering function) and also was party to a negotiated agreement covering such

employees. Competitive areas for reduction-in-force purposes for these two offices were: (a) the Lower Colorado River Projects Office, Blythe, California, including field offices involved in dredging activity, and (b) the Yuma Projects Office, Yuma, Arizona. 1/

On August 20, 1972, the Lower Colorado River Projects Office and the Yuma Projects Office were merged. The functions of the Lower Colorado River Projects 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, 1972, a meeting was held with representatives of the Complainant and the IBEW. At this meeting, the Respondent suggested, among other things, that: (a) the Complainant should represent the dredging employees inasmuch as they retain their identity as a distinct identifiable unit, and (b) other former employees of the Lower Colorado River Projects Office, which it contended had been assimilated into the Yuma Field Office, and shop pools 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 those suggestions.

Thereafter, the Respondent unilaterally decided that it would be appropriate to maintain separate competitive areas with regard to the dredging operation and for the remainder of the Yuma project. Consequently, 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. On January 4, 1973, the Respondent filed an RA petition. 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 reduction-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 function assigned to 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

1/ Under the reduction-in-force procedure in effect at the Lower Colorado River Projects Office, any employee, including those in the field office possessing the requisite seniority and skills, could bump any employee working within the Lower Colorado River Projects Office. Similarly, a project-wide reduction-in-force procedure existed with respect to the Yuma Projects Office.

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 March 26 and June 10, 1973.

In applying the principles enunciated by the Council to the instant case, it is clear that inherent in an agency's obligation to continue recognition during the pendency of its RA petition is the obligation to meet and confer with exclusive representatives, to the extent consonant with law and regulations, concerning personnel policies and practices and matters affecting working conditions of employees in the exclusively recognized bargaining units. Consequently, if matters related to the decision to establish areas of consideration for purposes of reduction-in-force are appropriate subject matters for bargaining, the Respondent herein was obligated to meet and confer with the Complainant prior to altering the established areas of consideration for reduction-in-force purposes. It has been held previously that while the decision to effectuate a reduction-in-force action is a matter upon which there is no obligation under the Order to meet and confer, such reservation of decision making and action authority does not bar negotiations, to the extent consonant with law and regulations, concerning the procedures involved and the impact of the reduction-in-force decision on the employees adversely affected by such decisions. 2/ In the instant case, it is undisputed that during the pendency of its RA petition the Respondent unilaterally established competitive areas for the purposes of a reduction-in-force. As noted above, on March 2, 1973, the Respondent met with the Complainant and, for the first time, informed the latter of the changes in the competitive areas. In my view, the announcement to the exclusive representative of the established fact of the changes in competitive areas without affording such exclusive representative a timely opportunity to meet and confer in this regard was inconsistent with the Respondent's obligation, as set forth by the Council, to continue recognition to the maximum extent possible until the representation matter was resolved. Thus, the evidence establishes that at no time between December 1972, when the Respondent recommended to its regional office that the area for consideration for reduction-in-force be altered, and March 2, 1973, when the Respondent notified the Complainant that the area for consideration for reduction-in-force had been altered, and set forth the details of the forthcoming reduction-in-force action, did the Respondent notify the Complainant, or give the latter an opportunity to meet and confer concerning the procedure involved and the impact resulting from the decision to alter the area of consideration for a reduction-in-force action. Under these circumstances, therefore, I find that Respondent failed in its obligation to meet and confer in good faith with the Complainant in violation of Section 19(a)(1) and (6) of the Order. 3/

2/ See United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289.

3/ As indicated by the Council in its decision in the subject case, the remedy herein should be consistent with its view of the appli-
(Continued)

ORDER

Pursuant to Section 6(b) of the 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 reduction-in-force within the Yuma Projects Office without first notifying Local 1487, National Federation of Federal Employees, the exclusive representative of certain employees in the Yuma Projects Office, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the procedure involved and the impact of the decision to change the areas of competition.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) In the future, notify Local 1487, National Federation of Federal Employees, the exclusive representative of certain employees in the Yuma Projects Office, and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, prior to changing personnel policies and practices and matters affecting working conditions of unit employees.

(b) 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, 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, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

3/ cation of Section 19(d) of the Qrder. Therefore, under the foregoing circumstances, I find that a status quo ante remedy is inappropriate.

IT IS FURTHER ORDERED that the complaint, insofar as it alleged other violations of Section 19(a)(1), and (3) and (6) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 1, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

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 change the areas of competition for purposes of reduction-in-force in the Yuma Projects Office without first notifying Local 1487, National Federation of Federal Employees, Blythe, California, the exclusive representative of certain employees in the Yuma Project Office and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the procedure involved and the impact of the decision to change the areas of competition.

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, in the future, notify Local 1487, National Federation of Federal Employees, the exclusive representative of certain employees in the Yuma Project Office and afford such representative the opportunity to meet and confer, to the extent consonant with law and regulations, prior to changing personnel policies and pratices and matters affecting working conditions of unit employees.

_____
(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 materal.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Administrator, 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
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Department of the Interior,
Bureau of Reclamation,
Yuma Projects Office,
Yuma, Arizona

and

Local 1487, National Federation
of Federal Employees, Blythe,
California

A/SLMR No. 401
FLRC No. 74A-52

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary who, acting upon a complaint filed by Local 1487, National Federation of Federal Employees (hereinafter referred to as "NFFE"), determined that the establishment by the Bureau of Reclamation, Yuma Projects Office (hereinafter referred to as "YPO" or "the activity") of new competitive areas during the pendency of an RA petition improperly interfered with its employees' rights assured by the Order in violation of section 19(a)(1).1/

The pertinent factual background of this case, as found by the Assistant Secretary, is as follows: Before a reorganization, the Lower Colorado River Projects Office (LCRPO) and the YPO were two separate field components within Region 3 of the Bureau of Reclamation of the Department of the Interior (hereinafter referred to as "the agency"). Nonsupervisory, nonprofessional employees of the LCRPO were represented by NFFE. The exclusive representative of the nonsupervisory employees (minus those in the engineering function) within the YPO was Local 640, International Brotherhood of Electrical Workers (IBEW). For reduction-in-force (RIF) purposes, the designated competitive areas for the two offices were (1) the LCRPO plus field offices involved in dredging activity, and (2) the YPO.

1/ Section 19(a)(1) of the Order provides as follows:

(a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order . . . .

Pursuant to a reorganization involving the merger of the LCRPO and the YPO, the functions of the LCRPO and the employees working therein were officially transferred to the YPO. The employees performing certain operations at the LCRPO were assimilated into similar operations of the YPO. Unlike the rest of the employees involved, the employees engaged in the operation of dredges for the Colorado Project (comprising "field offices") were transferred as an organizational entity to the YPO, but their work functions and work locations remained unchanged. Thus, this latter group associated with the dredging operations was not intermingled with any existing YPO personnel and their supervisor-employee relationships remained unchanged except that managerial direction came from the head of the YPO.

Subsequent to the reorganization, the activity held a meeting with representatives of NFFE and IBEW to determine the effects of the merger of the two offices into the YPO on employee representation. Neither union accepted an activity proposal that dredging employees continue to be represented by NFFE and the balance of former LCRPO employees be represented by IBEW, and the activity itself filed an agency representation (RA) petition seeking an election in an overall unit consisting of all eligible General Schedule and Wage Board employees at YPO and certain other employees at a facility not involved herein.[2/] During the same period of time, the activity unilaterally determined that separate competitive areas should be maintained for (1) dredging operations employees assigned to the YPO and (2) the balance of the YPO. A formal request to this effect was made by the activity to the Commissioner, Bureau of Reclamation. This request was approved, and an agency supplement to the Federal Personnel Manual (FPM) was issued establishing the new competitive areas. The activity thereafter determined that a RIF was necessary in the dredging program and notified NFFE and IBEW of the changes in the competitive areas and discussed the impending RIF in separate meetings with those unions. The activity then proceeded to conduct the RIF.

NFFE filed an unfair labor practice complaint, which was subsequently amended to allege section 19(a)(1), (3) and (6) violations of the Order, arising out of the activity's unilateral changing of the established competitive areas governing reduction-in-force and, thereafter, refusing to confer with NFFE for purposes of discussing the latter's pending complaint without the presence of rival union representatives. Concurrently, a group of employees who had been affected by the RIF filed appeals with the Civil

2/ This petition was dismissed after the filing of the instant NFFE complaint by the Assistant Secretary on the grounds that it did not raise a question concerning representation because "the reorganization . . . did not substantially or materially change the scope or character of the units involved and that, therefore, such units remain viable and identifiable . . . ." (United States Department of Interior, Bureau of Reclamation, Lower Colorado Region, A/SLMR No. 318.) No appeal was taken to the Council from this decision.

Service Commission (CSC) Regional Office alleging violations of their reduction-in-force rights and challenging the establishment of the new competitive areas. On appeal, the CSC's Board of Appeals and Review (BAR), affirming the Regional Office's determination, found that the establishment of the new competitive areas had been accomplished pursuant to CSC regulation (FPM chapter 351, section 4-2b(2)).

The Assistant Secretary, in his decision, first addressed the application of section 19(d) and found that it would not be dispositive of this matter.[3/] He stated, in this regard:

> . . . In its decision, the BAR acceded to the [agency'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. . . .

Finding the unfair labor practice issue properly before him, the Assistant Secretary held, in pertinent part, that the activity's action in changing competitive areas was violative of section 19(a)(1) of the Order. In reaching this conclusion, the Assistant Secretary noted particularly that his decision and the Council's decision in AVSCOM[4/] stood for the proposition 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. The Assistant Secretary thereafter concluded:

3/ Section 19(d) provides:

> (d) 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 griev ance 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.

4/ Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, 1 FLRC 473 [FLRC No. 72A-30 (July 25, 1973),-Report No. 42].

In this regard, I agree with the Administrative Law Judge's conclusion that the [activity] 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 untrammeled 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 [activity's] conduct herein was based on an overriding exigency which required immediate action, I find that the [activity'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).

As to the obligation owed by the activity to NFFE during the pendency of the RA petition, the Assistant Secretary rejected the finding of the Administrative Law Judge that the activity's conduct violated section 19(a)(6),[5/] stating:

Thus, as noted above, the [activity] 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--and the fact that the evidence establishes that such petition was filed in good faith, I find that during its pendency the [activity] was under no obligation to meet and confer with [NFFE] which may or may not have continued to represent an appropriate unit based on the outcome of the RA petition. [Footnotes omitted.]

5/ The Assistant Secretary likewise dismissed the section 19(a)(3) complaint.

Accordingly, the Assistant Secretary ordered that the YPO cease and desist from changing the competitive areas for purposes of a RIF during the pendency of its RA petition or in any like manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Order. Further, the Assistant Secretary ordered the activity to reestablish the competitive areas which existed prior to the reorganization and reevaluate layoffs made subsequent to the changes; reinstate with backpay any employees found to be incorrectly laid off following the aforementioned evaluation; and post notices to this effect at the YPO.

The agency appealed the Assistant Secretary's decision to the Council, alleging that the decision presented major policy issues, and NFFE filed an opposition to the appeal. The Council accepted the agency's petition for review, concluding that under section 2411.12 of its rules of procedure (5 CFR 2411.12), major policy issues are raised by the decision of the Assistant Secretary concerning: (1) the conclusion of the Assistant Secretary with respect to the applicability of section 19(d) of the Order in the circumstances of this case; and (2) the obligations, in the circumstances of this case, of an agency under the Order during the pendency of a representation petition with respect to the personnel policies and practices and matters affecting the working conditions of employees who are covered by the petition. The Council also determined that the agency's request for a stay met the criteria for granting a stay as set forth in section 2411.47 (c)(2) of its then current rules (now 5 CFR 2411.47(e)(2)), and granted the request.

The agency and the union filed briefs on the merits with the Council as provided for in section 2411.16 of the Council's rules (5 CFR 2411.16). Amicus curiae briefs were filed by the Department of the Treasury, the Department of Health, Education and Welfare, and the National Treasury Employees Union, as provided for in section 2411.49 of the Council's rules (5 CFR 2411.49).[6/]

Opinion

As already mentioned, there are two major policy issues raised by the Assistant Secretary's decision in the present case concerning respectively: (1) the conclusion of the Assistant Secretary with respect to the applicability of section 19(d) of the Order in the circumstances of this case; and (2) the obligation, in the circumstances of this case, of an agency under the Order during the pendency of a representation petition with respect to the personnel policies and practices and matters affecting the

6/ In its appeal, the agency requested permission to present oral argument before the Council. Pursuant to section 2411.48 of the Council's rules (5 CFR 2411.48), this request is denied because the positions of the participants in this case are adequately reflected in the entire record now before the Council.

working conditions of employees who are covered by the petition. These issues are discussed below.

1. Applicability of Section 19(d).

At issue here is the application of section 19(d) of the Order in the circumstances of this case, specifically the application of the first sentence of that section: "Issues which can properly be raised under an appeals procedure may not be raised under this section." Stated otherwise, the issue is the correctness of the Assistant Secretary's conclusion that section 19(d) of the Order would not be dispositive in the present case.

The first sentence of section 19(d) by its terms precludes the Assistant Secretary from considering, as an unfair labor practice, an issue which can properly be raised under an appeals procedure. As to this provision of the Order, the Council, in its 1971 Report and Recommendations which recommended other changes in section 19(d), stated:7/

> The existing requirement that when an issue can be raised under an established appeals procedure, that procedure is the exclusive procedure for resolving the issue is not affected by this recommendation. [Emphasis added.]

Thus, the policy reflected in the Order is that an issue which can properly be raised under established appeals procedures may not be raised under the unfair labor practice complaint procedures established by the Order. Further, such an established appeals procedure is the exclusive procedure for the total resolution of the issue, including the disposition of the issue on the merits as well as the fashioning of any remedies which may be appropriate. The question then becomes whether, in the circumstances of a given case, the issue sought to be resolved in an unfair labor practice, including its attendant remedies, could have properly been invoked under an appeals procedure. If so, section 19(d) precludes the Assistant Secretary from permitting the disposition of such issue or the fashioning of such attendant remedies under section 19 in an unfair labor practice proceeding.

In the instant case it is clear that the affected employees could, as they did, properly raise under an established appeals procedure (in this instance, the RIF appeals procedure) the issue as to whether the competitive areas established by the agency and the subsequent reduction-in-force actions were accomplished in compliance with applicable CSC regulations. The established appeals procedure was therefore the exclusive procedure available to the employees to raise that issue and to seek appropriate remedies including a determination that the actions taken should be cancelled because the competitive areas were improper, which cancellation would result in the restoration of the employees to their previous positions with backpay.

7/ Labor-Management Relations in the Federal Service (1975), at 57.

Since the issue of whether the establishment of the competitive areas and the running of the reduction-in-force were in accord with CSC regulations was an issue exclusively reserved for the appeals procedure under section 19(d) of the Order, such issue could not be raised before the Assistant Secretary. With respect to the unfair labor practice proceeding, the issue before the Assistant Secretary herein was brought by the union, not the employees, and the issue before him only pertained to rights directly or indirectly accorded the union under the Order. That issue, as addressed by the Assistant Secretary, concerned the obligation owed by the activity to the unions involved herein during the pendency of the representation proceeding: specifically whether the activity was obligated to remain neutral and maintain the status quo with respect to personnel policies and practices and matters affecting working conditions during this period. While the Civil Service Commission had jurisdiction over the employees' appeals, it was without jurisdiction under an appeals procedure to decide the union's unfair labor practice complaint that its rights (as contrasted to employees' rights) under the Order had been violated—a matter within the exclusive jurisdiction of the Assistant Secretary.8/ Accordingly, the Assistant Secretary's determination that section 19(d) was not dispositive of the merits of the alleged unfair labor practice complaint filed by NFFE was proper and must be affirmed.

8/ This is not to say that the Civil Service Commission, in resolving issues properly raised under an appeals procedure, may not consider the relevance of provisions of the Order to the resolution of issues before it. This is implicitly recognized in that portion of section 19(d) which provides that decisions under appeals procedures should not be construed as unfair labor practice decisions under the Order nor as precedents for such decisions. Thus, the CSC has indicated in its prior issuances that "[a] claim of unfair labor practice made as part or all of an appeal or grievance will be considered and acted upon as part of the merits of the case being decided, as heretofore. . . . However, there would be no decision as to whether an unfair labor practice had been committed, nor would any precedent be established in the area of unfair labor practices." (Attachment 1 to FPM Letter 711-36, "Technical Advice and Information on Amendments to Executive Order 11491" (November 8, 1971), at 9.) Where the Commission considers the relevance of provisions of the Order to the resolution of issues before it and further, determines that an authoritative interpretation of E.O. 11491, as amended, is required before the Commission can reach a decision in the matter before it, the Commission should seek such interpretation from the Council. Neither such consideration of the relevance of the Order nor the determination as to whether an authoritative interpretation of the Order is required precludes the Assistant Secretary from resolving related questions concerning obligations under the Order as they pertain to the union's rights (as contrasted to employees' rights), not otherwise cognizable under an appeals procedure, when raised by the union in an unfair labor practice proceeding arising out of the same circumstances.

However, while the Assistant Secretary could properly consider as unfair labor practices the issues relating to the obligation owed by the agency to the unions involved in a representation case, as stated above, the remedies attendant on the appeals procedures, apart from the disposition of the issue on the merits, are also subject to the proscription of section 19(d). More particularly, in the instant case, the issue of whether the competitive areas and the running of the reduction-in-force were consistent with CSC regulations was for exclusive disposition through the appeals procedure. Likewise, any attendant remedy, viz., that the affected employees should be restored to their previous positions with backpay, is exclusively for determination through the appeals procedure. Thus, where an appeals procedure is available, pursuant to section 19(d), an unfair labor practice complaint may not be used as an alternate method for obtaining redress for the employees who properly have access to the appeals procedure. Otherwise, the very conflict in proceedings sought to be averted by section 19 would potentially obtain. Therefore, if, in the resolution of unfair labor practices, the Assistant Secretary were to decide that violations of section 19 had occurred, then pursuant to section 19(d), his remedies may extend only to remedies which could not have been invoked in an appeals procedure. In other words, if an unfair labor practice were found by the Assistant Secretary, the Assistant Secretary could not, consistent with the requirements of section 19(d), direct, as he did in this case, the reestablishment of the competitive areas, the reevaluation of layoffs made, and the reinstatement with backpay of any employee incorrectly laid off.9/ Thus, these remedies imposed by the Assistant Secretary in the instant case, even assuming a proper finding of an unfair labor practice, were inconsistent with section 19(d) and must be set aside.

2. Obligation of an agency.

As stated above, the Assistant Secretary, relying principally upon his decision and the Council's in AVSCOM, concluded in substance that:

> . . . absent evidence . . . 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 conditions of employees who are covered by its RA petition.

9/ While without authority to direct such remedies, the Assistant Secretary has authority, pursuant to section 6(b), to utilize other remedies for unfair labor practices; that is, he may require a party to cease and desist from the violations of the Order and require it to take affirmative action insofar as such affirmative action deemed appropriate with respect to the union does not conflict with remedies which derive from the appeals procedure.

We are of the opinion that the Assistant Secretary improperly applied the AVSCOM decision of the Council in the present case.

In the AVSCOM case, as the Council recently explained at length in the DSA case,10/ the situation was essentially as follows:

> On July 1, 1971, a reorganization was effected within the Army Aviation Systems Command (AVSCOM), whereby 49 of 53 Headquarters employees represented in a separate unit by AFGE were combined with 35 employees from a nearby inactivated Depot unit represented by the Operating Engineers, into a newly formed subordinate element of AVSCOM Headquarters. This reorganization occurred while negotiations between AVSCOM and AFGE were in progress; and its anticipation prompted Army to file a petition with the Assistant Secretary in which Army contended that a single overall unit was now appropriate and requested an election to determine which of the two unions represented that unit. [Footnote omitted.] During the pendency of that petition, AFGE and AVSCOM continued to negotiate and in October 1971 reached full accord. However, AVSCOM refused to sign the agreement until the Assistant Secretary resolved the representation issue. AFGE thereupon filed a 19(a)(6) complaint by reason of AVSCOM's refusal to sign the agreement.
>
> In May 1972, the Assistant Secretary issued his decision in the representation case, dismissing the petition on the ground that there was insufficient basis for the activity's claim that separate units were no longer appropriate. (No appeal was taken to the Council from that decision.) Thereafter, in June 1972, the Assistant Secretary issued his decision in the unfair labor practice case, finding that, because the existing units remained viable, Army's refusal to sign the October 1971 agreement violated 19(a)(6). As a remedy, the Assistant Secretary ordered Army to sign the agreement upon request and to post the customary notice. Army appealed to the Council, objecting not to the 19(a)(6) finding or the required signing of the agreement, but to the posting requirement.
>
> In its AVSCOM decision, issued in July 1973, the Council upheld the posting requirement in the circumstances of that appeal. However, the Council also addressed the underlying dilemma faced by agency management in the course of such a reorganization, and the derivative responsibilities of the Assistant Secretary under the Order. In more detail, the Council stated at pp. 5-6 of its decision:
>
> > . . . [W]e recognize the serious dilemma which agency management is in when faced with circumstances such as those present in this case. That is, as a result of the reorganization of AVSCOM, the

10/ Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (December 9, 1975), Report No. 88, at 5-6 of Council decision.

Army had a doubt as to the continued appropriateness of the existing units, and sought to resolve that doubt by the filing of a petition with the Assistant Secretary. As stated above, if the existing units had been found to be inappropriate due to the reorganization of AVSCOM, the Army would not have been obligated to sign the contract. In fact, to have signed it could, at least potentially, have subjected it to a charge that it had violated section 19(a)(3) of the Order. Yet, because the existing units were subsequently found to be appropriate, the Assistant Secretary held that the Army was obligated to sign the negotiated agreement. Since there were no other allegations of misconduct involved in this case, the disposition of the representation issue was determinative of the disposition of the 19(a)(6) complaint.

In our view, this type of a dilemma or risk places an undue burden on an agency. That is, 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, 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.

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 finding.

. . . . . .

Accordingly, while we leave to the discretion and judgment of the Assistant Secretary the determination as to the precise procedures which will best accomplish this result, we direct that his procedures be reviewed and revised so that, in the future, agencies will be permitted to await his decision on a representation petition without incurring the risk of an unfair labor practice finding. [Underscoring in part supplied.]

Thus, the Council's decision in AVSCOM stands for the proposition that, to avert the risk of an unfair labor practice finding, an agency must be permitted 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. However, nothing in AVSCOM supports the Assistant Secretary's conclusion in the instant case that "absent evidence . . . of an overriding exigency," the petitioning agency has an obligation to maintain the status quo during the pendency of the RA proceeding. Indeed, the status of existing personnel policies and practices and matters affecting working conditions is not even addressed in the Council's AVSCOM decision.

Rather, the controlling principle as pertains to the status of personnel policies and matters affecting working conditions, following an agency reorganization, was subsequently explained by the Council in the report accompanying E.O. 11838. In that report, the Council discussed the agency's obligation while awaiting resolution of representation issues which arose because of an agency reorganization, stating:[11/]

> . . . [E]xisting recognitions, agreements, and dues withholding arrangements should be honored to the maximum extent possible consistent with the rights of the parties involved pending final decisions on issues raised by reorganizations. [Emphasis supplied.]

Applying this principle in the DSA case, the Council noted:[12/]

> [U]ntil any . . . issues raised by the reorganization are decided (e.g., questions concerning representation, unit questions, or the like), the . . . employer is . . . enjoined, in order to assure stability of labor relations and the well-being of its employees, to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, to the maximum extent possible. [Footnote omitted.]

Therefore, following a reorganization and during the pendency of a representation petition, the obligation of an agency under the Order, with respect to personnel policies and practices and matters affecting the working conditions of employees who are covered by the petition, is not to maintain the status quo absent evidence of an overriding exigency, as held in the present case by the Assistant Secretary, but instead to maintain recognition and to adhere to terms of the prior agreement to the maximum extent possible until the representation matter is resolved.

With respect to the precise nature of the obligation to maintain recognition and to adhere to the terms of the prior agreement to the maximum

11/ Labor-Management Relations in the Federal Service (1975), at 51.

12/ Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, note 10, supra, at 15 of Council decision.

extent possible until the representation issues raised by the reorganization are resolved, this means that consistent with the circumstances of the reorganization and with the necessary functioning of the agency, an agency must continue to recognize the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. Where the agency, as a direct result of the reorganization and consistent with the necessary functioning of the agency, must make changes in otherwise negotiable personnel policies and practices and matters affecting working conditions, then the agency must notify the incumbent union or unions of those proposed changes and, upon request, negotiate on those matters covered by section 11(a) of the Order. Similarly, if work forces must be realigned as a result of a reorganization, the incumbent labor organization or organizations must be so advised and negotiations must be conducted, upon request, as to appropriate arrangements for employees adversely affected by the impact of such realignment, as expressly sanctioned in section 11(b) of the Order.

These requirements under the Order are intended carefully to balance the interests of the employees in continued representation during the critical period after a reorganization, when their conditions of employment will most likely be facing serious change, and the needs of the agency in fully adapting to the changed circumstances which ordinarily derive from an agency reorganization. Such bargaining obligation manifestly does not prevent changes by the agency in personnel policies and practices and matters affecting working conditions brought about by and flowing out of the reorganization, and necessary to the functioning of the agency, but merely requires negotiation by the parties before those changes are undertaken in conformity with the provisions of section 11(a). Moreover, such obligation will not impede, but rather will implement, the efforts of the agency in carrying out its mission, by reason of the substantial impact on the well-being of the employees which the Order recognizes as vital to the efficient administration of the Government. Thus, this requirement best serves the interests of the employees, the union, and the agency, and most importantly, protects the paramount interest of the public.

We recognize that in AVSCOM the Council stated, and we affirm herein, that an agency should not be forced to violate its neutrality during the period in which the underlying representation question is pending; that is, risk committing an unfair labor practice, or, for that matter, risk improperly affecting the results of a representation election, because of its response to negotiating demands made by a labor organization whose continuing representational status has been called into question by the reorganization. Certainly, as the Council indicated in AVSCOM, an agency could decline to negotiate and execute a comprehensive new agreement with such a labor organization until the representational questions are resolved through the Assistant Secretary's procedures. However, balanced against this principle is the need, in circumstances where, during the pendency

of the representational procedures, management concludes that it is not possible to maintain the personnel policies and practices and matters affecting working conditions, for the previously existing representative to speak for the employees with respect to the intended change and the impact of such change on the employees. Otherwise, during this critical period either no changes would be possible in personnel policies and practices and matters affecting working conditions thereby perhaps interfering with the necessary functioning of the agency, or changes could be made and the employees would lack a spokesperson when, as mentioned, their conditions of employment will most likely be facing serious change. Accordingly, an agency must meet the above-described negotiation obligation and, absent other circumstances such as bad faith, the meeting of such obligation shall not be a basis for a finding of an unfair labor practice or grounds for setting aside the election.

Applying these considerations in the instant case, it is clear that, if NFFE was not informed of the agency's proposed change in competitive areas, or if NFFE was so informed but the agency, upon request, refused to bargain thereon with NFFE, the agency must be deemed to have violated its obligation to negotiate under the Order.

However, the findings of the Assistant Secretary, which were based on principles held inapplicable to the present case, failed to address these critical and dispositive factors. Accordingly, we must remand the case to the Assistant Secretary for reconsideration and determination as to whether the agency violated its bargaining obligation as set forth herein.

Conclusion

In summary, as to the Assistant Secretary's holding with respect to the applicability of section 19(d) in this case, the Assistant Secretary properly determined that disposition of NFFE's complaint concerning the agency's unilateral change of competitive areas during the pendency of a representation proceeding was not precluded by section 19(d) of the Order. However, even assuming the agency were properly found to have committed an unfair labor practice in this regard (under the standard set forth below), the Assistant Secretary was prohibited by section 19(d) from imposing remedies which were attendant upon the appeals procedure before the CSC, such as the restoration of the affected employees to their previous positions with backpay. Accordingly, the Assistant Secretary's order imposing such remedies must be set aside.

As to the obligation of the agency during the pendency of the representation proceeding, in the reorganization circumstances here involved, such obligation, contrary to the conclusion of the Assistant Secretary, was not to maintain the status quo absent evidence of an overriding exigency, but to continue recognitions and adhere to the terms of existing agreements to the maximum extent possible until the representation matter is resolved, i.e., consistent with the circumstances of the reorganization and with the

necessary functioning of the agency, an agency must continue to recognize the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. However, while we set aside the Assistant Secretary's finding that the agency, in the absence of an overriding exigency, violated the Order by its failure to maintain the status quo, we remand the case to the Assistant Secretary to determine if in changing the competitive areas, the agency maintained the previously existing conditions to the maximum extent possible and met its obligation to negotiate with respect to any changes in competive areas. Further, if an unfair labor practice is found, the Assistant Secretary shall direct a remedy consistent with the principles enunciated herein.

Therefore, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and order and remand the case to him for appropriate action consistent with our decision herein.

By the Council.

Henry B. Frazier III
Executive Director

Issued: September 17, 1976

March 2, 1977

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, NATIONAL OFFICE
A/SLMR No. 809

This case involves an unfair labor practice complaint filed by the Social Security Administration, Bureau of Retirement and Survivors Insurance (Complainant) alleging that the American Federation of Government Employees, AFL-CIO, National Office (Respondent) violated Section 19(b)(1) and (6) of the Order by refusing to concur with the Complainant's request to arbitrate the question of who is responsible for the cost of a transcript in an advisory arbitration hearing. In this regard, the Complainant contended that the parties' negotiated agreement provides for them to share the cost of court reporting services. On the other hand, the Respondent contended that the parties' negotiated agreement provides for the Complainant to pay the cost of court reporting services. Pursuant to a stipulation of facts by the parties, the Administrative Law Judge transferred the case to the Assistant Secretary without the issuance of a Recommended Decision and Order. While such action by the Administrative Law Judge was considered to be inappropriate under the Regulations, under the particular circumstances herein, the Assistant Secretary considered the case to be properly before him for decision.

The Assistant Secretary found that the Respondent's conduct was not violative of Section 19(b)(1) and (6) of the Order. In this regard, he noted that the gravamen of the instant dispute involves the parties' conflicting interpretation of their negotiated agreement which was not sufficiently unambiguous on the matter and that the Respondent's action was not a patent breach but, rather, was a good faith interpretation of the agreement. The Assistant Secretary noted further that alleged violations of a negotiated agreement which, as here, concern differing and arguable interpretations of such agreement, as distinguished from alleged action which constitute a clear, unilateral breach of the agreement, are not considered to be appropriately within the unfair labor practice forum but, rather, may be considered under Section 13(d) of the Order which provides for resolution of such disputes. Accordingly, he ordered that the complaint be dismissed in its entirety.

A/SLMR No. 809

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, NATIONAL OFFICE

Respondent

and Case No. 22-6462(CO)

SOCIAL SECURITY ADMINISTRATION, BUREAU OF
RETIREMENT AND SURVIVORS INSURANCE

Complainant

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Administrative Law Judge John H. Fenton's June 24, 1976, Order forwarding the record in this matter to the Assistant Secretary for decision. 1/ Upon consideration of the entire record in this case, including the parties' stipulation of facts and accompanying exhibits and briefs filed by both parties, the Assistant Secretary finds:

The complaint herein alleges that the American Federation of Government Employees, AFL-CIO, National Office (Respondent) violated Section 19(b)(1) and (6) of Executive Order 11491, as amended, by refusing to concur with the request of the Social Security Administration, Bureau of Retirement and Survivors Insurance (Complainant) to arbitrate the question of who is responsible for the cost of court reporting services in an advisory arbitration hearing. In this regard, the Complainant contends that the provision of Article 29 (Arbitration) of the parties' negotiated agreement which states, in part, that, "The arbitrator's fee and all expenses shall be borne equally by both parties," includes sharing the cost of court reporting services. It contends further that as the parties disagree as to what is the correct interpretation of the agreement regarding payment for court reporting services at an advisory arbitration hearing, the matter should be brought to arbitration for resolution. The Complainant also asserts that it properly processed a grievance under Article 28 (Grievance Procedure) of the agreement concerning the subject dispute which the Respondent has refused to acknowledge or accept. The Respondent, on the other hand, takes the position that Article 27 (Disciplinary and Adverse Action) of the negotiated agreement provides for advisory arbitration in certain adverse action proceedings in accordance with the procedure set forth in the arbitration article of the agreement and in lieu of a hearing held by an examiner under the Civil Service Commission Regulations. The Respondent maintains that Article 29 is silent in regard to the cost of transcripts and that Article 27, which incorporates higher level regulations, provides for the Complainant to supply and pay for transcripts at an advisory arbitration hearing. The Respondent also contends that the Complainant never processed a grievance under the required procedures of the negotiated grievance procedure and, therefore, no grievance on the matter involved has been appropriately filed.

The facts, as stipulated by the parties, are essentially as follows:

The Respondent is the current exclusive representative for all nonsupervisory employees at the Complainant's six regional offices located in New York City, Philadelphia, Birmingham, Chicago, Kansas City (Missouri), and Richmond (California). The parties entered into their current negotiated agreement on March 15, 1974. The National Council of Social Security Payment Center Locals (Council) administers the day-to-day functions of the negotiated agreement at the Complainant's six regional offices pursuant to the constitution approved by the Respondent and each of its locals.

The Council and the Complainant were parties to an advisory arbitration hearing held during the months of June and July 1974. The advisory arbitration hearing concerned the proposed discharge of an employee who, along with the Council, requested advisory arbitration in lieu of an examiner's hearing, pursuant to Article 27 of the negotiated agreement. On May 24, 1974, without the approval or authorization of the Respondent or the Council, the Complainant issued a $10,000 purchase order to Thyra D. Ellis and Associates, International (Ellis and Associates) to transcribe the advisory arbitration hearing. By letter dated June 27, 1974, Ellis and Associates requested the Council to guarantee payment for one-half the cost of the court reporting service. On or about July 1, the Council informed Ellis and Associates and the Complainant that it would not guarantee one-half the cost of transcribing the advisory arbitration hearing as it was the Complainant's responsiblity to pay the total cost of the reporting service. The Respondent suggested that Ellis and Associates look to the Complainant for a 100 percent payment guarantee. On or about July 2, 1974, the Complainant advised the Respondent that it would assume the responsibility for the payment of the court reporting service, but advised that it expected to be reimbursed by the Respondent for one-half of the total cost. The Respondent again refused to pay any portion of the court reporting cost stating that it was not its responsibility and restated its position upon receipt of the bill from the Complainant for one-half the cost. Both before and after the close of

1/ There is no provision in the Assistant Secretary's Regulations which provides that an Administrative Law Judge may transfer a case to the Assistant Secretary without the issuance of a Recommended Decision and Order. However, notwithstanding the Administrative Law Judge's procedural error in directly transferring this case to the Assistant Secretary, the case was considered properly before the Assistant Secretary for decision in light of the agreement of the parties herein that the matter be submitted to the Assistant Secretary and the ensuing delay that would result from strict adherence to the Regulations. See, in this regard, Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668.

the hearing in the advisory arbitration matter, the Complainant requested that the parties submit the payment dispute to arbitration, but the Respondent stated that it was unaware that a grievance had been filed on the matter and refused to proceed to arbitration.

FINDINGS AND CONCLUSIONS

As noted above, the Complainant contends that the Respondent labor organization violated Section 19(b)(1) and (6) of the Order by refusing to arbitrate the question of who is responsible for the cost of court reporting services in an advisory arbitration hearing.

Under the circumstances outlined above, I find that the Respondent's refusal to proceed to arbitration was not violative of the Order. Thus, in my view, the gravamen of the instant dispute involves the parties' conflicting interpretation of their negotiated agreement. It is clear that the Respondent refused to comply with the Complainant's request to submit the dispute concerning their conflicting interpretations of the negotiated agreement to arbitration. While it is arguable that the Respondent's refusal to proceed to arbitration constituted a breach of its negotiated agreement, such conduct, in my view, did not constitute a violation of Section 19(b)(1) and (6) of the Order. It has been held previously that a breach of a negotiated agreement can be found to constitute an unfair labor practice where the conduct involved is sufficiently flagrant and persistent. 2/ In the instant case, it is clear from the parties' conflicting interpretations that the negotiated agreement was not sufficiently unambiguous on the matter and that the Respondent's conduct was not a patent breach, but, rather, was based on a good faith interpretation of the agreement. Alleged violations of a negotiated agreement which, as here, concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute a clear unilateral breach of the agreement, are not considered to be appropriately raised within the unfair labor practice forum. 3/ Rather, as the dispute herein is over the Respondent's refusal to submit a particular issue to arbitration based on the latter's interpretation of its negotiated agreement, in my judgment, resolution of such a dispute may be attained under Section 13(d) of the Order which provides, in part, that "... questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, ... may be referred to the Assistant Secretary for decision." In this connection, Part 205 of the Assistant Secretary's Regulations provides a procedure by which either party to a negotiated agreement may file an application seeking a determination by the Assistant Secretary as to whether or not an appropriately filed grievance is on a matter subject to the grievance or arbitration procedure in an existing agreement.

2/ See Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, FLRC No. 75A-25 and the decisions cited therein at footnote 13.

3/ Cf. Department of the Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624.

As the evidence herein was insufficient to establish that the Respondent's conduct with regard to its interpretation of the agreement was violative of Section 19(b)(1) and (6) of the Order, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6462(CO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 2, 1977

Jack A. Warshaw, Acting Assistant Secretary of Labor for Labor-Management Relations

March 2, 1977

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 AGRICULTURE,
AGRICULTURAL MARKETING SERVICE,
GRAIN DIVISION,
NEW ORLEANS, LOUISIANA
A/SLMR No. 810

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3157 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by transferring the Complainant's president because of his union activity.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) when a supervisor issued a memo to the local president wherein a transfer was threatened. Although the Administrative Law Judge credited the supervisor's testimony to the effect that his comments and threat of transfer were directed to the local president as an individual as opposed to those activities carried on as union president, the Administrative Law Judge found that a literal reading of the memo failed to make such intention clear. The Administrative Law Judge recommended dismissal of the Section 19(a)(2) allegation finding that the evidence failed to show that the Respondent's action in transferring the local president was not based upon legitimate agency considerations.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE,
GRAIN DIVISION,
NEW ORLEANS, LOUISIANA

Respondent

and

Case No. 64-3375(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3157

Complainant

DECISION AND ORDER

On November 30, 1976, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order. The Respondent subsequently filed an answering brief 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 Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting brief filed by the Complainant, and the answering brief to

the exceptions filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, 1/conclusions and recommendations. 2/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Department of Agriculture, Agricultural Marketing Service, Grain Division, New Orleans, Louisiana, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Alfred Bjorkgren in the exercise of his rights assured by the Order by threatening him with a possible transfer because of his activity on behalf of American Federation of Government Employees, AFL-CIO, Local 3157.

(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 policies of the Executive Order:

(a) Post at the New Orleans Office of the U.S. Department of Agriculture, Agricultural Marketing Service, Grain Division, 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

1/ At page 6 of his Recommended Decision and Order, the Administrative Law Judge referred to an 8(a)(1) violation. The numerical notation should have read 19(a)(1) and such inadvertence is hereby corrected.

2/ Following the issuance of the Administrative Law Judge's Recommended Decision and Order, the Respondent filed a motion to dismiss with the Assistant Secretary on the basis that the local union president had appealed his subsequent discharge for failure to report to his new assignment to the Federal Employee Appeals Authority (FEAA) and, thus, Section 19(d) of the Order served to remove the instant proceeding from the jurisdiction of the Assistant Secretary. In my view, the issues involved herein concerning a threat of transfer and the basis for the transfer of the president of the Complainant are properly before the Assistant Secretary. Thus, while the issue of the discharge of the local union president is before the FEAA having been raised under a statutory appeals procedure, Section 19(d) of the Order would not dispose of the issues related to the transfer which were properly raised prior to the discharge under Section 19(a) of the Order. Under these circumstances, the Respondent's motion to dismiss is hereby denied.

be signed by the Division 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 Division Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 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) of the Order be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 2, 1977

Jack A. Warshaw, Acting 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 Alfred Bjorkgren in the exercise of his rights assured by the Order by threatening him with a possible transfer because of his activity on behalf of American Federation of Government Employees, AFL-CIO, Local 3157.

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.

_____
(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 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
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
U.S. DEPARTMENT OF AGRICULTURE, AGRICULTURAL MARKETING SERVICE, GRAIN DIVISION, NEW ORLEANS, LOUISIANA	:	
Respondent	:	
and	:	Case No. 64-3375 (CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL UNION 3157	:	
Complainant	:	

WILLIAM E. STRUCK, ESQUIRE
U.S. Department of Agriculture
Agricultural Marketing Service
Personnel Division
14th & Independence Avenue, N.W.
Washington, D.C. 20250

For the Respondent

MARK ROTH, ESQUIRE
Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005

For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint first filed on June 21, 1976, under Executive Order 11491, as amended, by Local 3157, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or AFGE), against the U.S. Department of Agriculture, Agricultural Marketing Service, New Orleans Grain Division Field Office, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the Kansas City, Missouri, Region on September 13, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its actions in transferring Union President Alfred Bjorkgren to the Sacramento, California field office in retaliation for his union activities.

A hearing was held in the captioned matter on September 30, 1976, in New Orleans, Louisiana. 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.

Findings of Fact

Alfred H. Bjorkgren, the alleged discriminatee herein, has been employed by the Respondent in the New Orleans area for some twenty-one years. 1/ In July of 1973, Mr. Bjorkgren was elected president of Local 3157, AFGE, which is the exclusive representative of the employees in the Respondent's New Orleans Field Office. Thereafter, during the ensuing three years, Mr. Bjorkgren, who had never filed a grievance or formal complaint, became extremely active and filed numerous complaints, grievances and unfair labor practice charges and complaints in an attempt to improve workign conditions. Most of the grievances, complaints and ULP's filed by Mr. Bjorkgren in his capacity as union president dealt with the hours of work and tours of duty, which at times involved 16 hour work days. Mr. Bjorkgren also played an important role in an extensive "media"

1/ At the time of the events underlying the instant complaint Mr. Bjorkgren was a GS-9 grain inspector.

campaign designed to inform the public of the problems and working conditions of the employees in the New Orleans field office. 2/ According to the stipulation of the parties, it appears that the "media" campaign started about December 1975.

In addition to New Orleans, Respondent operates numerous grain and commodity inspection stations throughout the United States, among which is Sacramento, California. Several years ago, pursuant to the request of California officials, Respondent abandoned its Sacramento field office and entered into a cooperative arrangement with the State of California whereby all inspections were to be carried out by California State employees under the supervision of one Federal inspector. The arrangement did not work out and in the Spring of 1975, California proposed that the parties go back to the original system whereby both the State and the Federal Government would each have their separate offices staffed with their own employees. The new arrangement put the Respondent in the position of having to restaff its Sacramento office from scratch since the federal employees formerly working in Sacramento had been promoted, retired, etc. Additionally, since the Sacramento office would be faced with the supervision of the California inspectors in the performance of grain, bean and rice grading and also be the appeal body from grading standards imposed by the experienced California inspectors, the Respondent determined that the inspector in the Sacramento office would have to have extensive experience in all phases of inspection and grading.

On December 4, 1975, Respondent issued "Vacancy Announcement 1773" for an "Agricultural Commodity Grader, Grade GS-9" to be located in Sacramento, California. The area of consideration for the vacancy was "nationwide." Only two employees, neither of whom was deemed qualified, responded to the announcement. Thereafter, Mr. George Lipscomb, the Assistant Branch Chief of the Inspection Branch, who was responsible for filling the vacancy, asked the Rice Inspection Section to canvass the field offices which grade rice and determine the names of anyone who could potentially qualify for the Sacramento position. The various field offices which grade rice were canvassed on

2/ Mr. Bjorkgren's extensive union activities are acknowledged by Respondent in a joint stipulation submitted by the parties.

January 8, 1976, and a report thereon was subsequently sent to Mr. Lipscomb. Upon receipt of the list from the field offices which contained some forty to fifty names, Mr. Lipscomb called the supervisor from each field office and discussed the qualifications of the respective employees appearing on the list. The list of candidates was eventually narrowed down to three individuals who were deemed qualified for the Sacramento vacancy, Mr. Bjorkgren, Mr. Hebert and Mr. Morgani. 3/

Upon discovering that Mr. Bjorkgren, the Union President, was one of the three remaining eligibles for the Sacramento position, Mr. Lipscomb went to the Division Director's office and informed him of such fact and the possible repercussions should he be the person selected for transfer. After a brief discussion it was decided to proceed without regard to the union affiliation or activities of the three eligibles and request Personnel to supply the retention rights, i.e. seniority, of the three individuals.

On February 4, 1976, Mr. Bjorkgren had a meeting with field office supervisor Harlan Ryan, wherein Mr. Ryan, among other things, reprimanded Mr. Bjorkgren for conducting union business on government time and telephones. On February 5, 1976, Mr. Ryan directed a memorandum to Mr. Bjorkgren wherein he summed up their conversation of the day before. 5/ In addition to discussing Mr. Bjorkgren's alleged union activity on Government time the memorandum went on to state:

> I also discussed with you the chronic complaining, lack of loyalty and pride in the D partment and conducting yourself in such a way as to embarrass the Department. I also discussed the harassment tactics that have been at least, in part, your doing.

3/ According to the record other employees on the list were eliminated because they did not have extensive experience in all three commodities.

4/ According to the record, it had always been the Agency practice to effect involuntary transfers on the basis of retention rights.

5/ A copy of the memorandum was sent to Mr. Lipscomb.

> I discussed with you the hours of work and suggested that I might recommend a lateral transfer to a market that would have hours that would be more to your liking. 6/

When Mr. Lipscomb received a copy of Mr. Ryan's February 5, 1976, Memorandum he immediately consulted with the Respondent's Labor-Management Relations Officer with respect to advisability of considering Union President Bjorkgren, who was one of the three eligibles, for the Sacramento vacancy. After concluding that they had no choice but to go through with their original plan to select the individual for the Sacramento vacancy on the basis of lowest seniority, Mr. Lipscomb on February 12, 1976, requested the Personnel Division to submit a report of the retention status of the three qualified individuals. 7/ The Personnel Division on March 4, 1976, submitted its report which showed that Mr. Bjorkgren had the lowest retention standing of the three employees involved. Mr. Lipscomb then called in each of the three eligible employees and asked if they were interested in a voluntary transfer. When each of the employees declined, Mr. Lipscomb selected Mr. Bjorkgren based upon his low retention standing and a formal letter to this effect was mailed on April 30, 1976. The initial date of transfer, July 4, 1976, was subsequently postponed to August 29, 1976. Mr. Bjorkgren did not report to Sacramento as scheduled.

Up at least to the time of the instant hearing no permanent assignment has been made to Sacramento. The Respondent has been carrying out its inspection duties at Sacramento on the basis of details and other temporary assignments. One of the other two qualified employees has spent only one month at Sacramento.

6/ Mr. Bjorkgren responded by letter dated February 19, 1976 and denied Mr. Ryan's allegations, pointing out, among other things, that his criticism of the hours of work and other activities which annoyed Mr. Ryan were solely in his capacity of Union President.

7/ According to Mr. Lipscomb, the activity was concerned that the deletion of Mr. Bjorkgren's name from the list of eligibles could be grounds for a complaint from the remaining two qualified employees should it turn out that they had more seniority and were required to involuntarily transfer to Sacramento.

With respect to the qualifications required for the Sacramento vacancy, the Complainant takes the position that qualified inspectors could be trained to do the required inspections at Sacramento in a two month period. On the other hand, Mr. Conrad Herdon, former Chairman of the Board of Appeals and Review in Washington, D.C. which is comprised of experts in the field and makes the final rulings on the "grading of grain" creditably testified that "to be proficient in grading beans, rice, or grain, to perform at a journeyman level takes approximately two years experience."

Other than the February 5, 1976 memeorandum from Mr. Ryan to Mr. Bjorkgren, the record is devoid of any evidence of independent 8(a)(1) violations or union animus. In fact, according to the uncontroverted testimony of Mr. Lipscomb over the past years a number of employees who had held various high positions in the Union such as president, vice-president, treasurer, etc., had been promoted to higher positions without incident. Additionally, according to the credited testimony of Mr. Lipscomb over the past three years there have been approximately 100 involuntary transfers within his area of supervision.

Discussion and Conclusion

Section 203.15 of the Rules and Regulations of the Assistant Secretary imposes upon a complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. The Complainant has failed in this endeavor.

While it is true that the decision to transfer Mr. Bjorkgren occurring shortly after the February 5, 1976, memorandum of Mr. Ryan threatening to take such action makes he case suspicious, I can not based upon the evidence as a whole conclude that the transfer was motivated in part by Mr. Bjorkgren's activities as president of the Union. In reaching this conclusion I note that other active union adherents and/or officers have been promoted without incident, the fact that involuntary transfers were a usual occurrence in the grain division, the absence of any probative evidence indicating that the extensive evaluation of possible eligibles made by the Respondent prior to reducing the list to three inspectors was deliberately tailored to Mr. Bjorkgren's qualifications, and the absence of any basis indicating that the Respondent's original decision to fill the Sacramento vacancy with a fully

experienced inspector was not based upon legitimate Agency considerations.

Accordingly, I am constrained to recommend that the 19( )(2) allegation of the complaint based upon the involuntary transfer of Mr. Bjorkgren to Sacramento be dismissed in its entirety.

However, with respect to the February 5, 1976 memorandum from Mr. Ryan to Mr. Bjorkgren wherein a transfer is threatened I find such memorandum to constitute coercion and restraint within the meaning of Section 19(a)(1) of the Executive Order. While I credit Mr. Ryan's testimony to the effect that his comments and threat of transfer were directed solely at Mr. Bjorkgren's activities as an individual as opposed to those carried on as Union president, the fact remains that a literal reading of the memorandum fails to make such intention clear. Accordingly, I conclude that in issuing the memorandum of February 5, 1976, wherein Mr. Bjorkgren was threatened with a possible transfer because of his activities as Union president, Respondent violated Section 19(a)(1) of the Executive Order and recommend the adoption of the order set forth below.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Department of Agriculture, Agricultural Marketing Service, Grain Division, New Orleans, Louisiana, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing Alfred H. Bjorkgren in the exercise of his rights assured by the Executive Order by threatening him with a possible transfer because of his participation in union activities.

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

2. Take the followi g affirmative action in order to effectuate the policies and provisions of the Order:

(a) Post at the New Orleans Office of the U.S. Department of Agriculture, Agricultural Marketing Service, Grain Division, New Orleans, Louisiana 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 Division Director and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that the 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.

BURTON S. STERNBURG
Administrative Law Judge

Dated: November 30, 1976
Washington, D.C.

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 interfere with, restrain, or coerce Alfred L. Bjorkgren in the exercise of rights assured by the Order by threatening him with a transfer for participation in union activities

WE WILL NOT in any like or related manner interefere with, restrain, or coerce Mr. Bjorkgren or any of our employees in the exercise of rights assured by the 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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose is: Room 2200, 911 Walnut Street, Kansas City, Missouri 64106.

March 24, 1977

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 TREASURY EMPLOYEES UNION,
CHAPTER 162, NTEU; CHAPTER 172, NTEU; and
JOINT COUNCIL OF CUSTOMS CHAPTERS, NTEU
A/SLMR No. 811

This case involved three unfair labor practice complaints filed by the Department of the Treasury, U.S. Customs Service, Chicago Region, alleging that the Respondents, the National Treasury Employees Union, Chapter 162, NTEU; Chapter 172, NTEU; and Joint Council of Customs Chapters, NTEU, (NTEU), violated Section 19(b)(4) of the Order by picketing the Terminal 2 Building and the International Arrivals Terminal Building at O'Hare International Airport on September 29, October 2, and October 8, 1976.

Under the expedited procedures provided in Section 203.7(b)(1) of the Assistant Secretary's Regulations, a preliminary hearing was held, and on the basis of the record and the decisions of the Assistant Secretary and the Federal Labor Relations Council (Council) in National Treasury Employees Union, A/SLMR No. 536, FLRC No. 75A-96, the Administrative Law Judge found the Labor-Management Services Regional Administrator had met the burden of showing that there was reasonable cause to believe that the picketing had violated Section 19(b)(4) of the Order. Subsequent thereto, pursuant to Section 203.7(b)(6) of the Regulations, a Notice of Hearing before the Chief Administrative Law Judge was issued. Thereafter, the parties executed a stipulation waiving the ordering of an evidentiary hearing on the complaints and agreeing that the record should consist of the entire record made in the course of the preliminary hearing.

In his Recommended Decision and Order, the Chief Administrative Law Judge concluded that under the precedent of the IRS case, in which the Assistant Secretary and the Council had held that Section 19(b)(4) prohibits all picketing in a labor-management dispute in the Federal Sector, he was constrained to find that the picketing in the instant cases was violative of the Order. In this connection, he noted that the United States District Court for the District of Columbia, in National Treasury Employees v. Paul J. Fasser, Jr., et al Civil Action No. 76-408- (D.D.C. 1976), had vacated the Assistant Secretary's Order in A/SLMR No. 536 on the ground that an absolute ban on all picketing in the precise fact situation in the IRS case was overly broad and violative of the First Amendment of the Constitution. Although, in his view, the holding of the District Court would be equally applicable to the factual circumstances in the instant case, he concluded that its decision, which was at the time of his Recommended Decision and Order still subject to appeal, was not yet the law of the forum and, thus, the decisions of the Assistant Secretary and the Council constituted binding precedent.

Subsequent to the issuance of the Chief Administrative Law Judge's Recommended Decision and Order, the Government withdrew its appeal from the decision of the District Court in the IRS case. Thereafter, the Council issued a Statement on Major Policy Issue, FLRC No. 76P-4, in which it delineated the permissible or nonpermissible areas of picketing, to be determined on a case-by-case basis. In this regard, it set forth as the standard for whether Section 19(b)(4) had been violated in specific cases "whether, under the particular circumstances of the case, the picketing interfered with or reasonably threatened to interfere with the operation of the Government agency involved" and, further, it indicated those matters the Assistant Secretary should develop in the record and consider in arriving at his conclusions in specific cases.

The Assistant Secretary, under the particular circumstances of the instant cases, concurred in the findings of the Chief Administrative Law Judge with respect to the nature and effect of the picketing on the Complainant's operation and, in accordance with the guidelines set forth by the Council in FLRC No. 76P-4, found that the Respondent's picketing fell within the permissible limits under Section 19(b)(4) of the Order. Accordingly, the Assistant Secretary ordered that the complaints be dismissed in their entirety.

A/SLMR No. 811

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 162, NTEU; CHAPTER 172, NTEU; and
JOINT COUNCIL OF CUSTOMS CHAPTERS, NTEU

Respondents

and

Case Nos. 50-13182(CO)
50-13184(CO) and
50-13190(CO)

DEPARTMENT OF THE TREASURY, U.S.
CUSTOMS SERVICE, CHICAGO REGION

Complainant

DECISION AND ORDER

On November 17, 1976, Chief Administrative Law Judge H. Stephan Gordon issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding that the Respondents had engaged in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative actions as set forth in the attached Chief Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant and the Respondents filed exceptions and supporting briefs with respect to the Chief Administrative Law Judge's Recommended Decision and Order.

Upon consideration of the Chief Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, including the exceptions and supporting briefs filed by the Complainant and the Respondents, I hereby adopt the findings, conclusions and recommendations of the Chief Administrative Law Judge, only to the extent consistent herewith. 1/

1/ Pursuant to Section 203.7(b)(6) of the Assistant Secretary's Regulations, a Notice of Hearing was issued by the Regional Administrator on October 26, 1976. Thereafter, the parties executed a stipulation waiving the ordering of an evidentiary hearing on the complaints in the instant cases. In this regard, they agreed that the record herein should consist of the entire record, including all exhibits, affidavits and other documents admitted into evidence, made in the course

(Continued)

The instant complaints allege that the Respondents violated Section 19(b)(4) of the Executive Order by improperly sponsoring picketing on September 29, October 2, and October 8, 1976, of the Complainant at the Terminal 2 Building and the International Arrivals Terminal Building of O'Hare International Airport, Chicago, Illinois.

As indicated above, pursuant to Section 203.7(b)(1) of the Assistant Secretary's Regulations, a preliminary consolidated hearing was conducted before Administrative Law Judge Burton S. Sternburg for the purpose of determining whether there existed reasonable cause to believe that a violation of Section 19(b)(4) of the Order had, in fact, occurred. On October 26, 1976, Administrative Law Judge Sternburg issued his Decision and Order in which he found reasonable cause to believe that the Respondents had violated Section 19(b)(4) of the Order, and ordered the Respondents to cease and desist from such conduct pending disposition of the complaints. 2/

The facts of the instant cases, which essentially are not in dispute, are set forth in detail in the Chief Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary.

The record reveals that on September 29, October 2, and October 8, 1976, the Respondents peacefully picketed the Complainant 3/ for the purpose of informing the public of the problem they were having with negotiations for a new agreement; the picketing lasted for approximately

1/ of the preliminary hearing on the instant complaints before Administrative Law Judge Burton S. Sternburg on October 14, 1976.

2/ Thereafter, the Respondents filed a Complaint for Injunctive Relief and Declaratory Judgment in the United States District Court for Northern District of Illinois, Eastern Division (Civil Action No. 76C4030). On November 1, 1976, that District Court temporarily restrained and enjoined, among others, the Assistant Secretary of Labor for Labor-Management Relations as well as the Regional Administrator from taking any action against the Respondents for engaging in peaceful picketing until further order of that Court. In his Recommended Decision and Order, the Chief Administrative Law Judge noted that he had been advised administratively that the U.S. District Court did not consider its order to include other administrative proceedings under the Executive Order, including the determination of the instant cases.

3/ The evidence establishes that the mission of the Complainant, including its operation at O'Hare International Airport, is to assess and collect customs duties on imported merchandise, to prevent fraud and smuggling, and to control carriers, persons, and articles entering and departing the United States.

two hours on each date and involved approximately 15 to 25 pickets during those periods; the picket signs related to the labor-management dispute and bore the legends: "Search Us: - Still No Contract;" "Customs Declaration - NTEU Contract Now;" the picketing was peaceful at all times and caused no interference with the operations of any airlines, the Complainant, deliveries or passengers; the picketing occurred at an entrance at the upper level of the International Arrivals Building where passengers generally embark and disembark; and the Complainant's quarters are located on the lower level of this building, which space is paid for by the airlines or donated by the City of Chicago. Two airline representatives and two custom brokers, upon inquiry, were assured by the Complainant that there would be no disruption of its services.

At the consolidated hearing before Administrative Law Judge Sternburg, the parties stipulated, and in their exceptions in the instant proceedings, the Respondents admitted that the picketing which occurred on September 29, October 2, and October 8, 1976, was, in fact, sponsored by the Respondents and occurred in the context of a labor-management dispute which existed between the Complainant and the Respondents and, further, that the Respondents had every intention of picketing in the future.

The Chief Administrative Law Judge found that the picketing engaged in by the Respondents was for the purpose of informing the public of the problem the Respondents were having with the Complainant with regard to the negotiations for a new agreement, that it was clearly designed to inform the public of the pending labor-management dispute, that such picketing was completely peaceful, and that it did not interfere in any manner with the operations of the Complainant or any other entity located on the premises where the picketing occurred. Nor did it interfere with the ingress or egress of the general public to these premises or with any deliveries or any other normal operations on the premises. He further found that the Complainant's mission at O'Hare International Airport was not of such a sensitive nature as to require that different criteria should be applied than had been applied in National Treasury Employees Union, A/SLMR No. 536, FLRC No. 75A-96. In that case, the Assistant Secretary and the Federal Labor Relations Council (Council) had held, respectively, that Section 19(b)(4) prohibited all picketing in a labor-management dispute in the Federal Sector. Noting that the holding of the IRS case was applicable herein and constituted binding precedent in the instant proceedings, the Chief Administrative Law Judge found the Respondents had violated Section 19(b)(4). In this connection, the Chief Administrative Law Judge noted and discussed in detail the decision of Judge Gerhard Gesell of the United States District Court for the District of Columbia, in National Treasury Employees v. Paul J. Fasser, Jr., et al, Civil Action No. 76-408 - (D.D.C. 1976), in which the District Court vacated the Order of the Assistant Secretary in A/SLMR No. 536 on the ground that an absolute ban on all picketing was, in the context of "the precise fact situation presented," overly broad and violative of the First Amendment of the Constitution. He noted

that if Judge Gesell's decision in the IRS case be considered binding precedent, then "in my opinion, his holding in the IRS case ... would be equally applicable to the case at bar," 4/ but that, in the circumstances applicable at the time of his decision herein, while the IRS case could be appealed to the U.S. Circuit Court, "Judge Gesell's decision would not become the law of the forum unless and until it is affirmed by the reviewing court." Accordingly, the Chief Administrative Law Judge concluded that for purposes of his decision he was constrained to follow the scheme of the Executive Order, and, under the circumstances, as well as the timing of the instant case, accept as binding precedent the prior decisions of the Assistant Secretary and the Federal Labor Relations Council in the IRS case that the prohibitions contained in Section 19(b)(4) of the Order are absolute and prohibit all picketing by a labor organization in a labor-management dispute.

On January 4, 1977, subsequent to the issuance of the Chief Administrative Law Judge's Recommended Decision and Order in this matter, the Government withdrew its appeal from the decision of the District Court in the IRS case. Thereafter, on January 5, 1977, the Council issued a Statement on Major Policy Issue, FLRC No. 76P-4, in which it noted, among other things, that the District Court had determined that the application of Section 19(b)(4) to the precise fact situation in the IRS case contravened the First Amendment of the Constitution and, consistent with that decision, delineated the permissible or nonpermissible areas of picketing. In this regard, the Council stated that it had concluded that it would "accomplish the delineation of picketing which is permissible or nonpermissible under Section 19(b)(4) on a case-by-case basis,

4/ The Complainant excepted to the Chief Administrative Law Judge's "specific rejection of the Complainant's argument that the mission of the U.S. Customs Service at O'Hare International Airport is of so sensitive a nature that different criteria should be applied than to the operations, functions, and mission of the IRS", and to his conclusion that the testimony as well as the evidentiary material introduced by the Complainant "convinces me that the two situations are virtually identical and the same criteria should be applied". It asserts that the thrust of its argument was not the difference between the missions of the two agencies, but that in the IRS case, the facts of record were essentially limited to the picketing activities per se and not against the background of the IRS mission. It contends that its functions are so sensitive that the picketing of the Respondents constituted an actual or threatened interference with its mission performed at the O'Hare International Airport. However, in agreement with the Chief Administrative Law Judge, I find that the evidence does not support a conclusion that the Complainant's activities at the O'Hare International Airport are so sensitive in nature as to warrant a different conclusion in this regard than in the IRS case.

utilizing the adjudicatory procedures established in sections 4(c)(1) and 6 of the Order." In this connection, it set forth as the standard for whether Section 19(b)(4) had been violated in specific cases, "whether, under the particular circumstances of the case, the picketing interfered with or reasonably threatened to interfere with the operation of the Government agency involved, in violation of section 19(b)(4) of the Order." The Council stated that the Assistant Secretary in his consideration of such matters should "fully develop in the record and carefully consider the precise Government interest sought to be protected and such matters as the sensitivity of the governmental function involved, the situs of the picketed operation, the number of pickets, the purpose of the picketing, the conduct of the pickets, and any other facts relevant to the exact nature of the picketing and the Government organization concerned," and "shall determine whether the picketing involved in the particular case interfered with or reasonably threatened to interfere with the operation of the affected Government agency and thereby violated section 19(b)(4) of the Order." 5/

Under the particular circumstances of the instant cases, including the findings of the Chief Administrative Law Judge, and in accordance with the guidelines set forth in the Council's Statement on Major Policy Issue , FLRC No. 76P-4, I find that in the instant cases the Respondent's picketing falls within the Council's definition of "permissible picketing" under Section 19(b)(4) of the Order. In this regard, the evidence establishes that the picketing by the Respondents was peaceful and was limited to relatively short periods on each day it occurred; the number of pickets was not excessive; the picketing was for the purpose of informing the public of its labor-management dispute with the Complainant; and the picketing did not interfere with the operation of the Complainant. Nor do I find in the record sufficient evidence to support a finding that the picketing reasonably threatened to interfere with the operation of the Complainant. Further, as noted above, I find that the evidence fails to establish that the Complainant's functions involved at the O'Hare International Airport were so sensitive that the Respondents' picketing would per se be so injurious and disruptive as to justify an absolute ban against all picketing.

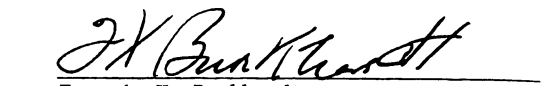
Accordingly, based on the Council's rationale contained in FLRC No. 76P-4, as applied to the facts found in the instant cases, I find the picketing engaged in by the Respondents falls within permissible limits and I shall order that the complaints herein be dismissed in their entirety.

5/ On January 24, 1977, based on the District Court's holding and the rationale contained therein, the Council's rationale contained in FLRC No. 76P-4, and the facts as found in A/SLMR No. 536, the Assistant Secretary dismissed the complaint in that case in its entirety. See A/SLMR No. 783.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 50-13182(CO), 50-13184(CO), and 50-13190(CO), be, and they hereby are, dismissed.

Dated, Washington, D. C.
March 24, 1977



Francis X. Burkhardt
Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
NATIONAL TREASURY EMPLOYEES UNION; CHAPTER 162, NTEU; CHAPTER 172, NTEU; JOINT COUNCIL OF CUSTOMS CHAPTERS, NTEU; Respondents		
and		
DEPARTMENT OF THE TREASURY, U. S. CUSTOMS SERVICE, CHICAGO REGION Complainant	Case Nos.	50-13182(CO) 50-13184(CO) 50-13190(CO)
and		
REGIONAL ADMINISTRATOR, LABOR-MANAGEMENT SERVICES ADMINISTRATION, U. S. DEPARTMENT OF LABOR Petitioner		

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Michael E. Goldman, Esq.
Assistant Counsel
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1730 K Street, N. W.
Washington, D. C. 20006
For the Respondents

Carmen Iodice, Esq.
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55 East Monroe Street, Suite 1417
Chicago, Illinois 60603
For the Complainant

Alan M. Serwer, Esq.
Office of the Solicitor
U. S. Department of Labor
230 South Dearborn Street
Chicago, Illinois 60604
For the Petitioner

Before: H. STEPHAN GORDON
Chief Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

These cases, having been consolidated for hearing by the Regional Administrator for the Chicago, Illinois Region, came to me on a Notice of Hearing on Complaint dated October 26, 1976, alleging violations of Section 19(b)(4) of Executive Order 11491, as amended (hereinafter called the Executive Order.

On the basis of these complaints which were filed by the Department of the Treasury, U. S. Customs Service, Chicago Region (hereinafter called Complainant) on September 29, October 2 and October 8, 1976, respectively, the Regional Administrator, Labor-Management Services Administration, U. S. Department of Labor (hereinafter called the Petitioner), issued a Notice of Preliminary Hearing on October 13, 1976, alleging that the National Treasury Employees Union, Chapter 162, NTEU; Chapter 172, NTEU; and the Joint Council of Customs Chapters, NTEU (hereinafter collectively called the Respondents) had engaged in conduct violative of Section 19(b)(4) of the Executive Order. 1/

Pursuant to such Notice of Preliminary Hearing a hearing was held on October 14, 1976 before Administrative Law Judge Burton S. Sternburg, resulting in Decision and Order, dated October 26, 1976, wherein Judge Sternburg found reasonable cause to believe that a violation of the Executive Order had occurred and ordered Respondents, among other things, to cease and desist from such conduct pending disposition of the consolidated complaints.

Subsequently, Respondents filed a Complaint for Injunctive Relief and Declaratory Judgment in the United States District Court for the Northern District of Illinois, Eastern Division (Civil Action No. 76C4030), and on November 1, 1976, that Court temporarily restrained and enjoined, among others, the Assistant Secretary of Labor for Labor-Management Relations as well as the Regional Administrator from taking any action against Respondent for engaging in peaceful picketing until further order of that Court. The breadth of the temporary restraining order of the U. S. District Court caused me some concern whether I was empowered to proceed with the case at bar. However, having recently been administratively advised

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1/ Section 19(b)(4) provides that a labor organization shall not "...picket an agency in a labor management dispute; or condone such activity by failing to take affirmative action to prevent or stop it."

that the U. S. District Court did not consider its order to include other administrative proceedings under the Executive Order, including the determination of the case at bar, and in view of the expedited procedures inherent in these proceedings, I feel constrained to decide this matter as expeditiously as possible and without the benefit of a further determination by the U. S. District Court.

On October 29, 1976, November 1, 1976, and November 3, 1976, the respective parties executed a stipulation wherein they waived an evidentiary Hearing on the Complaint in these matters and agreed that the record herein shall consist of the entire record, including all exhibits, affidavits, and other documents admitted into evidence, made in the course of the Preliminary Hearing on Complaint before Administrative Law Judge Sternburg on October 14, 1976.

On November 8, 1976, Respondents and Complainant filed additional briefs and on the same date Petitioner adopted by reference the brief previously submitted to Judge Sternburg. These briefs have been duly considered.

Findings of Fact

The facts in these consolidated cases do not appear to be in dispute. On the basis of the entire record, including a careful perusal of the transcript made at the Preliminary Hearing and the evidentiary material introduced at that hearing, I find, in essential concurrence with Judge Sternburg, that:

(1) Respondents sponsored picketing at the Terminal 2 Building and the International Arrivals Terminal Building, O'Hare International Airport, Chicago, Illinois, on September 29, October 2, and October 8, 1976.

(2) The picketing occurred in the context of a labor-management dispute.

(3) On September 29, 1976, approximately fifteen persons began picketing in a circle at 9:30 a.m. on the upper level outside of Terminal Building No. 2, some fifteen to twenty feet from the entrance of United Airlines. At approximately 10:30 a.m., upon being informed of an unwritten airline rule that picketing was to take place only in front of an affected airline, the pickets, at the request of a policeman, voluntarily complied and moved to a different location on the upper level of the International Arrivals Building. The picketing was confined to an area some ten feet from the nearest entrance to the building and ceased at approximately 11:30 a.m.

(4) On October 2, 1976, approximately twenty to twenty-five individuals began picketing at 11:30 a.m. on the upper level of the International Arrivals Building. The picketing which ended at about 1:30 p.m., was confined to a location some ten to fifteen feet from the entrance to the building.

(5) On October 8, 1976, some fifteen to twenty individuals picketed on the upper level of the International Arrivals Building from approximately 10:15 a.m. to 12 noon. Although the pickets were originally located some ten to fifteen feet from one of the two upper level entrances to the building, they subsequently moved to a location between the two entrances. In so doing they were forced to walk across one of the entrances. When, on this single occasion, they passed the building entrance, the pickets walked individually with their respective signs held down.

(6) The picket signs related to the labor-management dispute and the picketing was for the purpose of informing the public of the problem that NTEU was having with the negotiations for a new contract.

(7) The picket signs bore the following legends: "Search Us: - Still No Contract"; "Customs Declaration - NTEU Contract Now."

(8) The picketing was peaceful at all times and caused no interference with the operations of any airline, Complainant, deliveries or passengers entering or departing the buildings.

(9) Upon observing the pickets, two airlines representatives and two customs brokers inquired of Complainant regarding any possible disruption of services. All were assured that there would be no disruption.

(10) Although Complainant is located at the lower level of the International Arrivals Terminal Building, all picketing took place at the upper level which is generally used by embarking and disembarking passengers.

(11) The space occupied by the Complainant at the O'Hare International Airport is paid for by the airlines or donated by the City of Chicago.

Issues

1. Did the picketing violate Section 19(b)(4) of the Order?

2. Does the case at bar factually fall within the guidelines enunciated by Judge Gesell of the U. S. District Court

for the District of Columbia in NTEU v. Fasser, et al., Civil Action No. 76-408 (D.C.D.C. September 22, 1976)?

3. Is the aforementioned decision by Judge Gesell the law of the forum and, as such, binding precedent?

Conclusions of Law

The scope of the Executive Order with respect to the prohibition against picketing contained in Section 19(b)(4), including my personal apprehension concerning its breadth, has been fully discussed in the respective decisions issued in Internal Revenue Service v. National Treasury Employees Union, Case No. 22-5976(CA), July 7, 1975; A/SLMR No. 536, July 29, 1975; FLRC No. 75A-96, March 3, 1976. These decisions make it eminently clear that, in the opinion of the Assistant Secretary as well as the Federal Labor Relations Council, the respective reviewing bodies within the framework of the Executive Order, the prohibitions contained in Section 19(b)(4) of the Executive Order are absolute and prohibit all picketing by a labor organization in a labor-management dispute. Any further discussion or explication of these decisions and holdings would serve no further purpose and, indeed, would be redundant. This is especially so because the case at bar is factually virtually indistinguishable from the IRS case, supra. Thus, the type of picketing engaged in by Respondents is similar to that in the IRS Case in that: (1) the legends on the picket signs were unambiguous and inoffensive and were clearly designed to inform the public of a pending labor dispute; (2) the picketing was completely peaceful and did not interfere in any manner with the operations of Complainant or any other entity located on the premises where the picketing occurred nor did it interfere with the ingress or egress of the general public to these premises; and (3) the picketing was not designed to nor did it interfere with any deliveries or any other normal operation of the premises where the picketing occurred. In this respect, I must specifically reject Complainant's argument that the mission of the U. S. Customs Service at O'Hare International Airport is of so sensitive a nature that different criteria should be applied than to the operations, functions, and mission of IRS. A careful perusal of the testimony, as well as the evidentiary material introduced by Complainant, convinces me that the two situations are virtually identical and the same criteria should be applied.

On the basis of the foregoing, the conclusion is inescapable that the holding of the Assistant Secretary, as well as of the Federal Labor Relations Council are totally applicable to the case at bar and that, on the basis of these holdings, the picketing engaged in by Respondents was violative of Section 19(b)(4) of the Executive Order.

However, an ancillary and more difficult question is raised by the fact that on September 22, 1976, Judge Gesell of the United States District Court for the District of Columbia, issued a decision in the IRS case, supra, wherein he vacated the Order of the Assistant Secretary on the ground that an absolute ban on all picketing was, "in this particular instance" and in the context of "the precise fact situation presented" in that case, overly broad and violative of the First Amendment to the Constitution. In a carefully crafted, studious, and in my estimation, persuasive opinion, Judge Gesell, on the record before him, specifically declined to declare the picketing prohibition of the Executive Order unconstitutional. Indeed, Judge Gesell held that "Executive Order 11491 can constitutionally prohibit any picketing, whether or not peaceful and informational, that actually interferes or reasonably threatens to interfere with the operation of the affected Government agency." Moreover, as Judge Gesell points out, some types of peaceful informational picketing could, under given circumstances, including the sensitivity of a particular governmental function, be so disruptive and so injurious to the Government, that a total ban could be appropriately imposed. The application of such criteria and the development of further guidelines, Judge Gesell quite appropriately leaves to the circumstances of future and more complete records as well as to the expertise of the Federal Labor Relations Council which "may, if it chooses, develop through rulemaking proceedings a record delineating more precisely the nature of the Government interest to be protected under various circumstances." What Judge Gesell does decide quite clearly and emphatically is that, under the precise fact situation found in the IRS case, the Assistant Secretary's Decision and Order is overly broad and unduly intrudes upon free expression in violation of the First Amendment of the Constitution. In the Judge's opinion, "the interests of the Federal Government in the smooth, efficient functioning of IRS Service Centers can be adequately protected by a more limited order."

Thus, while Judge Gesell's decision in the IRS case is deliberately very limited in scope, it nevertheless has a direct bearing on the case at bar. For, as I have already found, the factual situation of the instant case, whether by accident or design, is indistinguishable from the facts in the IRS case. A more detailed attempt on my part to distinguish the facts of the two cases could well be interpreted as an exercise in sophistry and to have no other purpose than to circumvent Judge Gesell's holding in the IRS case. Nor, for the same reason, is it necessary to engage in a lengthy discussion whether the nature of the picketing or the mission and function of the Complainant fall within those examples cited by Judge Gesell which would permit a total ban on picketing. First, the record is devoid of even

a scintilla of evidence that the picketing did have any adverse effect on Complainant's operations ; second, the fear that the City of Chicago may, because of the picketing, in the future deprive Complainant of facilities at O'Hare International Airport is so speculative and so unsupported by the record, that no finding could be based thereon; and third, as already noted above, I cannot find on the record before me that the mission of Complainant is so sensitive or so different from that of the Internal Revenue Service so as to bring it within the permissible prohibition against picketing outlined by Judge Gesell. In short, if Judge Gesell's decision is, indeed, binding precedent, than, in my opinion, his holding in the IRS case would be equally applicable to the case at bar.

This, of course, raises the rather difficult question whether Judge Gesell's decision in the IRS case has become the law of the forum and must be applied to the instant case. As Respondents point out in their excellent brief, there is a great paucity of case law or commentaries on this issue of stare decisis. The few cases which Respondents cite do indeed support the argument that decisions of Federal Courts, whether at the District Court or Circuit Court level, are binding on administrative agencies, including Administrative Law Judges, within respective jurisdictions. See Stacy Manufacturing Company v. Internal Revenue Service, 237 F.2d 605 (6th Cir. 1956); Vazquez v. Ribicoff, 196 F. Supp. 598 (D.C. Puerto Rico, 1961); Flores v. H.E.W., 228 F. Supp. 877 (D.C. Puerto Rico, 1964). Indeed, in the Flores case, supra, the Court noted that in the absence of a reversal or modification of the District Court's decision, "the refusal or failure to follow such decisions in the future cases appears to be contemptuous."

However, in examining these cases one common factor becomes readily apparent, i.e., that the Court decisions allegedly ignored by H.E.W. had never been appealed by it, and thus, became the law of the forum and binding on H.E.W. in subsequent cases. Thus, in the Vazquez case, supra, the Court specifically noted that "the Secretary of Health, Education and Welfare never sought a review thereof [the prior decision relied upon] by any higher tribunal and it must be considered the law of this forum on the subject." Similarly, in the Flores case, supra, the Court appeared to premise its holding of stare decisis on the fact that its prior decision was never appealed when it noted that "if an Agency is dissatisfied with any ruling or decision of this Court, it should seek its reversal or modification by the legal media provided by our laws for the review thereof."

The situation in the case at bar is complicated by the fact that the period for filing an appeal from Judge Gesell's

decision has not yet expired and I have not been able to ascertain whether any of the Defendants in that case intend to file an appeal in the Circuit Court for the District of Columbia. Nor have I been able to discover any case law which addresses the applicability of the doctrine of stare decisis during the period between a lower court's decision and the filing of an appeal, or, indeed, during the pendency of such an appeal. However, in view of the considerable reliance the Courts appear to place on the absence of an appeal in the cases cited above, I must conclude that if the IRS case were to be appealed to the Circuit Court, Judge Gesell's decision would not become the law of the forum unless and until it is affirmed by the reviewing court. Carrying this reasoning one step further, I must also conclude that during the period wherein an appeal may be perfected, the decision of the District Court cannot as yet be regarded as the law of the forum. Therefore, with the utmost deference to Judge Gesell and, though the issue is certainly not free of doubt, I am constrained to consider myself bound by the precedents established by those bodies which are the reviewing authorities of my decision under the scheme of the Executive Order. Moreover, since these reviewing authorities, i.e., the Assistant Secretary of Labor and the Federal Labor Relations Council, have previously determined in the IRS case that the prohibition of Section 19(b)(4) of the Executive Order constitutes an absolute ban on all picketing during any labor controversy, their holdings are applicable to the instant case, especially since, as found above, the two cases are virtually indistinguishable on their facts. Therefore, since Respondents admittedly did engage in this prohibited activity, their conduct was violative of Section 19(b)(4) of the Executive Order. I note that such a finding is not necessarily prejudicial to Respondents. By the time the contemplated exceptions to my decision reach the Assistant Secretary, the procedural uncertainty regarding an appeal from Judge Gesell's decision in the IRS case, supra, will, by necessity, have been resolved and the Assistant Secretary will then have an opportunity to review this case in the light of such resolution.

There remain two ancillary questions regarding the applicability of the doctrine of stare decisis. In view of my determination of the issue, supra, they do not necessarily require a specific resolution, but the parties, as well as the Assistant Secretary may wish to consider them in case exceptions are filed to this recommended decision.

The first of these questions concerns the issue of venue. Respondents' contention that Judge Gesell's decision in the IRS case, supra, is indeed the law of the forum and therefore applicable to the instant case, is, of course, premised on

the assumption that the District Court for the District of Columbia is the only proper forum wherein the Assistant Secretary's as well as the Federal Labor Relations Council's decision can be reviewed on the Constitutional question presented. It must be noted, however, that the conduct occurred in Chicago; that certain of the parties conduct their business in Chicago; and that it was the United States District Court for the Northern District of Illinois, Eastern Division which issued a temporary restraining order and enjoined the Assistant Secretary and the Regional Administrator of the U. S. Department of Labor from taking any action against Respondents for engaging in peaceful picketing until further order of that Court. Under these circumstances it remains somewhat speculative and problematical whether or not the U. S. District Court for the District of Columbia or the U. S. District Court for the Northern District of Illinois will be the appropriate forum for any further resolution of the Constitutional question inherent in this case and explicated by Judge Gesell in the IRS case. If, indeed, the U. S. District Court for Northern Illinois is the proper forum for such a resolution, then the decision of Judge Gesell in the IRS case is certainly not the law of the forum and, while entitled to considerable deference and consideration, not binding on the parties in this case. I am not unmindful of the fact that Respondents have indicated in their brief that "should the case at bar ultimately require appeal to U. S. District Court, such an appeal of an A/S Order would inevitably be filed in the Federal Courts of the District of Columbia." Moreover, by virtue of §1391(e) of Title 28 U.S.C.A. 2/ Respondents may well be successful in bringing such an action in the U. S. District Court for the District of Columbia.

However, under all the circumstances of this case, there remains a possibility that the eventual forum for a resolution of any Constitutional issues which may arise and may require resolution, would, either by action of the court or the parties, be different from that in the IRS case, supra.

A second related question is whether the above cited precedents should be applied to the instant case. Although

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2/ This section provides: "a civil action in which each defendant is an officer or employee of the United States or an agency thereof acting in his official capacity or under color of legal authority, or an Agency of the United States, may, except as otherwise provided by law, be brought in any judicial district which: (1) a defendant in the action resides, or (2) the cause of action arose;...."

the U. S. District Court for Puerto Rico in the above-cited cases is most emphatic in its holdings regarding the applicability of the law of the forum, it must be noted that, at the time these cases were decided, that particular Court consisted of a single judge. By necessity, all other cases filed in that Court would, of course, be decided by the same judge. In contrast, the U. S. District Court for the District of Columbia consists of twenty-some judges. Since it is, of course, speculative to which judge of that Court a future case may be assigned, it remains equally speculative whether Judge Gesell's decision in the IRS case would be binding on or would be followed be his colleagues on the bench.

On the basis of the above, I am further constrained to follow the scheme of the Executive Order and, under the circumstances, as well as the timing of this case, accept as binding precedent the decisions of the Assistant Secretary and the Federal Labor Relations Council in the IRS case, supra.

I therefore find that the Regional Administrator has fully met the required burden of proof and that Respondents, by picketing Complainant's premises in connection with a labor-management dispute, has violated Section 19(b)(4) of Executive Order 11491.

Recommended Order

In view of the fact that my recommendation for a more limited order in the IRS case was rejected by the Assistant Secretary, and having found that Respondents have engaged in conduct violative of Section 19(b)(4) of the Executive Order, I recommend that the Assistant Secretary adopt the order as set forth which is designed to effectuate the policies of the Executive Order.

ORDER

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the National Treasury Employees Union, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Picketing the U. S. Customs Service, or any other agency of the Government of the United States, in a Labor-management dispute, or from assisting or participating in any such picketing.

(b) Condoning any such activity by failure to take effective affirmative action to prevent or stop it.

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

(a) Post at its national and local business offices, at its normal meeting places, and at all other places where notices to members and to employees of the U. S. Customs Service are customarily posted, including space on bulletin boards made available to the National Treasury Employees Union by agreement or otherwise by the U. S. Customs Service, 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 Treasury Employees Union and shall be posted by the National Treasury Employees Union for a period of 60 consecutive days in conspicuous places, including all places where notices to members and to employees of the U. S. Customs Service are customarily posted. Reasonable steps shall be taken by the National Treasury Employees Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Submit signed copies of said notice within 14 days of the date of this Decision and Order to the U. S. Customs Service for posting in conspicuous places where it customarily posts information to its employees. The U. S. Customs Service shall maintain such notices for a period of 60 consecutive days from the date of posting.

(c) Pursuant to Section 203.27 of the Regulations notify the Assistant Secretary, in writing, within 20 days from the date of this order to what steps have been taken to comply herewith.

H. STEPHAN GORDON
Chief Judge

Dated: November 17, 1976
Washington, D. C.

APPENDIX

NOTICE TO ALL MEMBERS

and

TO ALL EMPLOYEES

OF THE INTERNAL REVENUE SERVICE

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 all employees of the U. S. Customs Service that:

WE WILL NOT picket the U. S. Customs Service, or any other agency of the Government of the United States, in a Labor-management dispute.

WE WILL NOT assist or participate in picketing the U. S. Customs Service, or any other agency of the Government of the United States, in a labor-management dispute.

WE WILL NOT condone any of the above-mentioned activity and WE WILL take affirmative action to prevent or stop it in the event it reoccurs.

National Treasury Employees Union

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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 1033B, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois 60604.

March 28, 1977

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,
INDIANAPOLIS AIR ROUTE TRAFFIC
CONTROL CENTER,
WEIR COOK AIRPORT,
INDIANAPOLIS, INDIANA
A/SLMR No. 812

This case involved an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, alleging that the Respondent violated Section 19(a)(1) and (2) of the Order when a supervisor struck or otherwise disciplined a unit employee when he attempted to invoke a provision of the negotiated agreement.

The Administrative Law Judge found that the Respondent's actions in striking the unit employee and threatening to move him to another work area violated Section 19(a)(1) and (2) as such actions had the obvious consequence of chilling the assertion of agreement rights by warning those employees who would pursue their rights that they do so at their peril. Further, such treatment of an employee for invoking his rights is to discriminate against him in a condition of employment.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings and conclusions of the Administrative Law Judge that the Respondent's conduct improperly interfered with the employee's protected right under the Order to assist a labor organization. However, as there was no evidence of discrimination on the part of the Respondent with regard to hiring, tenure, promotion, or other conditions of employment as to the unit employee involved, the Assistant Secretary found that the Respondent's actions were not violative of Section 19(a)(2) of the Order. Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of Section 19(a)(1) of the Order and that it take certain affirmative remedial actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
INDIANAPOLIS AIR ROUTE TRAFFIC
CONTROL CENTER,
WEIR COOK AIRPORT,
INDIANAPOLIS, INDIANA

Respondent

and

Case No. 50-13128(CA)

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, M.E.B.A., AFL-CIO

Complainant

DECISION AND ORDER

On December 8, 1976, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge, except as modified herein.

The Administrative Law Judge found that the Respondent had violated Section 19(a)(1) and (2) of the Order by its actions which had the effect of chilling the assertion of contract rights and denigrating the exclusive representative. Under the circumstances of this case, I find, in agreement with the Administrative Law Judge, that the Respondent's conduct herein interfered with, restrained, or coerced employees in the exercise of their right assured by the Order to assist a labor organization

1/ On page 2 of his Recommended Decision and Order, the Administrative Law Judge indicated that the date on which the controllers were working in the Traffic Control Center was June 18, 1975, rather than December 18, 1975. This inadvertence is hereby corrected.

in violation of Section 19(a)(1) of the Order. However, as there was no evidence of discrimination on the part of the Respondent with regard to hiring, tenure, promotion, or other conditions of employment as to the unit employee involved, I find no basis on which to find a violation of Section 19(a)(2) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Transportation, Federal Aviation Administration, Indianapolis Air Route Traffic Control Center, Weir Cook Airport, Indianapolis, Indiana, shall:

1. Cease and desist from:

a. Interfering with, restraining, or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended, by disciplining or threatening to discipline employees for exercising their right assured by the Order to assist a labor organization.

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

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

a. Post at the Indianapolis Air Route Traffic Control Center, 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 the Indianapolis Air Route Traffic Control 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 Chief shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

b. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary of Labor for Labor-Management Relations in writing within 30 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)(2) of the Order be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 28, 1977

Francis X. Burkhardt, 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 our employees in the exercise of their rights assured by Executive Order 11491, as amended, by disciplining or threatening to discipline employees for exercising their right assured by the Order to assist a labor organization.

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

_____
(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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 1060, Federal Office Building, 230 S. Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:

Department of Transportation,
Federal Aviation Administration,
Indianapolis Air Route Traffic
Control Center,
Wier Cook Airport,
Indianapolis, Indiana,
Respondent

v.

Professional Air Traffic
Controllers Organization, M.E.B.A.,
AFL-CIO,
Complainant

Case No. 50-13128(CA)

WALTER L. GEORGE, ESQUIRE
Federal Aviation Administration
2300 East Devon
Des Plaines, Illinois 60018,
For the Respondent,

ROBERT E. MEYER, ESQUIRE
P.A.T.C.O.
Suite 203
115 South Wilke Road
Arlington Heights, Illinois 60005,
For the Complainant.

Before: PETER McC. GIESEY
Administrative Law Judge

Recommended Decision and Order

This is a proceeding brought under the terms of Executive Order 11491, as amended (hereafter, "the Order") by Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO ("The Union"). The Union asserts that respondent violated section 19(a)(1) and (2) of the Order when an employee who is a member of the bargaining unit was struck or otherwise disciplined by a supervisor when he invoked a section of the collective bargaining agreement then in effect.

A hearing was held in Indianapolis, Indiana on August 3, 1976. Briefly, the record shows the following circumstances.

Statement of the Case

Mr. Robert Cunning testified that, on June 18, 1975, he was working at the Traffic Control Center as Dayton High Altitude Manual Controller ("Day Hi Sector"). Working directly with him in Day Hi was Robert Ellis, Radar Controller. At about 10:45 p.m., Mr. Cunning stated that traffic "started to build" and he felt that a tracker was needed to assist Ellis in controlling the aircraft in his section. Cunning requested a tracker.

Team Supervisor Howard Brandt had just assumed supervision of the Center at 10:35. He came to the Dayton Hi position and, according to Cunning, asked Ellis and Cunning what he was expected to do-that he "didn't grant annual leave."1/ Brandt then left.

About five minutes later, Brandt returned to the Day Hi Sector, having heard that Mr. Ellis had invoked article 55 of the collective bargaining agreement. 2/ Cunning testified

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1/ An apparent reference to the fact that the center was short one controller who had been granted several hours leave by another supervisor.

2/ This article provides, in relevant part;

> In the event of a difference in professional opinion between the employee and the supervisor, the employee shall comply with the instructions of the supervisor and the supervisor shall assume responsibility for his own decisions.

that Brandt "made [a] comment" indicating that he believed that Cunning, rather than Ellis, had invoked article 55, asked "can't you handle the job, you want to work the low side?" At the same time, or moments earlier, according to Cunning, Brandt brought his hand, in which he was holding some papers down and across Cunning's right shoulder. Ellis and Cunning both testified that Cunning then said "don't hit me again," to which Brandt replied, "I didn't hit you, I swatted you."

According to Brandt, shortly after assuming supervision, he walked past Cunning and Ellis and was "yelled at to come back" to the Day Hi Sector because they wanted some relief. He returned to that position, looked at the board, and determined that Ellis had five aircraft on radar and Cunning had five on manual. He went on picking up position logs (slips of paper approximately 8-1/2 inches by 3 inches), when "they yelled again for me to return, something to the effect that Article 55 was being invoked." He then walked into a position between the two controllers and "Mr. Cunning swerved around to the left and the sheets of paper were there on his shoulder." Brandt asserts that Cunning said, "don't hit me again" and he replied,"I didn't hit you." After that, Brandt testified that "words kept flying and I saw nothing to add to it, so I left...."

Findings of Fact and Conclusions of Law

All witnesses were credible. Predictably, some memories are more precise than others. I find that the events occurred substantially in accordance with the testimony of Ellis and Cunning.

It is commonly understood that air traffic controllers and their supervisors work under some stress at most times and, frequently, under stress which average men and women would find impossible to bear. They are special persons with important responsibilities for the lives and safety of many.

The circumstances in this case, in my opinion, emphasize the importance-and difficulty inherent-in maintaining an atmosphere of quietly efficient cooperation in a stressed atmosphere where the persons involved must work short handed.

Management's (Brandt's) annoyance indicated by ironic humiliation - "can't you handle the job...? "-and his striking, swiping, swatting or brushing Cunning in frustration, are both understandable in a business where decisions must be lighting swift and deadly accurate. There is no room for error or human frailty in air traffic control. In the world of industrial reality, however, such perfection is rarely achieved. The record in this case demonstrates that reality.

It is of no concern here whether some, all or none of the parties were correct or incorrect in the various professional judgments implied by their words and actions. Here an employee attempted to invoke the protection of his collective bargaining agreement. Rightly or wrongly, his invocation cannot be dealt with by management in a manner which "has the obvious consequence of chilling the assertion of contract rights by warning those who would persue their [rights] that they do so at their peril." Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington A/SLMR No. 582, FLRC No. 76A-13. Such action violates the provisions of Section 19(a),(1) of the Order.

Similarly, because the action was taken at the workplace, in the presence of other, uninvolved employees, the words and actions of the supervisor indicate disdain for the collective bargaining agreement. Where the collective bargaining agreement is treated thus, the bargaining agent is made to appear weak and ineffectual. In my opinion, to treat an employee in this manner for invoking his rights is to discriminate against him in a condition of employment within the meaning of Section 19(a),(2) of the Order. In short, to demonstrate to the employees that the attempt to exercise rights under a collective bargaining agreement will have embarrassing effects-or no effect - is to demonstrate that membership in an organization whose sole purpose is collective bargaining is at least as useless as the agreement is disrespected.

Recommended Order

It is recommended that the Assistant Secretary issue an order in the following form;

Pursuant to section 6(b) of Executive Order 11491, as amended, and section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of Transportation, Federal Aviation Administration, Indianapolis Air Route Traffic Control Center, Indianapolis, Indiana, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended, by disciplining or threatening to discipline employees for invoking their rights under the effective collective bargaining agreement.

(b) Discouraging membership in Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO by taking action which demonstrates to employees that they may invoke their rights under the collective bargaining agreement negotiated by such labor organization only at the peril of disciplinary action or the threat of same.

(c) In any like or related manner interferring with, restraining or coercing its employees in the exercise of rights assured by Executive Order 11491, as amended.

2. Take the following actions to effectuate the purpose of this order.

(a) Post at its Indianapolis Route Traffic Control Center copies of the attached notice marked "Appendix," on forms furnished by the Assistant Secretary of Labor for Labor Management Relations. Upon receipt of such forms, they shall be signed by a responsible management official 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. Care shall be taken that such notices are not altered, defaced or covered by any other material.

(b) Notify the Assistant Secretary of the steps taken in compliance with this order, in writing, within 30 days of the date of this order.

Peter McC. Giesey
Administrative Law Judge

Dated: December 8, 1976
Washington, D.C.

A P P E N D I X

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 purposes 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 our employees by disciplining or threatening to discipline employees for invoking their rights under the effective collective bargaining agreement.

We will not discourage membership in Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, by taking action which demonstrates to our employees that they may invoke their rights under the collective bargaining agreement negotiated by that labor organization only at the peril of disciplinary action or the threat of same.

We will not in any like or related manner interfere with, restrain or coerce own employees in the exercise of rights assured by Executive Order 11491, as amended.

Department of Transporation
Federal Aviation Administration
Indianapolis Air Route Traffic
Control Center

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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Building, Room 1033B, 230 South Dearborn Street, Chicago, Illinois 60604.

March 29, 1977

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 HOUSING AND
URBAN DEVELOPMENT,
GREENSBORO AREA OFFICE,
GREENSBORO, NORTH CAROLINA
A/SLMR No. 813

This case arose as a result of a petition filed by an individual seeking to decertify the Intervenor, American Federation of Government Employees, AFL-CIO, Local 3409 (AFGE) as the exclusive representative in a unit of all nonprofessional employees in the Greensboro Area Office. The AFGE contended that there exists a current negotiated agreement which constituted a bar to the petition. It argued that the petition was untimely inasmuch as it had not been filed during the valid challenge period pursuant to the Assistant Secretary's Regulations but, instead, had been filed during the period of an extension of the negotiated agreement.

The record indicated that the AFGE and the Activity entered into a negotiated agreement on July 20, 1973. The agreement had a duration of 3 years with automatic 3-year renewals unless either party requested renegotiations. The AFGE made such a request and the parties extended their agreement to November 29, 1976, although no negotiations actually took place. The instant petition was filed during the extension period.

The Assistant Secretary noted that it has previously been held that where, as here, a negotiated agreement provides for automatic renewal unless a party requests renegotiations, a party's request to renegotiate serves to terminate such a negotiated agreement, even if, in fact, no negotiations subsequently take place. Further, where the parties execute an extension agreement to serve merely as an interim arrangement during a period of further negotiations, such an agreement may not operate as an agreement bar to a petition otherwise timely filed. Under these circumstances, the Assistant Secretary found that when the AFGE requested renegotiations, such request served to terminate the negotiated agreement three years from its original date of approval on July 20, 1973. Accordingly, as there was no agreement bar, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT,
GREENSBORO AREA OFFICE,
GREENSBORO, NORTH CAROLINA

Activity

and

Case No. 40-7598(DR)

MARTIN O. WISECUP

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3409

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 Otis Chennault. 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, Martin O. Wisecup, an employee of the Activity, seeks the decertification of American Federation of Government Employees, AFL-CIO, Local 3409, herein called AFGE, as the exclusive representative of employees in a unit consisting of:

> All employees of the Department of Housing and Urban Development, Greensboro Area Office, Greensboro, North Carolina, excluding all professional employees, temporary employees with appointments of 90 days or less, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors as defined in the Order.

The AFGE contends that its existing negotiated agreement constitutes a bar to the instant petition. In this regard, it argues that the petition was untimely as it was not filed within the valid challenge period provided for in Section 202.3(c) of the Assistant Secretary's Regulations but, instead, was filed during the period of an extension of the basic agreement between the AFGE and the Activity. 1/ The Petitioner, on the other hand, asserts that by its terms the negotiated agreement terminated three years from the date of its approval, notwithstanding the extension agreed to by the AFGE and the Activity for the purpose of renegotiations, and that, once terminated, there was an opportunity for a petition to be filed.

The record indicates that the Activity and the AFGE executed a negotiated agreement on July 20, 1973. On that same date, higher agency management indicated that several changes were needed before the agreement could be approved pursuant to Section 15 of the Order. At the hearing in this matter, the AFGE and the Activity stipulated that such changes were, in fact, made on July 20th and that the parties received telephonic approval of their agreement on that date. The agreement was to remain in effect for three years from the date of approval and was subject to automatic renewal for an additional three years unless either party gave written notice of its desire to renegotiate the agreement. 2/

On May 20, 1976, the AFGE made a timely request to renegotiate. The AFGE and the Activity agreed to several extensions of time for the purpose of renegotiating the agreement although no negotiations actually took place. The instant petition was filed on September 27, 1976, and on October 4, 1976, the Activity notified the AFGE that it could not enter into renegotiations inasmuch as a valid question concerning representation had been raised. The parties did, however, agree to extend the terms of their agreement to November 29, 1976.

The Assistant Secretary has held previously that where, as here, a negotiated agreement provides for automatic renewal unless a party requests renegotiations, a party's request to renegotiate serves to terminate such a negotiated agreement, even if, in fact, no negotiations subsequently take place. 3/ Further, it has been held that where the parties execute an extension agreement to serve merely as an interim arrangement during a period of further negotiations, such an agreement may not operate as an agreement bar to a petition otherwise timely filed as such a temporary, stopgap arrangement does not constitute a final, fixed term agreement and lacks the stability sought to be achieved by the agreement bar principle. 4/ Consistent with this rationale, I find that when, on May 20, 1976, the AFGE made a timely request for renegotiations, such request served to terminate the parties' negotiated agreement three years from its original date of approval on July 20, 1973. The instant petition, filed on September 27, 1976, was, therefore, timely filed. Accordingly, I shall direct an election in the following unit which I find appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

> All employees of the Department of Housing and Urban Development, Greensboro Area Office, Greensboro, North Carolina, excluding all professional employees, temporary employees with appointments of 90 days or less, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards and supervisors 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 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 wish to be represented by the American Federation of Government Employees, AFL-CIO, Local 3409.

Dated, Washington, D. C.
March 29, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ Section 202.3(c) states, in pertinent part: "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition 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 and dated by the activity and the incumbent exclusive representative;...."

2/ In this connection, Article XXII, Section B of the parties' agreement provided that: "Either party may give written notice to the other, not more than 90 nor less than 60 days prior to the 3 year expiration date, and each subsequent expiration date for the purpose of renegotiating this agreement. The present agreement will remain in full force and effect during the renegotiation of said agreement and until such time as a new agreement is approved."

3/ Cf. National Center for Mental Health Services, Training and Research, A/SLMR No. 55, and Veterans Administration Center, Togus, Maine, A/SLMR No. 317.

4/ See, in this regard, U.S. Department of the Air Force, Holloman Air Force Base, Alamogordo, New Mexico, A/SLMR No. 235.

March 29, 1977

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 TREASURY,
INTERNAL REVENUE SERVICE,
BROOKHAVEN SERVICE CENTER
A/SLMR No. 814

This case arose as a result of a complaint filed by the National Treasury Employees Union and the National Treasury Employees Union, Chapter 099 (Complainant) alleging that the Department of Treasury, Internal Revenue Service, violated Section 19(a)(1) and (6) of the Order by failing to inform the Complainant prior to implementing a change in a Standard Position Description (SPD) at its Brookhaven Service Center (Activity) and that said change in position description was issued and implemented by the Respondent on or about October 1974, without informing the Complainant.

The Assistant Secretary concluded, contrary to the Administrative Law Judge, that the Respondent did not violate Section 19(a)(1) and (6) of the Order. He noted that the issuance of the new SPD herein was excepted from the obligation to bargain under Section 11(b) of the Order. He noted further that when an agency takes an action that falls within the ambit of Section 11(b), there remains an obligation to give reasonable notice to the exclusive bargaining representative so that it may have ample opportunity to request that the agency bargain regarding the procedures involved and the impact of the decision prior to its implementation. This obligation arises, however, only when agency management takes action that affects a change in existing terms and conditions of employment. The Assistant Secretary found that the facts herein showed no such change. In this regard, he noted the first hand testimony of a Section Chief and Program Manager that control clerks in the Adjustment Branch had been using an Integrated Data Retrieval System (IDRS) on a regular basis since November 1972. Also, he found that there was direct testimony by two Adjustment Branch control clerks who had been using IDRS prior to October 1974. Furthermore, no testimony by any witness who had personal knowledge was given, nor was any witness called or identified, who could attribute any change in IDRS duties as a result of the new SPD. Under these circumstances, and absent any change in the actual duties performed by control clerks in the Adjustment Branch of the Activity, the Assistant Secretary concluded that the Respondent was under no obligation to notify or inform the Complainant prior to issuing the aforementioned SPD and ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,
BROOKHAVEN SERVICE CENTER

Respondent

and

Case No. 30-6126(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 099

Complainant

DECISION AND ORDER

On June 9, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain alleged unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief to the Respondent'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 Recommended Decision and Order and the entire record in this case, including the Respondent's exceptions and supporting brief and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions 1/ and recommendations, as modified herein.

This case arose as a result of a complaint filed by the National Treasury Employees Union and the National Treasury Employees Union,

1/ In view of the disposition herein, I find it unnecessary to pass upon the Administrative Law Judge's conclusion that it is sufficient to name the Activity in a complaint in order to adjudicate the alleged violation of the Order, even though the conduct alleged as the basis of the complaint was committed by an unnamed subordinate installation of the named Activity.

Chapter 099 (Complainant) alleging that the Department of Treasury, Internal Revenue Service (Respondent) violated Section 19(a)(1) and (6) of the Order by failing to inform the Complainant prior to implementing a change in a Standard Position Description at its Brookhaven Service Center, and that said change in position description was issued and implemented by the Respondent on or about October 1974, without informing the Complainant.

The Brookhaven Service Center, hereinafter called the Activity, is part of the North Atlantic Region of the Internal Revenue Service and performs basic taxpayer auditing and processing. It is administratively divided into four divisions, one of which is the Taxpayer Service Division. The Taxpayer Service Division has an Adjustment Branch which is subdivided organizationally into the "IMF" and "BMF" Sections. All branches and divisions of the Activity employ control clerks.

The record shows that Mr. Donald Somersat has been the Section Chief and Program Manager of the "BMF" Section of the Adjustment Branch since September 5, 1971, and, on occasion, has served as the Acting Branch Chief of the entire Adjustment Branch. The record shows also that Somersat has direct and first hand knowledge of employee duties and work assignments in both the "IMF" and "BMF" Sections. In November 1972, an Integrated Data Retrieval System (IDRS) 2/ became operational at the Activity and control clerks in the Adjustment Branch of the Taxpayers Service Division began to use the IDRS to perform certain of their duties. The record reveals that Somersat personally instructed supervisors to provide the control clerks in the Adjustment Branch with on-the-job training for the IDRS and that clearance to utilize the IDRS by control clerks in the Adjustment Branch had been obtained since November 1972, at which time they began to use IDRS on a regular basis. On November 27, 1972, the Activity issued a Standard Position Description (SPD) for the position of Control Clerk, GS-301-04, applicable to control clerks throughout the Activity. It did not contain IDRS duties.

In March 1973, the National Treasury Employees Union, Chapter 099 (NTEU 099) was certified as the exclusive bargaining representative at the Activity. 3/ On April 13, 1974, NTEU 099 and the Activity entered into a negotiated multi-center agreement which became effective on July 1, 1973. In the summer of 1974, a control clerk in the "IMF" Section of the Adjustment Branch, Ms. Antoinette Bettinelli, complained to the NTEU local representative, Ms. Anne Tamney, that the November 27, 1972, SPD was inaccurate for Adjustment Branch control clerks. Tamney advised Bettinelli that she could consult the NTEU area representative or her supervisor about the problem and see what might be worked out. Similarly, in the early part of September 1974, another control clerk in the "IMF" Section of the Adjustment Branch, Mr. Vito LaMonica, approached his immediate supervisor and complained about the inadequacy of the aforementioned SPD and suggested to his supervisor that it be written to

2/ The IDRS is a clerical operation using machine codes which enable control clerks to obtain and research cases.

3/ At that time, the National Treasury Employees Union, Chapter 099 was designated as the National Association of Internal Revenue Employees, Chapter 99.

clarify the duties he was performing. Thereafter, Somersat authorized LaMonica's supervisor to work with him in revising the November 27, 1972, SPD. LaMonica rewrote the SPD in order to update it to include his current duties and sent his draft through his supervisor to Somersat who reviewed it. Somersat found that the draft accurately set forth the then current duties and responsibilities of control clerks in the Adjustment Branch and sent the draft to an Activity Position Classification Specialist where it was compared to Civil Service Commission standard codes, found acceptable, and adopted.

The record shows further than on October 4, 1974, the Activity issued an SPD, entitled Control Clerk, GS-301-4, which was made effective on that date and was made applicable only to the Taxpayers Service Division, Adjustment Branch, in any section or unit. The October 4, 1974, SPD is substantially similar to the former SPD, except for the mention of IDRS duties. The Respondent concedes that it gave no notice to the Complainant of the new SPD prior to its implementation and, in this regard, the record shows that the Complainant learned of the implementation of the new SPD from employees on or about October 25, 1974. In a letter to the Complainant local's president dated December 13, 1974, the Activity contended that the change effectuated by the October 4, 1974, SPD was "a clarification and particularization in the description of the duties of the affected employees without any change in those duties, working conditions or in the grade level...." At the hearing, Adjustment Branch control clerks Bettinelli and LaMonica testified that they had been performing IDRS duties before and after the issuance of the new SPD and were unable to attribute any change in their IDRS duties as a result of the issuance of the SPD on October 4, 1974. No control clerk in the Adjustment Branch was either personally identified or called as a witness in this matter who had not used IDRS prior to October 4, 1974.

The Administrative Law Judge found that the Respondent violated Sections 19(a)(1) and (6) of the Order by the unilateral institution of the October 4, 1974, SPD without giving the Complainant prior notice and an opportunity to negotiate over its impact and/or implementation. I disagree. In my view, the decision to issue the October 4, 1974, SPD was excepted from the Respondent's obligation to bargain under Section 11(b) of the Order. 4/ Also, as previously stated in earlier decisions, where, as here, an agency takes an action that falls within the ambit of Section 11(b) of the Order, there remains an obligation to give reasonable notice to the exclusive bargaining representative so that it may have ample opportunity to request that the agency bargain regarding the procedures involved and the impact of the decision prior to its implementation. 5/ This obligation arises, however, only when

4/ Cf. International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, New York, 1 FLRC 323, FLRC No. 71A-30, and Louisville Naval Ordnance Station, Department of the Navy, 2 FLRC 56, FLRC No. 73A-21.

5/ Cf. Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656.

agency management takes action that effects a change in existing terms and conditions of employment. 6/ The facts herein show no such change. Thus, the undisputed evidence herein establishes that control clerks in the Adjustment Branch had been performing IDRS duties prior to the modification of the SPD. In this connection, the record shows that control clerks in the Adjustment Branch had clearance to utilize the IDRS since November 1972, at which time they began to use the IDRS on a regular basis. Additionally, there was direct testimony by two control clerks in the Adjustment Branch that they used the IDRS prior to the issuance of the October 4, 1974, SPD and Somersat gave first hand testimony that control clerks had been using IDRS in the Adjustment Branch prior to October 1974. There was no testimony by any witness who had personal knowledge that Adjustment Branch control clerks did not perform IDRS duties prior to October 4, 1974. Nor was any witness called or personally identified who could attribute any change in IDRS duties as a result of the new SPD. Under these circumstances, absent any evidence of a change in the actual duties performed by the control clerks in the Adjustment Branch brought about by the October 4, 1974, SPD, I find that the Respondent was under no obligation to notify or inform the Complainant prior to issuing the SPD in question. Accordingly, I find that the Respondent's conduct herein was not violative of Section 19(a)(1) and (6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-6126(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 29, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

6/ Cf. Northeastern Program Center, Bureau of Retirement and Survivors Insurance, Social Security Administration, A/SLMR No. 753.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

DEPARTMENT OF THE TREASURY :
INTERNAL REVENUE SERVICE
BROOKHAVEN SERVICE CENTER
Respondent :

Case No. 30-6126(CA)

and :

NATIONAL TREASURY EMPLOYEES :
UNION AND NTEU CHAPTER 099
Complainant :

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Theodore E. Davis, Esquire
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For Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). It was initiated by a complaint filed April 11, 1975, alleging violations of Sections 19(a)(1) and (6) of the Order. The Complaint alleged that the Internal Revenue Service failed to inform Complainant prior to implementing a change in a Position Description at its Brookhaven Service Center; that said change in Position Description was issued and implemented by Respondent on or about October, 1974, without informing Complainant. A Notice of Hearing on the alleged 19(a)(1) and (6) violations issued December 12, 1975, and, pursuant thereto, a hearing was held before the undersigned in Holtsville, New York, on January 13, 1976. At the request of Complainant, and for good cause shown, time for submission of briefs was extended to and including March 29, 1976.

All parties were represented at the hearing and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved. Extremely able, comprehensive and most helpful briefs were timely submitted by both parties and have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following Findings of Fact, Conclusions and Recommendation:

Findings of Fact

The operative facts are not seriously in dispute. On November 27, 1972, Brookhaven Internal Revenue Service(IRS) issued a position description for "Control Clerk GS-301-04 Brookhaven Service Center Any Division" (Jt. Exh. 8). This position description ("PD") applied to control clerks throughout the Service Center. In November, 1972, an integrated data retrieval system ("IDRS") became operational at the Brookhaven Service Center and throughout the Internal Revenue Service. Beginning in November, 1972, control clerks in the Adjustment Branch of the Taxpayer Service Division began to use IDRS to perform certain duties of their positions and it was a general practice to furnish all Adjustment Branch Control Clerks with authorization of clearance to use IDRS and to issue "passwords" to enable entry to the system.

Duites of a control clerk in the Adjustment Branch were always more varied than the duties of control clerks in other Branches. For example, Ms. Bettinelli described her duties in the Processing Branch as "pipe line" which involved fixed procedure; while

in Adjustments there is constant change and a variety of jobs. As conversion to IDRS progressed, the control clerks in the Adjustment Branch used IDRS more and more to perform their work. During the summer of 1974, Ms. Bettinelli complained to NTEU Representative Anne Tamney that the PD for Adjustment Branch Control Clerks was inaccurate and Ms. Tamney advised her "what avenues were open to her." Somewhat later, in September, 1974, another Adjustment Branch Control Clerk, Mr. LaMonica, complained to his supervisor that the PD was inaccurate and suggested that the PD be revised. With the assistance of his supervisor, Mr. LaMonica drafted a revised PD for Adjustment Branch Control Clerks which was subsequently adopted, effective October 4, 1974 (Jt. Exh. 9).

The October 4, 1974, PD is "Control Clerk GS - 301 - 04 Brookhaven Service Center, Taxpayer Services Division, Adjustment Branch, Any Section, Any Unit" and the Position Description has a further heading "IDRS Unit Clerk". Respondent concedes that it gave no notice to Complainant of the new PD prior to its implementation. Indeed, Complainant learned of the unilateral implementation of the new PD from employees on or about October 25, 1974. Control Clerks in the Adjustment Branch were given copies of the new PD, signed by Mr. LaMonica, at some time after October 4, 1974, but the record does not disclose the date of the distribution. The PD was not reviewed with each Adjustment Branch Control Clerk and no clerk, other than Mr. LaMonica, signed item 12, certifying that the PD "is a complete and accurate description of the duties and responsibilities of my position".

There is some testimony that, prior to the new PD being made effective on October 4, 1974, some Adjustment Branch Control Clerks were not using IDRS. Two Adjustment Branch Control Clerks, Ms. Bettinelli and Mr. LaMonica, both of whom were using IDRS prior to October 4, 1974, testified that, to their knowledge, some Adjustment Branch Control Clerks were not using IDRS before October 4, 1974; however no adjustment Branch Control Clerk who had not used IDRS prior to October 4, 1974, was either identified or called as a witness. 1/ There was

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1/ A letter from a former Adjustment Branch Control Clerk, Mrs. Joan Blanchfield, marked for identification as Complainant's Exhibit 1, was rejected and placed in the Rejected Exhibit file. This rejected exhibit has not been considered beyond noting that Mrs. Blanchfield, had she appeared as a witness, would have testified that she used IDRS before she received the new PD.

also some testimony, in particular by Mr. LaMonica, that after October 4, 1974, the amount of IDRS work increased. Ms. Bettinelli quite candidly stated that the workflow determined the amount of IDRS utilization and that she could not say that increase in IDRS work coincided with the new PD becoming effective.

There are two sections in the Adjustment Branch. Mr. Donald Somersat, Section Chief in the B.M.F. Adjustment Section, testified that to his knowledge all clerks were performing IDRS functions prior to the new PD becomming effective on October 4, 1974; but on cross examination stated that his personal knowledge was limited to his section (B.M.F.) and as to the other section he could only speak of his knowledge as an acting branch chief.

In late November, 1974, Chapter 099 President Richardson advised NTEU National Field Representative Lipton of the new PD and on December 2, 1974, Messrs. Richardson and Lipton met with Calvin Litwack, Chief of the Brookhaven Employee Management Relations Section. Mr. Lipton testified that he told Mr. Litwack that Complainant was appalled that the new PD had been implemented without notice to Complainant; that Mr. Litwack responded that Respondent had no obligation to give notice of a PD change and that Complainant could not negotiate impact because there was no impact; that he, Lipton, responded that Respondent could not unilaterally tell Complainant there was or was not an impact, that that was a decision for Complainant to make.

On December 4, 1974, Messrs. Lipton and Richardson met with Director Seufert and Mr Litwack. Mr. Lipton testified that he again asserted that he felt there had been a violation of Complainant's rights; that Respondent was obligated to notify Complainant of such changes (the new PD) and, upon request, to negotiate. Mr. Lipton testified that Director Seufert stated that he disagreed and the meeting terminated.

Mr. Litwack agreed fully with the substance of Mr. Lipton's testimony except that he testified that Mr. Lipton did not indicate anything concerning the impact of the new PD; that Mr. Lipton spoke only to the fact that under the Order and his interpretation of Article (Section) 11, we had to show the PD to the Union prior to implementation; that had Mr. Lipton raised some impact question he would have considered it. Mr. Litwack further testified that Mr. Lipton wanted some guarantee that in the future every PD would be shown to Complainant before implementation.

On December 13, 1974, Acting Director Copeland wrote President Richardson, with a copy to Mr. Lipton, as follows:

> "In our meeting of December 4, 1974 you and Mr. Lipton requested our position on whether we were obligated under the Multi-Center Agreement and/or Executive Order 11491 as amended to consult with you prior to the change of [PD] ... It is our interpretation of the Executive Order and the Multi-Center Agreement that this change is a reserved right of management under Section 11 B of the Order and, furthermore, since there was no conceivable impact on the employees involved, we were under no obligation to give you prior notification of this change. For your information, the change in question which was effected on October 4, 1974, was purely a clarification and particularization in the description of duties of the affected employees without any change in those duties, working conditions or in the grade level.
>
> "However, since you have raised this matter, I would be pleased to receive any comments or suggestions you would care to make. You can be assured that we will make every effort to adhere to our obligations both under the Executive Order and the Multi-Center Agreement in a true spirit of bilateralism." (Comp Exh. 1)

Mr. Lipton testified that the only response to Acting Director Copeland's letter of December 13, 1974, was the charge filed herein.

On April 11, 1975, all Adjustment Branch Control Clerks filed classification Appeals seeking to upgrade their positions to GS-5; and in October, 1975, the Adjustment Branch Control Clerks filed grievances under the Multi-Center Agreement challenging the accuracy of the October 4, 1974, PD. 2/

2/ Each grievance was identical (Jt. Exh. 7); the Subject was stated as "Inaccurate P.D. Employee dignity"; and the relief sought was: "Include all duties and responsibilities being performed by employees in employment including job knowledge and skill required."

In March, 1973, Complainant Chapter 099 was certified as the exclusive bargaining Representative at the Brookhaven Service Center (NTEU was then known as the National Association of Internal Revenue Employees); on April 13, 1973, the parties executed a Multi-Center Agreement (Jt. Exh. 1); and on July 8, 1975, executed a successor Multi-Center Agreement (Jt. Exh. 2).

RESPONDENT'S MOTIONS TO DISMISS

Respondent has moved that the Complaint be dismissed on two grounds. First, that the parties named in the complaint are not obligated to bargain with Complainant which will be referred to as "Joinder of Parties"; and second, that the Complaint should be dismissed pursuant to Section 19(d) of the Order and/or pursuant to the Assistant Secretary's Ruling No. 49 and/or pursuant to the Collyer case principles which will be refereed to as "Section 19(d).

a) Joinder of Parties. The Complaint in this case names as Agency and/or Activity,

> "Department of Treasury, Internal Revenue Service" 3/

The address shown is "1111 Constitution Avenue, N.W., Washington, D.C. 20224" and the person to contact is shown as "Billy J. Brown, Director, Personnel Division". In Item F, "Internal Revenue Service" is shown as the Agency of which the Activity is a part. The basis of the complaint is stated, inter alia, as "The Internal Revenue Service failed to inform ... prior to implementing a change in Standard Position Description ... Brookhaven Service Center. ..." The Preamble to the Multi-Center Agreement (Jt. Exhs. 1 and 2) states, in part,

> "... this Agreement is made and entered into by and between the Internal Revenue Service representing the Centers listed in Appendix A ..." (Brookhaven Service Center is listed in Appendix A).

From the outset, beginning with the meeting with Mr. Litwack on December 2, 1974, the meeting with Director Seufert on December 4, 1974, the letter of Acting Director Copeland, dated December 13, 1974, the response of Respondent, dated May 8, 1975 to Compliance Officer Conti (Ass't. Sec. Exh. 1-C) and Respondent's letter to Compliance Officer Goldberg, dated August 4, 1975 (Ass't. Sec. Exh. 1-C), Respondent was fully aware that the Complaint involved the IRS Brookhaven Service Center, indeed, Respondent's letter dated August 4, for example, specifically so states.

Nevertheless, Respondent asserts that the Brookhaven Service Center is not named as a Respondent; that Brookhaven is the activity which granted exclusive recognition; that only Brookhaven, and not the Department of the Treasury or the Internal Revenue Service, could be found to owe any bargaining obligation, and that, in reliance on National Aeronautics and Space Administration (NASA), A/SLMR No. 457 (1974), FLRC No. 74A-94 (Report No. 84, 1975); and Department of the Navy and U.S. Civil Service Commission, A/SLMR No. 529 (1975), FLRC No. 75A-88 (Report No. 93, 1976), the complaint must be dismissed.

I do not find the NASA or the Department of the Navy cases, supra, relied upon by Respondent, to have involved the threshold question presented in this case, namely, whether there is jurisdiction to proceed against alleged unfair labor practices committed by an unnamed subordinate installation of a Department (Agency) and of an Activity (Internal Revenue Service) named in a complaint under the Order. In practical effect the issue is whether it is sufficient to name an Activity in a complaint in order to remedy an alleged unfair labor practice committed by an unnamed subordinate instillation of the named Activity. For the reasons stated hereinafter, I conclude that it is sufficient to name the Activity in a Complaint in order to adjudicate the alleged violation of the Order, even though the conduct asserted as the basis of the complaint was committed by an unnamed subordinate installation of the named Activity.

Section 2(a) of the Order defines "Agency" as:

> "(a) 'Agency' means an executive department, a Government corporation, and an independent establishment ..."

Section 2(f) of the Order defines "Agency Management" as:

> "(f) 'Agency management' means 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."

3/ The Regional Administrator added Brookhaven Service Center in the caption of the Notice of Hearing (Ass't. Sec. 1A).

Section 19 provides that:

> "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."

For the purpose of jurisdiction under Section 19(a) of the Order, it would be sufficient to name the executive department (Agency), in this case Department of Treasury, since, for the purpose of Section 19(a), "Agency management" means "the agency head and all management officials ... having authority to act for the agency in any matters relating to the implementation of the agency labor-management relations program established under this Order."

However, Section 203.3 of the Regulations provides, in part, that:

> "(a) A complaint ... shall contain the following:
>
> "(2) The name, address, and telephone number of the activity, or agency ... against whom the complaint is made."

Section 201.14 of the Regulations provides that:

> "'Activity' means any facility, geographical subdivision, or combination thereof, of any agency as that term is defined in section 2 of the order ..."

Section 201.21 of the Regulations provides that:

> "'Party' means any... activity or agency: ... (b) named in a complaint ..."

In the instant case, it is clear that the complaint identifies

the agency as Department of Treasury and the activity as Internal Revenue Service. The definition of "Activity" in Section 201.14 of the Regulations is sufficiently broad as to constitute the Internal Revenue Service an "Activity" of the Department of Treasury whether viewed as a "facility" or "geographical subdivision" or "combination thereof" of the Executive Department ("Agency" within the meaning of Section 2(a) of the Order and Section 201.11 of the Regulations). Thus, the complaint alleges that Internal Revenue Service violated Section 19(a)(1) and (6) of the Order by failing to inform Complainant prior to implementing a change in a PD at Brookhaven Service Center. Brookhaven Service Center, a subordinate subdivision of the Internal Revenue Service, is not named in the complaint; but Brookhaven Service Center is a part of the Internal Revenue Service and, as the Internal Revenue Service, an activity, is a party, a bargaining order would lie, should a violation be found, at least against Brookhaven Service Center even if, pursuant to the NASA and Department of Navy cases, supra, and Department of the Treasury, Internal Revenue Service, A/SLMR No. 550 (1975), such order could not extend beyond the scope of the duty to bargain. Cf. Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390 (1974) (NAVSHIPS, which had no bargaining obligation, issued an instruction to SUPSHIPS, which did have a bargaining obligation, and implementation of the NAVSHIPS instruction violated the Order. In order to remedy the 19(a)(6) violation, the order ran to SUPSHIPS).

The purpose of the portions of the Regulations dealing with the content of a complaint is to insure notice to the agency or activity of the facts constituting the alleged unfair labor practice in order that the right of the agency or activity to due process of law be insured. In this case, the complaint clearly and concisely set forth the very specific allegation asserted to have constituted the violation; identified the particular PD at the Brookhaven Service Center which was asserted to have been changed without prior notice to Complainant; stated the time when the change was alleged to have been made; and Respondent, by its response to the complaint, demonstrated that it was fully advised of the violation alleged. Of course, the converse is not time. Thus, if a complaint names only a subordinate activity, neither the activity nor the agency is a party, Iowa State Agricultural Stabilization and Conservation Office, Department of Agriculture, A/SLMR No. 453 (1974), and a complaint which fails to state clearly and consicely the facts constituting the alleged unfair labor practice is subject to dismissal pursuant to Section 203.3(3) of the Regulations.

Moreover, even though the Council reversed the decision of the Assistant Secretary in the NASA case, supra, that the Agency (the Activity was held not to have violated either 19(a)(1) or (6)) could not be found in violation of 19(a)(6) because there was no bargaining obligation, but that an independent 19(a)(1) violation by Agency not premised on the existence of a bargaining relationship between Agency and the Union could be found, a contrary result might well be warranted where, as here, the activity, Internal Revenue Service, on behalf of various Service Centers, did negotiate and enter into the Multi-Center Agreements. If not sufficient to constitute a bargaining relationship to support, if appropriate, a 19(a)(6) order against the Internal Revenue Service,and this is not necessary for decision at this point, Internal Revenue Service's direct involvement in the labor-management relations program under this Order would, consistent with the decision of the Assistant Secretary in NASA, supra, as well as the analysis of the Council in NASA, supra, permit a 19(a)(1) order if an independent 19(a)(1) violation were found.

Accordingly, Respondent's Motion to Dismiss on this ground is denied.

b) Section 19(d)

Classification appeals were filed, but the unfair labor practice asserted could not properly be rasied under that procedure and neither the unfair labor practice nor the facts giving rise to it were raised or asserted in the appeals procedure, Veterans Administration, Veterans Benefits Office, A/SLMR No. 296 (1973); Department of Navy, Aviation Supply Office, A/SLMR No. 434 (1974). Grievances were filed contesting the accuracy of the PD but neither the unfair labor practice issue nor the facts giving rise to it were raised by the grievances. Accordingly, as the unfair labor practice issue was not raised under a grievance procedure, Section 19(d) does not constitute a bar.

Intertwined are Respondent's contentions that, pursuant to the principles of Collyer Insulated Wire, 192 NLRB No. 150 (1971), Arnold Co. v. Carpenters District Council, 417 U.S. 12, 15 (1974), the Assistant Secretary's Ruling No. 49; Norfolk Naval Shipyard, A/SLMR No. 548 (1975), and Veterans Administration Center, A/SLMR No. 335 (1974), as the issuance of the 1974 PD was not a patent breach of contract but, rather, constituted a good faith effort by Respondent to implement the terms of the Agreement, etc., jurisdiction should be declined and the complaint dismissed. Respondent's contentions have been well and forcefully argued. It is apparent that, in a

sense, there is a contract nexus; and it is true that there is an appeals procedure and a grievance procedure, both of which were exercised; but the unfair labor practice asserted, i.e., a duty to give Complainant prior notice before implementing a change in a PD and/or a duty to meet and confer, upon request, with respect to the impact of such change in a PD, was not subject to the appeals procedure and neither the unfair labor practice nor the facts giving rise to it were asserted or raised through the grievance procedure. 4/ As Section 19(d) leaves to the discretion of the aggrieved party the choice of forum, it would be inappropriate under Section 19(d) to decline jurisdiction where Complainant has elected the complaint procedure. Internal Revenue Service, Southeast Service Center, A/SLMR No. 448 (1974). This is especially true where, as here, there is no clear cut contractual right to prior notice assured Complainant under the terms of the collective bargaining agreement. To the contrary, the unfair labor practice alleged is bottomed on an obligation imposed by the Order and is not based on disagreement over the interpretation of an existing collective bargaining agreement. Therefore, Respondent's motion to dismiss on this ground is denied.

4/ Article 32, Grievance Procedure, provides, in part, as follows:

> Section 1 "B. The Union agrees to submit virtually all contract related matters to the negotiated grievance procedure ... and to use sparingly unfair labor practice procedures. ...
>
> Section 2 "A grievance is a request for personal relief in any matter of concern or dissatisfaction to an employee, a group of employees or the Union, which is subject to the control of the Employer. ...
>
> Section 3 "A. ... In any case, the Union may initiate a grievance when it believes that rights assured it under the terms of this Agreement have been denied." (Jt. Exhs. 1, 2)

CONCLUSIONS

Complainant does not contend that Respondent had any duty to negotiate its decision to institute IDRS or to negotiate its revision of the PD. Complainant does assert that Respondent had a duty under Section 11(a) and (b) of the Order to notify Complainant prior to implementing the new PD; to negotiate, upon request, concerning the impact, if any, of the new PD; and that the unilateral action of Respondent violated Sections 19(a)(6) and (1) of the Order.

Respondent admits that it did not notify or inform Complainant prior to issuing its October 4, 1974 PD, asserts, in essence, that a duty to notify Complainant prior to implementation of a reserved right of management exists only where there is impact; that the October 4, 1974 PD was merely a particularization and clarification of an existing position description which did not have demonstrable impact or negotiable terms and conditions of employment of affected employees; and, accordingly, it did not violate 19(a)(6) and (1) of the Order by failing to give Complainant notice of the new PD prior to its implementation. 5/

5/ The Complaint alleges only that Respondent violated Sections 19(a)(1) and (6) by unilaterally instituting the October, 1974 PD without giving Complainant prior notice and an opportunity to negotiate over the impact and/or implementation of the new PD. The complaint did not allege a refusal to negotiate impact and/or implementation on December 2, 1974, December 4, 1974, or any other date. At the hearing, Complainant sought to amend the complaint to allege a refusal, upon request, to negotiate impact. In agreement with Respondent, Complainant's request to amend the complaint to include the further allegation that Respondent violated Sections 19(a)(6) of the Order when it failed "to negotiate upon timely request" is denied. Moreover, the record does not show any failure or refusal to negotiate impact upon request. To the contrary, Mr. Litwack testified that the December 2, 1974, meeting concerned only the failure to give Complainant notice prior to implementation of a new PD; that Mr. Lipton did not indicate anything concerning impact; and that had impact been raised he would have considered it. Mr. Lipton, in agreement, testified that he asserted on December 2, 1974, that he was appaled that the new PD had been implemented without notice to Complainant; that Respondent could not unilaterally tell Complainant there was or was not an impact, that that was a decision for Complainant to make. Mr. Lipton further testified that on December 4, 1974, he complainaed to the Director that the unilateral issuance of the PD violated Complainant's rights; that

There is considerable merit in Respondent's contentions. In full agreement with Respondent, each case must be decided on its own merits. This case involves the specific question as to whether Respondent violated Sections 19(a)(1) and (6) of the Order by its unilateral implementation of its PD of October 4, 1974. A disturbing aspect of this case is that the duties of Adjustment Branch Control Clerks began to change in November, 1972, or shortly thereafter, with the introduction of IDRS and the record shows that Complainant had knowledge of such change in duties at least by the summer of 1974 but took no action until after it learned of the unilateral issuance of the new October 4, 1974 PD. Obviously, Respondent can, and does, contend that the new PD simply spells out what Adjustment Branch Control Clerks had been doing for nearly two years. Nevertheless, for reasons stated hereinafter, it has been concluded that issuance of the new PD was, itself, a change which affected existing working conditions.

The duty to give notice prior to making effective a change reserved to management by the Order cannot be wholly divorced from impact. On the other hand, the exclusive bargaining representative must be afforded a meaningful opportunity to meet and confer on the impact of such action on adversely affected unit employees, Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454 (1974), and a failure to notify the exclusive bargaining representative of a change affecting personnel policies and practices or other matter affecting working conditions is a violation of Section 19(a)(6), Veterans Administration, Veterans Center, Hampton, Virginia, A/SLMR No. 385 (1974; Veterans Administration, Wadsworth Hospital Center, Los Angeles, California, A/SLMR No. 388 (1974). In the Wadsworth Hospital Center case, supra, the Assistant Secretary, with regard to a questionnaire, stated:

> "... I find that the Complainant's conduct with respect to the first questionnaire [accepted without objection] and

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Footnote continued from page 12.

Respondent was obligated to notify Complainant of such change and, upon request, to negotiate. The letter of Acting Director Copeland, dated December 13, 1974, confirmed the focus of the meeting of December 4, 1974, and concluded with the statement, "However, since you have raised this matter, I would be pleased to receive any comments or suggestions you would care to make. ..." Mr. Lipton testified that the only respense to the December 13, 1974, letter was the charge filed herein. Accordingly, the record fails to show a refusal to negotiate upon the request of Complainant.

> with respect to other communications [also accepted without question] 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. ..."

In the Veterans Administration Center case, supra, the Assistant Secretary stated:

> "... 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."

A position description directly affects personnel policies and directly affects working conditions. In this case, the October 4, 1974 PD was a new position description which differed from the 1972 standarized PD in two significant respects. First, the Adjustment Branch Control Clerks were severed from the

standarized PD which had applied throughout the Service Center. Second, IDRS duties, knowledge of technical data processing words and phrases, etc., were added to the PD. With full recognition that, as Mr. Somersat testified, all Adjustment Branch Control Clerks probably were cleared to perform and probably performed some IDRS functions prior to October 4, 1974; nevertheless, the 1972 PD did not require the performance of IDRS duties and the record shows that some Adjustment Branch Control Clerks were not regularly performing IDRS duties prior to October 4, 1974. The October 4, 1974 PD potentially affected movement of control clerks to the Adjustment Branch and set forth different duties, skills, etc., on which performance of incumbent Adjustment Branch Control Clerks would be evaluated. Accordingly, the new PD did involve personnel policies and practices and did concern matters affecting working conditions within the meaning of Section 11(a) of the Order and its unilateral issuance by Respondent constituted an improper bypass and undermining of the status of Complainant and deprived Complainant of any meaningful opportunity to meet and confer on the impact of such action in violation of Section 19(a)(6) of the Order. Army and Air Force Exchange Service, supra; Veterans Administration, Wadsworth Hospital Center, supra; Veterans Administration, Veterans Administration Center, supra. Respondent's improper failure to meet and confer with Complainant prior to issuance of its October 4, 1974 PD also derivatively violated Section 19(a)(1) of the Order. Army and Air Force Exchange Service, supra.

In concluding that Respondent violated the Order by failing to give Complainant notice of the new PD prior to its implementation, I have given careful consideration to Respondent's contention that there was no impact on affected employees and, accordingly, no duty to bargain. I agree completely with the decision of Judge Sternburg, In the Matter of: Northeastern Program Center, Bureau of Retirement and Survivors Insurance, Social Security Administration, Case No. 30-6595(CA)(May 28, 1976), where the exclusive bargaining representative has notice of a change in position description and the sole change in duty occurs in the written job description and not in the job itself, that if there is no impact there is no duty to bargain. But the issue here is not simply whether there was a duty to bargain on impact. The threshold issue here is whether the new position description involved personnel policies and practices and concerned matters affecting working conditions within the meaning of Section 11(a) of the Order as to which Complainant was entitled to notice prior to implementation. Agency action may well involve personnel policies and practices and matters affecting working conditions as to which the exclusive bargaining representative is entitled to notice prior to implementation where,

as in Veterans Administration Center, supra, bargaining on impact is not reasonably foreseeable; or may, as here, involve action as to which there may or may not be impact on which the exclusive bargaining representative may request bargaining on impact and implementation. The right of Complainant under the Order to be afforded notice and an opportunity to meet and confer regarding the new PD must be measured by whether it involved personnel policies and practices and concerned matters affecting working conditions within the meaning of Section 11(a) of the Order and not by whether there was, or was not, a duty to bargain on impact issues. Not only is notice to the exclusive bargaining representative required prior to action by agency management which involves personnel policies and practices and affects working conditions, whether or not there is a duty to bargain on the action, but such notice is a necessary cornerstone of the right of the exclusive bargining representative to a meaningful opportunity to consult and confer on impact issues. As recognized in Army and Air Force Exchange Service, supra, without notice of contemplated action there can be no meaningful opportunity to consult and confer on impact. To equate the duty to give prior notice, as Respondent urges, to the duty to bargain on impact would emasculate the obligation to deal with the exclusive bargaining representative concerning personnel policies and practices or other matters affecting working conditions and would erode the obligation to bargain on impact issues prior to implementation by permitting agency management to bypass the union by its unilateral determination as to impact, a result which would be inimical to the purpose and spirit of the Order.

As the violation alleged, and found, concerned solely the violation of Sections 19(a)(1) and (b) by the unilateral institution of the October 4, 1974 PD without giving Complainant prior notice and an opportunity to negotiate over the impact and/or implementation; as Complainant concedes that the Respondent had no duty to negotiate its revision of the position description; and as the new position description has been in effect since October 4, 1974, and both grievances and classification appeals were filed with regard thereto, it would be inappropriate to recommend withdrawal of the October 4, 1974 position description pending negotiation on impact, particularly as the record shows that Complainant did not request negotiations on impact in December, 1974, when it met with Respondent. In addition, as the 19(a)(1) and (6) violations found resulted wholly from the failure of the Brookhaven Service Center to give

Complainant notice of the new position description prior to its implementation at the Brookhaven Service Center, and consistent with the decisions discussed hereinabove with respect to bargaining obligation, the recommended order will run only to the Internal Revenue Service's Brookhaven Service Center.

RECOMMENDATION

Having found that Respondent Internal Revenue's Brookhaven Service Center engaged in conduct which was in violation of Section 19(a)(6) and derivatively of Section 19(a)(1) of the Executive Order by unilaterally instituting its October 4, 1974, position description without giving Complainant prior notice and an opportunity to negotiate over the impact and/or implementation thereof, I recommend that the Assistant Secretary adopt the following order:

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 Internal Revenuw Service's Brookhaven Service Center shall:

1. Cease and desist from:

(a) Failing to notify the National Treasury Employees Union, Chapter 099, or other exclusive representative, concerning changes in, or issuance of new, position descriptions which concern changes in existing personnel 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 Chapter 099, National Treasury Employees Union, or any other exclusive representative, of any intended changes in existing position descriptions, personnel policies and practices, or other matters affecting the working conditions of employees in the unit.

(b) Post at the Internal Revenue Service, Brookhaven Service Center, Holtsville, 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 Service Center and shall be posted and maintained by him for 60 consecutive days thereafter, in concpicuous 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.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 9, 1976
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 implement changes in existing position descriptions, personnel policies and practices, or other matters affecting the working condition of employees in the unit without affording Chapter 099, National Treasury Employees Union, or 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 questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Suite 3535, 1515 Broadway, New York, New York 10036.

March 31, 1977

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,
MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA
A/SLMR No. 815

This case involved a petition filed by the Engineers and Scientists of California seeking a unit of all Nuclear Engineering Technicians employed by the Activity. The Activity contended that the petitioned for unit was not appropriate as the claimed employees do not possess a clear and identifiable community of interest separate and distinct from other employees of the Activity. Further, the Activity asserted that such a unit would result in the artificial fragmentation of the Activity and would not promote effective dealings and efficiency of agency operations.

Applying the three criteria found in Section 10(b) of the Order, the Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive recognition. In this regard, the Assistant Secretary noted that the employees petitioned for have substantial interaction and interchange with other employees of the Activity, especially other technicians, and that other employees of the Activity are subject to the same personnel policies and practices. Under these circumstances, he concluded that the evidence established that the claimed employees do not share a community of interest separate and distinct from other employees of the Activity, and that such unit would not tend to promote effective dealings or efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the petition be dismissed.

A/SLMR No. 815

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD,
VALLEJO, CALIFORNIA

Activity

and Case No. 70-5403(RO)

ENGINEERS AND SCIENTISTS OF CALIFORNIA

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 George R. Sakanari. 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, Engineers and Scientists of California, seeks an election in a unit of all Nuclear Engineering Technicians at the Activity. 1/ The Activity contends that the claimed unit is inappropriate for the purpose of exclusive recognition under the Order because the sought employees do not enjoy a clear and identifiable community of interest separate and distinct from other employees of the Activity, i.e., other technicians, and because such a unit would result in artificial fragmentation of the Activity and would not promote effective dealings or efficiency of agency operations.

The Activity's mission is to provide logistics support for assigned ships and service craft; to perform authorized work in connection with construction, conversion, overhaul, repair, alteration, drydocking, and outfitting of ships and craft; to provide services and material to other activities and units; and to perform manufacturing, research, development and test work, as directed by the Department of the Navy.

1/ The unit description contained in the petition specified by classification numerous exclusions in addition to the normal exclusions. In view of the disposition herein, I find it unnecessary to pass upon such exclusions.

The Shipyard is subdivided into 8 major offices and 8 departments which report directly to the Shipyard Commander. The eight offices consist of: Ship Management, Radiological Control, Data Processing, Quality Assurance, Management Engineering, Industrial Relations, Combat Systems and Dispensary. The eight departments consist of: Planning, Production, Public Works, Supply, Comptroller, Administrative, Nuclear Engineering, and a special staff entitled Nuclear Managers.

The record discloses that the overwhelming majority of employees classified as Nuclear Engineering Technicians work in the Nuclear Engineering Department. The Nuclear Engineering Department is responsible for all nuclear reactor plant matters, such as plant modifications, refueling, construction and testing, and accomplishes other technical activity, such as documents, work controls, evaluation of work performance and material. Most of the employees of the Nuclear Engineering Department are professional engineers in a variety of disciplines, with a lesser number of technicians. The Department is subdivided into: the Nuclear Reactor Engineering Division, the Nuclear Fluid Systems and Mechanical Engineering Division, the Nuclear Control Engineering Division, the Nuclear Test Engineering Division, the Nuclear Quality Engineering Division, and the Nuclear Radiological Engineering Division, all under the direct supervision of a Head Nuclear Engineer. The Nuclear Engineering Technicians in these departments perform a variety of subprofessional nuclear technical work, either independently or as an assistant to an engineer.

The Shipyard has granted exclusive recognition to the Federal Employees Metal Trades Council of Vallejo for a unit consisting primarily of Wage Grade employees, but also including some General Schedule employees in the positions of Physical Science, Electrical, and Mechanical Engineering Technicians. The Planners and Estimators, Progressmen and Schedulers Association, Local No. 5, also has been granted exclusive recognition for certain Wage Grade employees at the Activity. Additionally, the Petitioner, has been granted exclusive recognition for a unit consisting of all professional employees at the Activity.

The record reveals that there are approximately 772 nonsupervisory technical employees at the Activity, including the Nuclear Engineering Technicians. Additionally, there are approximately 704 other General Schedule, nonsupervisory personnel at the Activity who are unrepresented and not included in the unit requested, but who do not fall into the category of technical employees. At the time of the hearing in this matter, there were approximately 33 employees classified as Nuclear Engineering Technicians.

The record shows that in the performance of their duties Nuclear Engineering Technicians work throughout the Shipyard and have considerable contact with employees of other departments. Thus, during the time the Nuclear Engineering Technicians are in the Shipyard area or working aboard a ship, they experience substantial interaction with other employees of the Shipyard, especially the Electrical Technicians of the Production Department and with technicians assigned to the Radiological Control Office. Moreover, other technicians are assigned to the Nuclear

Engineering Department. Thus, the Mechanical Engineering Technicians are assigned to the Nuclear Reactor Engineering and the Nuclear Quality Engineering Divisions. Nuclear Engineering Technicians in the Nuclear Engineering Department perform technical duties of the same general type as non-nuclear engineering technicians, and, in the course of performing their duties, enjoy significant integration of operations with Metallurgists, Welders, Radiographers, and persons performing non-destructive tests either shipboard or in the shop areas. Furthermore, Nuclear Engineering Technicians function in departments outside the Nuclear Engineering Department. 2/

In addition to revealing significant interaction of personnel between the Nuclear Engineering Department and other departments of the Shipyard, the record also reveals a significant degree of tranfer of technicians between nuclear and non-nuclear fields. Thus, certain employees hired as technicians in non-nuclear departments have subsequently transferred into the Nuclear Engineering Department to become Nuclear Engineering Technicians. Nuclear Engineering Technicians have also transferred to non-nuclear departments as technicians in other engineering disciplines. These transfers in and out of the Nuclear Engineering Department and in and out of the Nuclear Technician classification have occurred as the result of, but not limited to, merit promotion procedures. The record also reveals evidence that many of the Nuclear Engineering Technicians have held some job title other than technician before they entered the Nuclear Engineering Department. In this regard, it appears that many employees gained the designation Nuclear Engineering Technician after on-the-job training in the Nuclear Engineering Department, and that prior to this training they were employed in such classifications as Electronics Specialists, Marine Engineer Inspectors, Test-Specialists, etc., before joining the Nuclear Engineering Department.

All unrepresented General Schedule employees of the Activity are covered by the same personnel policies and procedures, including policies concerning safety, merit promotion, annual leave, emergency leave, sick leave, holidays, adverse actions, disciplinary appeals, grievances, reduction-in-force, equal employment opportunity, position management, basic work week, hours of work, work breaks, overtime, emergency recall, duty travel, employee details, and other Post privileges. Further, the record reveals that all of the Activity's personnel programs and policies are centrally administered through the Industrial Relations Office.

Based on the foregoing, I find that the unit sought herein is not appropriate for the purpose of exclusive recognition under the Order. In this regard, it was noted particularly that Nuclear Engineering Technicians have significant interaction and interchange with non-nuclear technicians, that all technicians are covered by the same personnel policies and practices, that these policies are centrally administered, and that all technicians share the same general mission and overall supervision. Under these circumstances, I find that Nuclear

2/ The Nuclear Repair Superintendent of the Production Department supervises two Nuclear Engineering Technicians.

Engineering Technicians do not have a clear and identifiable community of interest separate and distinct from certain other employees of the Activity. Further, I find that a unit composed exclusively of Nuclear Engineering Technicians would artifically fragment the Activity, and would not tend to promote effective dealings and efficiency of agency operations. Accordingly, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 70-5403(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
March 31, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

March 31, 1977

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,
BUREAU OF HEARINGS AND APPEALS,
DALLAS, TEXAS
A/SLMR No. 816

This case arose as a result of an amended unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3506 (Complainant) alleging, in effect, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to negotiate with the Complainant concerning the impact and implementation of a management decision to establish a new Staff Attorney Support program in the Regional Offices of the Bureau of Hearings and Appeals.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he found that the Respondent timely advised the Complainant of the establishment of the Staff Attorney position and that the Complainant failed to request bargaining concerning the impact and implementation of the institution of the program after it was notified that the Staff Attorney program was going to be instituted.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge. Accordingly, he ordered that the complaint be dismissed.

A/SLMR No. 816

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS,
DALLAS, TEXAS

Respondent

and Case No. 63-6200(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3506

Complainant

DECISION AND ORDER

On January 25, 1977, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-6200(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
March 31, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF HEALTH, EDUCATION AND
WELFARE, SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS
DALLAS, TEXAS

Respondent

and Case No. 63-6200(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3506

Complainant

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For Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under the provisions of Executive Order 11491, as amended (hereinafter called the Order). American Federation of Government Employees, AFL-CIO, Local 3506 (hereinafter called the Union or AFGE Local 3506) filed a complaint on November 10, 1975 alleging that the Bureau of Hearings and Appeals, Department of Health, Education and Welfare, Dallas, Texas (hereinafter called the Activity or BHA Region 6) violated Sections 19(a)(1) and (6) of Order by failing to bargain with the Union about the decision to establish a new attorney position and the job description, and about the impact and implementation of the decision to use such an attorney position. The Union withdrew the portion of the complaint alleging that the Activity violated Section 19(a)(6) by its failure to consult "regarding the decision to establish the Staff Attorney Support Program." The withdrawal letter stated further that "the other allegations remain a part of my complaint." The Regional Administrator for Labor Management Services for the Kansas City Region issued a Notice of Hearing on Complaint on July 22, 1976.

Pursuant to the Notice of Hearing on Complaint a hearing was held before the undersigned in Dallas, Texas. Both parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties were advised of their right to argue orally and to file briefs. Both parties filed briefs, which have been duly considered.

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. AFGE Local 3506 was certified and recognized on July 29, 1974 as the exclusive collective bargaining representative for a unit composed of all BHA Region 6 non-professional employees, including GS-6, 7 and 8 Hearing Assistants.

BHA Region 6 has its regional office in Dallas, Texas and has several field offices. There are approximately 84 Hearing Assistants employed in Region 6.

2. During the summer of 1974 the Regional Personnel Office of the Department of Health, Education and Welfare (DHEW) conducted a classification survey. Because they received no report on their survey a group of Hearing Assistants instituted a classification appeal with the Civil Service Commission on about February 28, 1975.

3. At about this same time the Bureau of Hearings and Appeals decided to consider the establishment of a Staff Attorney Support Program to provide professional assistance to Administrative Law Judges in order to achieve higher case production and to reduce a national case backlog.

4. In March 1975 the Regional Personnel Office and the BHA Region 6 Assistant Chief Administrative Law Judge Winfrey received notification that the BHA was considering this program and copies of proposed position descriptions for the new attorney positions. They were requested to submit comments to BHA.

5. On March 21, 1975, Assistant Chief Administrative Law Judge Winfrey sent a memo to AFGE Local 3506 President Sandy Palmer advising her of the proposed employment of legal assistants and that there may be some overlapping of duties between those the Hearing Assistants and the proposed job description of the legal assistants.

6. Mrs. Palmer and Danny Hill, another Union official, went to the Regional Personnel Office and asked Mr. Tommy Long, the Activity's Labor Management Specialist, for a copy of the proposed position description for the attorney position. Mr. Long advised Union officials Palmer and Hill that because the proposed job description came from the central office, he did not feel he could give them copies of it, but he did allow them ample opportunity to examine it. Mrs. Palmer, after examining the job description advised Mr. Long that the job seemed similar to hers and that they were concerned about the position description and how it would affect the Hearing Assistants and that they should be given an opportunity to negoitate and consult about it.

Mr. Long replied that the Union didn't have national recognition and that management was not obligated to consult about a new program being instituted at the national level. The record is not quite clear concerning this conversation but it is found that apparently Union officials Palmer and Hill were asking to bargain and consult about the proposed job description and its contents because it would affect the Hearing Assistants position. Mr. Long was responding to that question. It is concluded that the record does not establish that the Union, at that time, was requesting to bargain at the BHA Region 6 level about the implementation and impact of the Staff Attorney Support Program. 1/

7. During the latter part of May 1975 Union President Palmer asked one of the Activity's position classifiers for a copy of the staff attorney's job description. The position classifier looked but was unable to find a copy of the job description and thus could not provide Union President Palmer with a copy.

8. The Attorney Assistant job description in its final form was submitted to the Civil Service Commission for its approval. The Civil Service Commission notified the DHEW and BHA that it approved the position description on June 5, 1975.

9. The Regional Personnel Office was then sent copies of the approved description. The program was scheduled to begin in late July or early August 1975. The Activity advised the Union President, telephoncially, in the latter part of July 1975 that the Staff Attorney Program was to commence and that they were going to hire 15 Staff Attorney to begin training in Dallas in August 1975 and that they would be assigned to field offices around September 15, 1975.

10. The record does not establish that any time after May the Union requested a copy of the approved job description of the Staff Attorney position.

1/ In this regard it should be noted that any such request would have been premature because the job description ahd not been finally drafted and the exact duties of the attorney assistant had not been decided upon. In fact the job description was substantially changed from the form in which it was proposed in March 1975.

11. The Union's unfair labor practice charge letter is dated July 30, 1975.

12. The Activity provided the Union with a copy of the approved job description during August 1975, 2/ before any Staff Attorneys reported to the field offices on or about September 15, 1975.

13. The record fails to establish that AFGE Local No. 3506 ever requested to bargain with representatives of BHA Region 6 concerning the Region's implementation of the Staff Attorney 3/ Program and its impact on Hearing Assistants.

14. The record establishes that the Staff Attorney position, both with respect to its position description and how those filling those positions are acutally performing, in many instances overlaps the Hearing Assistant position, both in respect to its position description and how many filling those positions are actually performing. Therefore it has resulted, and my foreseeably result, in a change and reduction in the duties that many Hearing Assistants are actually performing. 4/

Conclusions of Law

1. The creation of the Staff Attorney position and the duties assigned it foreseeably had an impact on the Hearing Assistant position.

2. It is concluded that DHEW and BHA were privileged under Section 11(b) of the Order to establish the Staff Attorney position without first bargaining with AFGE Local 3506 concerning this decision. It seems clear that

2/ The record indicates that the Union had already received a copy of the approved Staff Attorney job description prior to this date, from sources outside of management.

3/ The Staff Attorney position is not in the unit represented by AFGE Local 3506.

4/ There was much evidence with respect to some classification surveys and whether the creation of the Staff Attorney position will or might result in a downgrading of the Hearing Assistant Position. The record is sufficient to find that because, as found above, the new staff attorney position has resulted in a change and reduction in the duties of many Hearing Assistants, it might very well result in the downgrading of the Hearing Assistant position.

when Section 11(b) provides that the Activity does not have to bargain concerning "...the numbers, types and grades of positions or employees assigned to an organizational unit....," it covers the type of decision arrived at in the subject case to establish the Staff Attorney position. 5/

3. It is concluded further than an integral and inseparable part of the Section 11(b) privilege to unilaterally decide to establish the Staff Attorney position, is the right to unilaterally determine the precise duties the Staff Attorney is to perform and prepare a position description that reflects this. Accordingly it is concluded that the Order did not require that BHA Region 6 bargain with AFGE Local 3506 with respect to the position description for the Staff Attorney position. 6/

4. Even though the unilateral decision to establish the Staff Attorney position and the unilateral preparation of the position description were privileged by Section 11(b) of the Order, nevertheless BHA Region 6 was obliged by the Order to bargain with AFGE Local 3506 with respect to their implementation and impact on the Hearing Assistants. cf. Great Lakes Naval Hospital, A/SLMR No. 289; Marine Corps Supply Center, Barstow California, A/SLMR No. 692.

5. Once the final decision to establish the Staff Attorney position was made and the job description approved, the Activity timely advised the Union of the foregoing. Further during August 1975, the Activity furnished the Union with a copy of the final position description weeks before any Staff Attorneys reported to field offices for work. It is therefore concluded that the Activity gave the Union notice of the Staff Attorney Program sufficiently in advance of its implementation and in sufficient detail to

5/ The Union does not contend the Activity violated the Order by failing to bargain concerning the decision to establish the Staff Attorney decision.

6/ In this regard it must be further noted that the decision to establish the Staff Attorney position and the actual preparation of the position description was made by the BHA headquarters and not by BHA Region 6.

meet the Activity's obligation under the Order. cf. Great Lakes Naval Hospital, supra.

6. The Union failed to request to bargain with BHA Region 6 about the impact and implementation of the Staff Attorney position after it was notified that the Staff Attorney Program was finally going to be instituted. 7/

7. In light of the foregoing, noting the absence of any timely request by the Union to bargain about the impact and implementation of the Staff Attorney Program, it is determined that the Activity did not fail or refuse to bargain about the impact and implementation of the Staff Attorney Program and therefore, it is further concluded that the Activity did not violate Section 19(a)(1) of the Order. 8/ Great Lakes Naval Hospital, supra; Marine Corps Supply Center, Barstow California, supra.

Recommendation

In view of all of the foregoing it is recommended that the Assistant Secretary dismiss the complaint in this case.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: January 25, 1977
Washington, D.C.

7/ The only possible request to bargain was made by the Union was in March 1975, before the program was finally decided upon and before the position descriptions were prepared in final form and approved. At such time the request was premature. Also, the request was really to bargain about the contents of the position description and not about its impact and implementation.

8/ The Section 19(a)(1) allegation was in fact in the nature of a Section 19(a)(6) refusal to bargain.

March 31, 1977

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

DALLAS REGIONAL OFFICE,
U.S. SMALL BUSINESS ADMINISTRATION
A/SLMR No. 817

This case involved an RA petition filed by the Dallas Regional Office, U.S. Small Business Administration (Activity-Petitioner) seeking to clarify an existing bargaining unit represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 2959 (AFGE), and asserting a good faith doubt as to the continuing majority status of the AFGE in any unit or units found appropriate. The Activity-Petitioner contended that, as a result of a 1973 reorganization, certain employees in the existing bargaining unit assigned to the Regional Office were moved to a new building six miles away, while other employees in the bargaining unit, assigned to the District Office, remained in the same location. As a consequence of the reorganization, the character and scope of the existing bargaining unit were so altered as to render it inappropriate, and that there now exists two separate bargaining units, each of which is appropriate for the purpose of exclusive recognition under the Order. The AFGE contended, on the other hand that, although the 1973 reorganization resulted in the physical separation of certain of the employees in the bargaining unit, the character and scope of the unit was not altered so as to destroy the community of interest shared by such employees, and that the existing unit continues, after the reorganization, to promote effective dealings and efficiency of agency operations.

The Assistant Secretary found that the exclusively recognized unit represented by the AFGE continued, after the reorganization, to remain appropriate for the purpose of exclusive recognition under the Order. In this regard, he noted that subsequent to the reorganization, the employees in the exclusively recognized unit continued to perform the same duties, under the same immediate supervision; continued to enjoy a common mission, common overall supervision, common personnel policies and practices administered by the same personnel office; and shared the same areas of consideration for promotions and reduction-in-force procedures. Under these circumstances, the Assistant Secretary found that the employees in the exclusively recognized unit continued to enjoy a clear and identifiable community of interest separate and distinct from other employees of the Activity, and that the unit continued, after the reorganization, to promote effective dealings and efficiency of agency operations. The Assistant Secretary also found that there was sufficient evidence to support a good faith doubt by the Activity-Petitioner as to the AFGE's continuing majority status in the existing exclusively recognized unit, and that it would effectuate the purposes and policies of the Order to afford the unit employees the opportunity to express their desires with respect to the continued exclusive representation of such unit by the AFGE. In this regard, the Assistant Secretary noted that there are currently no unit employees who have authorized dues deduction; there have been substantial changes in the complement of employees in the unit; there has been a recent history of difficulty experienced by the Activity-Petitioner in contacting the AFGE, and securing responses to proposed changes in operating and personnel policies; the AFGE has failed to supply the Activity-Petitioner with a list of officers or individuals authorized to act for the AFGE in the absence of its President; and the AFGE has not processed any grievances for a substantial period of time.

Accordingly, the Assistant Secretary directed that a election be conducted in the appropriate unit.

A/SLMR No. 817

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DALLAS REGIONAL OFFICE,
U.S. SMALL BUSINESS ADMINISTRATION 1/

Activity-Petitioner

and Case No. 63-6523(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2959

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 Joel D. Reed. 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 case, the Assistant Secretary finds:

The Dallas Regional Office, U.S. Small Business Administration, hereinafter called the Activity or the Activity-Petitioner, filed the instant petition contending that as a result of a reorganization on October 21, 1973, a bargaining unit of its employees presently represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 2959, hereinafter called the AFGE, was divided into two separate organizations which now constitute separate appropriate bargaining units. In addition, the Activity-Petitioner seeks an election in each of the new bargaining units, contending that it has a good faith doubt of the continuing majority status of the AFGE as the representative of such employees, either in the two bargaining units it contends are now appropriate, or in the existing bargaining unit. Contrary to the Activity-Petitioner, the AFGE contends that, although the reorganization resulted in the physical separation of certain of the employees in the bargaining unit, it did not so alter the character and scope of such unit as to destroy the community of interest shared by the employees. Additionally, the AFGE argues that, despite the physical separation of some of the employees, the bargaining unit continues to promote effective dealings and efficiency of agency operations.

The mission of the Activity-Petitioner is to service and promote small businesses within the geographical area of the Dallas Region, which includes the states of Texas, Oklahoma, New Mexico, Arkansas, and Louisiana. In achieving its mission, the Activity-Petitioner is responsible for the administration of numerous programs, including financial assistance, and the training and assistance of businessmen in successfully establishing and maintaining small businesses. The record reveals that on August 13, 1970, the AFGE was certified as the exclusive representative of certain employees of the Activity-Petitioner in a bargaining unit described as:

> "Including all graded nonprofessional accountants, administrative and clerical personnel, and all graded professional attorneys and accountants. Excluding, all independent supervisors and management personnel, (except clerical personnel), all employees engaged in Federal personnel work in other than a purely clerical capacity, and guards as defined in the Order." 2/

In achieving its mission, the Activity-Petitioner is organized into a Regional Office and several District Offices, among which is the Dallas District Office. The Dallas District Office was located physically in the same place as the Regional Office, and the certified bargaining unit involved herein encompassed employees of both offices.

The record discloses that as a result of a reorganization, effective October 21, 1973, the Regional Office and the District Office of the Activity-Petitioner were physically separated, and the Regional Office was moved to a new building approximately six miles away. Further, on March 31, 1975, the "cashier function," consisting of approximately 40 employees, was transferred to Denver, Colorado. Finally, the Marshall, Texas, District Office was closed in July 1976, and its 14 employees were transferred to the Dallas District Office.

The record further discloses that prior to the reorganization and separation of the two offices, although the employees assigned to the Regional Office performed administrative and staff functions and employees assigned to the District Office performed program functions, there was some degree of overlapping of functions among the employees assigned to these offices. Thus, it appears that a small number of employees performed both program and staff/administrative functions. Subsequent to the reorganization in 1973, no new functions or responsibilities were added but, rather, there was a more complete separation of functions of the employees assigned to the respective offices. Thus, the staff/administrative functions were made solely the responsibility of the employees assigned to the Regional Office, and the program functions were assigned only to the District Office employees. With this minor exception, all employees continued, after the reorganization, to perform the same duties, under the same immediate supervision. Further, the evidence establishes that all of the employees involved continued to enjoy, the same mission, the same overall supervision, the same personnel policies and practices administered by the same personnel office,

1/ The name of the Activity-Petitioner appears as amended at the hearing.

2/ Although a copy of the certification of representative was not introduced into the record, I hereby take official notice of such certification.

and the same areas of consideration for merit promotion and reduction-in-force procedures. In addition, the Regional Director continued, after the reorganization, to exercise final authority with regard to the adjustment of grievances and all other aspects of labor relations matters within the region. 3/

Under all the foregoing circumstances, I find that the exclusively recognized unit represented by the AFGE continues, after the reorganization, to remain appropriate for the purpose of exclusive recognition under the Order. In this regard, it was noted particularly that, subsequent to the reorganization, the employees in the exclusively recognized unit continue to perform the same duties under the same immediate supervision, and that they continue to enjoy a common mission, common overall supervision, common personnel policies and practices administered by the same personnel office, and share the same area of consideration for promotion and reduction-in-force procedures. Accordingly, I find that the employees in the exclusively recognized unit continue to enjoy a clear and identifiable community of interest separate and distinct from other employees of the Activity. 4/ Further, I find that the exclusively recognized unit continues, after the reorganization, to promote effective dealings and efficiency of agency operations. In this regard, it was noted that the ultimate authority for personnel and labor relations matters continues, subsequent to the reorganization, at the level of recognition of the existing exclusively recognized unit, and it would appear that agency operations would not experience additional costs, utilization of agency resources, or loss of productivity as a result of the continued existence of the unit. Moreover, I reject the contentions of the Activity that the establishment of two units in the place of the already existing unit would result in increased effective dealings and efficiency of agency operations. Rather, in my view, under the particular circumstances herein, the establishment of two new units would result in unnecessary fragmentation, and could not reasonably be expected to promote effective dealings and efficiency of agency operations. 5/

With regard to the contention of the Activity-Petitioner that it has a good faith doubt concerning the AFGE's continued majority status, the record reveals that since its establishment there have been substantial changes in the complement of the recognized unit. Thus, in March 1975, approximately 40 employees were transferred from the Activity to Denver, and in July 1976, approximately 14 employees were transferred from the defunct Marshall, Texas, District Office to the Activity.

3/ Although the record discloses that the Regional Director retains the ultimate authority in labor relations matters, it further reveals that the District Director, both before and after the reorganization, was authorized to negotiate with labor organizations having exclusive recognition for employees in the District.

4/ Cf. Small Business Administration, Region II, New York, New York, A/SLMR No. 759.

5/ Cf. Naval Aerospace and Regional Medical Center, Pensacola Florida, A/SLMR No. 603, FLRC No. 76A-18.

Further, the evidence establishes that during the past several years the Activity has experienced difficulty in making contact with the AFGE and in securing adequate responses from the AFGE. Thus, during the past several years there has been only sporadic and infrequent response by the AFGE to propose changes in the Activity's operating and personnel practices. Further, the Activity has experienced difficulty in contacting officials authorized to act for the AFGE during the absence or unavailability of the AFGE's President, and when the Activity-Petitioner requested a list of officials or individuals authorized to represent the AFGE, such list was not provided. The record further discloses that for a substantial period of time prior to the filing of the petition herein, the AFGE has not filed any grievances, either on behalf of employees, or in its own behalf. Finally, in October 1975, during an appropriate period, all members of the AFGE then authorizing dues deductions, cancelled such authorizations, and the record reveals that at the time of the hearing herein, no employees in the unit had authorized dues deductions.

When viewed in their totality, I find that the above-noted circumstances are sufficient to support a good faith doubt by the Activity-Petitioner as to the AFGE's continuing majority status and that it will effectuate the purposes and policies of the Order to afford the unit employees the opportunity to express their desires with respect to continued exclusive representation by the AFGE. 6/ Particularly noted in this regard were the above-noted facts that there are currently no unit employees who have authorized dues deductions; there has been a recent history of difficulty experienced by the Activity in contacting the AFGE and securing responses to proposed changes in operating and personnel policies; the AFGE has failed to supply the Activity with a list of officers or individuals authorized to act for the AFGE in the absence of its President; and for a substantial period of time the AFGE has not processed any grievances, either on behalf of individual members of the bargaining unit, or on its own behalf.

Accordingly, I shall direct an election in the following unit:

> All professional and nonprofessional employees of the Regional Office and the District Office, U.S. Small Business Administration, Dallas, Texas, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order. 7/

6/ Cf. Federal Aviation Administration, Great Lakes Region, Chicago Airports District Office, A/SLMR No. 250.

7/ The unit description incorporates several "cosmetic changes" suggested by the parties at the hearing. In this regard, the parties stipulated that as the Administrative Aide to the District Director and the Program Assistant and the Clerk-Stenographer in the Office of the Regional Director were confidential employees and should be excluded from the unit, the classification of "confidential employees"

(Continued)

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 professional 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 groups:

> Voting group (a): All professional employees of the Regional Office and the District Office, U.S. Small Business Administration, Dallas, Texas, excluding all nonprofessional employees, management officials, confidential employees, employees engaged in Federal Personnnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.
>
> Voting group (b): All nonprofessional employees of the Regional Office and the District Office, U.S. Small Business Administration, Dallas, Texas, excluding all professional employees, management officals, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors 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 American Federation of Government Employees, AFL-CIO, Local 2959.

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, AFL-CIO, Local 2959. 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 in 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 2959, was selected by the professional employee unit.

7/ should be added to the unit exclusions. In addition, a question was raised as to the inclusion of temporary employees in the unit. However, as there was insufficient evidence in the record regarding this matter, I make no determination as to the eligibility of temporary employees to vote in the election.

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 Regional Office and the District Office, U.S. Small Business Administration, Dallas, Texas, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors 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 appropiate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

> (a) All nonprofessional employees of the Regional Office and the District Office, U.S. Small Business Administration, Dallas, Texas, excluding all professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in the Order.
>
> (b) All professional employees of the Regional Office and the District Office, U.S. Small Business Administration, Dallas, Texas, excluding all nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors 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 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 2959.

Dated, Washington, D.C.
March 31, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

April 5, 1977

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,
DEFENSE MAPPING AGENCY,
SAN ANTONIO TOPOGRAPHIC CENTER,
FORT SAM HOUSTON, TEXAS
A/SLMR No. 818

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2174, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain over the temporary promotion of an employee and by failing to bargain over the impact of this promotion on unit employees. In this regard, the AFGE contended that the promotion was violative of the Defense Mapping Agency's (DMA) Merit Promotion Plan, which was incorporated into the parties' negotiated agreement, and, thus, constituted a unilateral change in working conditions.

The Administrative Law Judge found that in the settlement of an Equal Employment Opportunity complaint the subject employee was given a temporary promotion for 120 days and subsequently a permanent promotion. In this regard, he noted that the DMA Merit Promotion Plan, which was an existing condition of employment, specifically excepted and did not apply to temporary promotions of less than 120 days. The Administrative Law Judge, therefore, concluded that the temporary promotion did not constitute a unilateral change of working conditions and was not violative of the Order. The Administrative Law Judge further concluded that the issue of the subsequent permanent promotion was not properly raised in the proceeding. In this connection, he noted that the permanent promotion was not specifically alleged as improper in the pre-complaint charge, complaint, or amended complaint, and no attempt was made by the AFGE to amend the complaint to include such an allegation. Accordingly, he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, and that the AFGE had failed to request to bargain over the impact of the temporary promotion although it had ample opportunity to do so, 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

DEPARTMENT OF THE ARMY,
DEFENSE MAPPING AGENCY,
SAN ANTONIO TOPOGRAPHIC CENTER,
FORT SAM HOUSTON, TEXAS

Respondent

and

Case No. 63-6111(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2174, AFL-CIO

DECISION AND ORDER

On December 20, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendation. 2/

1/ Although the Administrative Law Judge did not make a finding with respect to whether the Complainant requested bargaining over the impact of the temporary promotion of Mr. Aquila McGrew, the record reflects that the Complainant had ample opportunity to make such request and failed to do so.

2/ The Administrative Law Judge determined that the issue of the permanent promotion of Mr. McGrew was not properly raised in the instant proceeding. Under these circumstances, I find it unnecessary to pass upon the Administrative Law Judge's findings at footnote 5 of his Recommended Decision and Order with respect to whether the Respondent's actions in this regard were violative of Section 19(a)(6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-6111(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 5, 1977

Francis X. Burkhardt, Assistant Secretary
of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF THE ARMY DEFENSE MAPPING AGENCY SAN ANTONIO TOPOGRAPHICAL CENTER FORT SAM HOUSTON, TEXAS	:	
Respondent	:	
	:	Case No. 63-6111(CA)
and	:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2174, AFL-CIO	:	
Complainant	:	

DOYLE HUNTSMAN
National Representative
American Federation of Government
Employees, AFL-CIO
442 Rothe Loop
New Braunfels, Texas 78130

For Complainant

CAPT. THOMAS R. CUNNINGHAM, ESQUIRE
Labor Counselor
Office of the Staff Judge Advocate
Headquarters
Fort Sam Houston, Texas 78234

For the Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed September 16, 1975 and amended on February 2, 1976, 1/ under Executive Order 11491,

1/ The charge letter is dated June 30, 1975.

as amended (hereinafter called the Order) by American Federation of Government Employees, Local 2174, AFL-CIO, (hereinafter called the Union and AFGE Local 2174) against Department of the Army, Defense Mapping Agency, San Antonio Topographic Center, Fort Sam Houston, Texas (hereinafter called the Activity; DMA, San Antonio Office; and the Respondent) a Notice of Hearing on Complaint was issued by United States Department of Labor Assistant Regional Director for the Kansas City Region on July 30, 1976.

A hearing was held before the undersigned in San Antonio, Texas. Both parties were represented and afforded a full opportunity to be heard, to introduce evidence and to examine and cross-examine witnesses. Both briefs, which have been duly considered.

Upon the basis of the entire record, 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. AFGE, Local 2174, was, at all times relevant in this matter, the exclusive bargaining representative of all of the Activity's personnel in the following recognized bargaining units: (a) the non-professional, non-supervisory GS and WG employees employed by the DMA San Antonio Office, with duty stations at Fort Sam Houston, Texas, excluding all professional employees, management officials, all employees engaged in Federal Personnel work in other than a purely clerical capacity, supervisors and guards, as defined in the Order, and (b) the professional unit which includes all permanent, non-supervisory, non-management, professional employees (GS-1370 and GS-1372 series) of the activity, as described above. Excluded are all supervisors, management officials (to include Project Directors, GS-1370 series), employees engaged in Federal Personnel work in other than a purely clerical capacity, guards, and all non-supervisory employees other than those in the GS-1370 and GS-1372 series.

2. The DMA San Antonio Office is a branch of the Defense Mapping Agency Topographic Center located in Washington, D.C. (hereinafter referred to as the Washington Topographic Center). The overall agency is the Defense Mapping Agency,

also headquartered in Washington, D.C. (hereinafter referred to as HQ-DMA or DMA-Washington).

3. In September, 1974, Mr. Aquila McGrew, an employee of Activity, filed an Equal Employment Opportunity complaint under applicable Defense Mapping Agency procedures, alleging discrimination based on his race, because he was not selected for a position as a GS-12 Supervisory Cartographer at the DMA San Antonio Office.

4. By letter dated January 9, 1975, Colonel Raymond A. Whelan, Director of the Washington Topographic Center, without deciding there was merit to Mr. McGrew's allegations, ordered the Director of the DMA-San Antonio Office to promote Mr. McGrew to a temporary GS-12 position in an attempt to informally settle the complaint.

5. The current negotiated agreement between the parties was signed by the parties on July 23, 1975 and approved on September 3, 1975. No other agreement was received in evidence. It provides, at Article XXI, that vacancies at the GS-12 level and above will be governed by the DMA Merit Promotion Plan.

6. On January 13, 1975, DMA-San Antonio Office's Director, Lieutenant Colonel F. L. Hanigan, was advised of the January 9, 1975 order of the Director, Washington Topographic Center. LTC Hanigan arranged for a meeting with the Union's President, Mr. Mariano Gonzalez, and those unit employees who would be concerned about the promotion action. The meeting was held on the same day, Monday, January 13, 1975.

7. At the meeting LTC Hanigan advised those present of the order given him to promote Mr. McGrew. Those present were concerned about the decision and questioned its appropriateness under established Merit Promotion procedures. A main concern voiced by AFGE Local 2174, during this meeting and subsequent weeks, was with the legality of the proposed action. When questioned as to the authority or reason for Mr. McGrew's promotion, LTC Hanigan, other than responding that it was to settle a discrimination complaint, gave no other authority, basis or explanation for the promotion and would discuss it no further. 2/

2/ LTC Hanigan apparently did not discuss the matter further because he had not been fully advised with respect to the decision to promotion and the reasons for that action.

8. LTC Hanigan, by letter dated January 15, 1975, offered Mr. McGrew the promotion for his acceptance. The promotion was accepted the same day. The temporary promotion for 120 days of Mr. McGrew was finally effected February 23, 1975. In the interim, between January 15 and February 23, the decision to promote Mr. McGrew was retracted by the Washington Topographic Center because it was learned such an action would violate the DMA's Merit Promotion Program, but it was later reinstated by HQ-DMA. This temporary promotion was terminated on June 22, 1975. Mr. McGrew was to receive priority consideration for the next GS-12 vacancy. 3/

9. At no time during the meeting of January 13, 1975, or at any time thereafter, did Complainant's representatives request to discuss the "impact" of Mr. McGrew's temporary promotion, or subsequent permanent promotion, on bargaining unit employees.

10. A hearing on Mr. McGrew's allegation was held before a Civil Service Commission Hearing Examiner. He recommended to DMA-HQ that Mr. McGrew be promoted to a GS-12 position. He did not recommend that the promotion be retroactive to 1974, the date of the alleged discrimination, because there was not sufficient information to make qualifications comparisons and therefore he could not conclude that "but for" the racial discrimination, Mr. McGrew would have gotten the job. DMA-HQ followed the CSC Hearing Examiner's recommendations.

11. By letter dated March 17, 1976, Vice Admiral S. D. Cramer, Jr., Director, HQ-DMA, ordered the permanent promotion of Mr. McGrew to a GS-12 Cartographer, a Project Director. The promotion would be retroactively effective to January 10, 1976. The action to promote Mr. McGrew was taken on April 8, 1976.

12. Neither the temporary position nor the permanent position into which Mr. McGrew was promoted was either posted or advertised and other employees were not solicited or invited to apply for the positions. Normally permanent promotions to the GS-12 position are posted and advertised and employees are solicited to apply and are considered.

13. The permanent GS-12 Project Supervisor position into which Mr. McGrew was promoted was not an existing vacancy

3/ This basically means that except under unusal circumstances he would be promoted to the next GS-12 position vacant.

but was one created specially for this situation. It is clearly not a supervisory position, nor from the record is it a management position within the meaning of the Order. It is a position specifically excluded from the units represented by AFGE Local 2174.

14. Defense Mapping Agency Instruction 1405.2 (DMAINST 1405.2) sets forth the DMA Merit Promotion Program. It provides for advertising positions to be filled and methods for selecting among the applicants. However paragraph 3(b)(2) provides that the Merit Promotion Program shall not apply to temporary promotions for less than 120 days.

15. Applicable Civil Service Commission (CSC) Regulations provide authority for informal settlement of discrimination complaints (5 CFR 713.217). Further, these regulations require that the agency, in resolving complaints of discrimination, shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issues of discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination (5 CFR 713.221(c)). Finally, these regulations provide that, if discrimination in promotion is found, but there is insufficient showing that, but for such discrimination, the complaining employee would clearly have been promoted, then the complainant must be extended priority consideration for a position vacancy for which he is qualified (5 CFR 713.271(b)).

Conclusions of Law

The basic issues presented in this case are did the Activity violate Sections 19(a)(1) and (6) of the Order by failing to bargain with AFGE Local 2174 concerning to both the temporary and subsequent permanent promotion of Mr. McGrew and did the Activity further fail to bargain concerning the impact of Mr. McGrew's promotions. In regard to the foregoing additional issues which must be resolved are whether Mr. McGrew's permanent promotion is properly to be considered in this matter and whether the Activity's promotions of Mr. McGrew constituted unilateral changes in working conditions.

The Activity contends that because Mr. McGrew's promotions, both temporary and permanent, were decided upon and ordered either by the Washington Topographic

Center and/or by HQ-DMA, that it, DMA-San Antonio Office, was not responsible for the promotions, was in no position to bargain about the promotions and therefore could not have violated the Order and was not the proper party to be charged. This contention is rejected. If in fact the promotions were changes in working conditions and the Activity was obliged to bargain about such changes, it could not be freed from that obligation by its own higher authority. 4/ If the Activity's own higher authority orders the Activity to act in such a way so as to require the Activity to violate its obligations as required by the Order, the Activity must be deemed to be responsible for its failure to comply with the requirements of the Order. The working and managing relationship between the Activity and its own higher authority is a matter that they must arrange and settle between themselves. Clearly it would be inappropriate under the Order to determine or set relationships among internal agency management. Rather we are limited to determining whether a party, in this case the Activity, is living up to its obligations as set forth in the Order.

With respect to the temporary promotion of Mr. McGrew, it is concluded that the DMA's own Merit Promotion Program, which was an existing condition of employment, specifically excepted and did not apply to temporary promotions of less than 120 days. Therefore the promotion of Mr. McGrew, which was accomplished without meeting the requirements of the Merit Promotion Program, was excepted from the Merit Promotion Program's procedures, did not constitute a unilateral change in working conditions and therefore did not constitute a violation of Section 19(a)(6) of the Order.

The Amended Complaint in this matter which was filed on February 2, 1976, basically alleged that the Activity violated Section 19(a)(6) of the Order by the way it handled the temporary promotion of Mr. McGrew. It did not raise the permanent promotion which was first raised in the letter of March 17, 1976 to Mr. McGrew, because it was made after the amended complaint was filed. The letter to the parties from the Regional Administrator dated July 30, 1976 advised the parties to adduce evidence at the hearing with respect to whether there was a refusal

4/ Except in the limited situation of regulations meeting the "compelling need" test as set forth in Section 11 of the Order. This exception is not relevant to the case.

to bargain with AFGE Local 2174 concerning Mr. McGrew's "promotion." The question of the permanent promotion was fully litigated at the hearing. AFGE Local 2174 did not at any time move to amend the complaint to include any allegation involving the permanent promotion of Mr. McGrew. In these circumstances, because the Activity's conduct with respect to the permanent promotion of Mr. McGrew was not alleged or discussed in the charge, complaint or amended complaint in this case and because the complainant has made no motion to amend the complaint to include it, I am constrained to conclude in light of Department of the Activity's the Treasury, U.S. Customs Service, A/SLMR No. 739, that the issue is not properly before me and can not be considered on its merits. 5/

In light of the foregoing therefore, the only issues before me deals with whether the Activity violated Sections 19(a)(1) and (6) of the Order with respect to its handling of the temporary promotion of Mr. McGrew and, as heretofore discussed, it is concluded that the Activity did not violate the Order with respect to the temporary promotion of Mr. McGrew.

RECOMMENDED ORDER

In view of the foregoing it is recommended that the Assistant Secretary dismiss the complaint in its entirety.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: December 20, 1976
Washington, D.C.

5/ If this aspect of the case, on its merits, were before me, I would conclude that the decision to permanently promote Mr. McGrew was not violative of the Order because the decision, although a departure from the Merit Promotion Program, was made pursuant to Civil Service Commission Regulations and in accordance with the recommendation, after hearing, of a Civil Service Commission Hearing Examiner. However, it would have been further concluded that Section 19(a)(6) of the Order was violated because AFGE Local 2174, was not given sufficient notice of this decision to permit it to request to meaningfully bargain about the impact of this decision.

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

U.S. ARMY CORPS OF ENGINEERS
A/SLMR No. 819

This case arose when the National Marine Engineers Beneficial Association, AFL-CIO (MEBA) filed a petition seeking an election in a unit of all licensed marine engineers employed by the U.S. Army Corps of Engineers in all Corps of Engineer Districts in the continental United States. The Activity took the position that the petitioned for unit was not appropriate for the purpose of exclusive recognition under the Order. The Intervenor, National Federation of Federal Employees (NFFE), maintained that the only appropriate units would be those which include all employees of each of the Activity's districts. The Activity and the MEBA stipulated that all of the Activity's licensed marine engineers were supervisors within the meaning of Section 2(c) of the Order. However, in this regard, the NFFE contended that not all of the licensed marine engineers were supervisors as defined in the Order and, accordingly, some of the nonsupervisory licensed marine engineers were included in three of its exclusively recognized district units where its negotiated agreements constituted bars to any election for nonsupervisory licensed marine engineers in these districts.

The Assistant Secretary found that all of the licensed marine engineers were supervisors as defined by Section 2(c) of the Order. Further, the Assistant Secretary noted that he had previously found that the MEBA had traditionally represented units of licensed marine engineers under Executive Order 10988 and in the private sector and that a unit of supervisory licensed marine engineers sought by the MEBA was permissible under Section 24(2) of the Order. As the NFFE was granted intervention status in this proceeding based on its contention that some of the licensed marine engineers were not supervisors under the Order and thus were included in its three exclusively recognized district units, he revoked the NFFE's intervention status in the instant case inasmuch as the NFFE did not qualify as an intervenor in this proceeding (to represent supervisors) within the meaning of Section 202.5(a) of the Assistant Secretary's Regulations.

Based on all the circumstances, the Assistant Secretary found that the unit claimed by the MEBA--all licensed marine engineers employed by the U.S. Army Corps of Engineers in Corps of Engineer Districts in the continental United States--was appropriate for the purpose of exclusive recognition. In this regard, he found that the claimed employees constituted a homogeneous grouping of employees with a clear and identifiable community of interest separate and distinct from the other

employees of the Activity in that they were all supervisors as defined by Section 2(c) of the Order and possessed similar skills, functions, job classifications and license requirements; that they have transferred between various vessels within the districts and between the various other districts of the Activity; and that they are subject to the same labor relations programs which are set forth in Activity-wide personnel regulations. The Assistant Secretary found further that such a unit would promote effective dealings and efficiency of agency operations. In this regard, he noted that the claimed unit would meet the objectives of the Order as explicated by the Federal Labor Relations Council in its 1975 Report and Recommendations as such a unit not only would result, in effect, in the consolidation of the existing units of licensed marine engineers within the Activity, but would prevent further fragmentation of bargaining units, thereby promoting a more comprehensive bargaining unit structure. Thus, he noted that the Activity has 21 districts which employ licensed marine engineers, that 8 of these districts have exclusively recognized units, and that 8 of the remaining 13 districts employ 4 or fewer licensed marine engineers. With respect to effective dealings, he found that negotiations encompassing the more comprehensive unit sought by the MEBA may permit the parties to address a wider range of matters of critical concern to a greater number of the claimed employees who are unique within the Activity and who have the same concerns and problems. Further, he found that negotiations in less fragmented bargaining unit structures established at higher organizational levels would result in efficiency of agency operations in terms of cost, productivity and use of resources by allowing the Activity, as well as the MEBA, to concentrate efforts on a single negotiated agreement, rather than dissipating resources in negotiating possibly 21 separate agreements with respect to the wide range of problems unique to this group of employees. Moreover, in this regard, he noted that the Office of the Chief of Engineers plays a significant role in the coordination of personnel programs and policies, including the negotiation of agreements, and, accordingly, would be an appropriate bargaining level for a functional Activity-wide grouping of employees.

Accordingly, the Assistant Secretary directed that an election be conducted in the petitioned for unit.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY CORPS OF ENGINEERS

Activity

and Case No. 22-6738(RO)

NATIONAL MARINE ENGINEERS
BENEFICIAL ASSOCIATION, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
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 Carol M. Rollins. 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 1/, including briefs filed by the U.S. Army Corps of Engineers, hereinafter called the Activity, the MEBA and the National Federation of Federal Employees, hereinafter called NFFE, the Assistant Secretary finds:

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

2. In its petition, the MEBA seeks an election in a unit consisting of all licensed marine engineers employed by the U.S. Army Corps

1/ Subsequent to the close of the hearing, the Petitioner, National Marine Engineers Beneficial Association, AFL-CIO, hereinafter called MEBA, filed a motion to reopen the record for receipt of newly discovered evidence and the Activity objected to said motion. The motion is hereby denied and the proffered evidence has not been considered in the disposition of this matter.

of Engineers in all Corps of Engineers' Districts in the continental United States, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and other supervisors as defined in Executive Order 11491, as amended. 2/ At the hearing, the MEBA stated that it would accept as an alternative unit, "all licensed marine engineers on dredges and tugs who are supervisors and all licensed marine engineers on dredges and tugs or other crafts who are not supervisors as determined by the Assistant Secretary."

The Activity takes the position that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the Order. The NFFE maintains that the only appropriate units would be those which include all employees of a particular district, which units would include certain of the licensed marine engineers whom the NFFE contends are nonsupervisory employees.

The Activity and the MEBA stipulated that all of the some 188 licensed marine engineers employed by the Activity within the continental United States are supervisors within the meaning of Section 2(c) of the Order. 3/ Contrary to the Activity and the MEBA, the NFFE contended that not all the licensed marine engineers are supervisors as defined in the Order and, in this regard, some of the nonsupervisory licensed marine engineers are included in its three exclusively recognized district units at Mobile, Alabama, St. Paul, Minnesota, and Vicksburg, Mississippi. Therefore, the NFFE claimed that its negotiated agreements in these Districts constituted bars to any election for the nonsupervisory licensed marine engineers in these districts. 4/

The Activity is entrusted with, among other things, the planning, design, construction, operation and maintenance and acquisition or disposal of real estate necessary for the development of the nation's water resources and the improvement of rivers, harbors and waterways

2/ The unit appears essentially as amended at the hearing.

3/ The Assistant Secretary found in Department of the Navy, Military Sealift Command, A/SLMR No. 245, that the MEBA traditionally represented units of licensed marine engineers (of the Activity involved therein) under Executive Order 10988, and in the private sector. Accordingly, the Assistant Secretary found therein that the unit sought by the MEBA, consisting of supervisory licensed marine engineers, was permissible and appropriate under Section 24(2) of the Order.

4/ The Activity and the MEBA which, as noted above, stipulated that all of the claimed employees are supervisors, further stipulated that there were no bars to an election in this case.

for navigation, flood control, hydro-electric power, recreation, fish and wildlife, and related purposes, including shore protection. It is comprised of 35 district offices within the continental United States. Of these 35 districts, 21 employ licensed marine engineers and operate various floating plants such as hopper dredges, pipeline dredges, towboats, tugs and snagboats which are involved in dredging, snagging, and wreck removal at the district level. Of these 21 operational districts, 8 districts employ 4 or less licensed marine engineers, 5 districts employ between 6 to 8 licensed marine engineers, and 8 districts employ between 10 and 21 licensed marine engineers.

The record reveals that the MEBA currently holds exclusive recognition for licensed marine engineers in the following eight Districts: Portland, Galveston, New Orleans, Jacksonville, Philadelphia, Buffalo, St. Louis, and Kansas City. Of these eight Districts, four have negotiated agreements covering the licensed marine engineers: Portland, Philadelphia, St Louis, and Kansas City. 5/

Supervisory Status-Licensed Marine Engineers

As noted above, the Activity and the MEBA stipulated that all licensed marine engineers are supervisors within the meaning of Section 2(c) of the Order. Although the NFFE contended that some of the licensed marine engineers are not supervisors, it did not specify which individuals or groupings it believed were nonsupervisory. The record reveals that licensed marine engineers must be licensed by the United States Coast Guard as either chief, assistant chief, or first, second, or third engineers. Licenses are issued by the Coast Guard on the basis of whether the vessel involved is steam or dieseled powered. Licensed marine engineers on any vessel have functions which include, among other things, taking charge of a watch and assuring that the vessel is operating properly and that proper maintenance is maintained in the engine room, and supervising the unlicensed personnel in the engine room. A licensed marine engineer on the day shift is responsible for the maintenance and repair of the vessel involved.

5/ In its brief to the Assistant Secretary, the MEBA indicated that by its petition herein it was waiving its exclusive representative status with respect to licensed marine engineers in its exclusively recognized units encompassed by the petition should it lose an election in the Activity-wide unit sought. See Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 83. As the Activity and the MEBA stipulated that there were no bars to an election in this case, I find that the parties have, in effect, mutually waived the agreement bars in the four units where they have negotiated agreements. Accordingly, such units may be included in any unit found appropriate herein. See Veterans Administration, A/SLMR No. 240, and U.S. Department of Defense, DOD Overseas Dependent Schools, A/SLMR No. 110.

The evidence establishes that licensed marine engineers have a number of personnel assigned to them during a watch. In this connection, they have discretion as to how the order of work assigned to the shift will be performed and they use independent judgment in handling emergency situations during their shifts taking necessary corrective actions, including assigning work and calling for extra help if needed. The record reveals also that only licensed marine engineers have the authority, under certain conditions, to grant overtime and that they have effectively recommended employees for disciplinary actions and promotions.

Based on all of the foregoing circumstances, I find that licensed marine engineers are supervisors as defined by Section 2(c) of the Order. Particularly noted, in this regard, were the facts that licensed marine engineers have the authority to assign, reward, or discipline other employees, and to responsibly direct them or effectively recommend such actions, and that in the exercise of such authority they are required to use independent judgment. 6/

As indicated above, the NFFE was granted intervention status in this proceeding based on its contention that some of the licensed marine engineers were not supervisors under the Order and thus were included in three of its exclusively recognized district units at Mobile, Alabama, St. Paul, Minnesota, and Vicksburg, Mississippi. Based on my finding that all the claimed licensed marine engineers are supervisors within the meaning of the Order and, therefore, may not be included in any unit represented by the NFFE, I find that the NFFE does not qualify as an intervenor in this proceeding within the meaning of Section 202.5(a) of the Assistant Secretary's Regulations. Accordingly, I hereby revoke its intervention status in the instant case.

Appropriate Unit

Organizationally, the Activity operates through a three tier command line in accomplishing its mission and functions-i.e. (1) the Office of the Chief of Engineers; (2) the Division Offices; (3) and the District Offices. The Office of the Chief of Engineers and the 12 continental United States division offices are staff offices which exercise no control over the day-to-day operations of the line offices, the districts. However, the record reveals that the Office of the Chief of Engineers develops Activity-wide policies and programs and assigns programs and missions to field activities for accomplishment. This Office also provides staff supervision over division offices including guidance and assistance as required. The division offices have jurisdiction over specified geographical or program areas. They oversee the execution of the construction mission of the Chief of Engineers involving military and civil works planning, engineering, construction, operation and maintenance of facilities and related real estate matters. In

6/ Cf. Department of the Navy, Military Sealift Command, cited above.

accomplishing these mission responsibilities, the divisions have responsibility for review and approval of major plans and programs of the districts within their geographical boundaries. They are also responsible for the interpretation of plans and policies of the Chief of Engineers. The district offices are the principal operational offices of the Corps for the design and construction of military and civil facilities.

As indicated above, the evidence establishes that all licensed marine engineers of the Activity hold either a steam or diesel license from the U.S. Coast Guard and perform duties which are similar in nature no matter which type of vessel they work on or in which district they are employed. The engineers are the only employees of the Activity on the various vessels who are engaged in repair of various pumps, such as fuel pumps, water pumps, fire pumps, and dredge pumps, in addition to supervising the watch so that the engine room equipment will remain operable. All licensed marine engineers' job descriptions and job classifications are similar throughout the districts. Further, licensed marine engineers have their own separate quarters, recreation rooms, and mess areas. Although the wages for the majority of licensed marine engineers are set by local district survey committees and are approved by the Department of Defense Wage Fixing Authority, a number of these employees have their wages fixed pursuant to 5 U.S. Code, Section 5342 in accordance with prevailing rates in the private sector maritime industry. The record reveals that licensed marine engineers have been transferred between various floating plants within a district and have, on occasion, transferred to floating plants in various other districts. The area of consideration for all licensed marine engineers is usually district-wide, but because there is a shortage of some licensed marine engineers, the area of consideration is sometimes expanded to division-wide or even to Activity-wide. Reductions-in-force and bumping rights are confined to the individual districts.

The evidence establishes that civilian personnel functions for licensed marine engineers are, in general, handled at the district level as such functions have been delegated down from the Chief of Engineers to the district engineers subject to the Chief's review and the review of the division engineers. Further, Engineer Regulation 690-1-272 gives the responsibility to the delegated appointing officers, the district engineers, for assuring that strict compliance with Civil Service laws, rules, and regulations, and Department of the Army, Corps of Engineers, and division-wide regulations governing civilian personnel administration is obtained. Thus, among other things, the district engineers have the authority to hire, promote, transfer, assign, and retain employees in positions within his district, and to suspend, demote, discharge, or take other disciplinary action. Furthermore, the district engineers have control over most third-party actions that affect employees under their jurisdiction, such as proceedings before the Federal Service Impasses Panel and before the Assistant Secretary of Labor for Labor-Management Relations.

The record reveals also that the Activity has promulgated a Corps-wide labor-management relations program pursuant to Department of the Army labor relations policy as contained in Army Civilian Personnel Regulations (CPR 711) and a Corps-wide personnel program as contained in Department of the Army, Personnel Relations and Services (CPR 700). Thus, basic labor relations and personnel policies are the same for all engineer districts and any differences that do exist in the employee benefit category is limited to administration which may vary to meet the particular demands of local conditions. In this regard, the record shows that the Activity employs a Chief of Labor-Employee Relations in the Office of Civilian Personnel who is involved at the Activity level with, among other things, labor relations, discipline, grievances and appeals. The Chief of Labor-Employee Relations and his staff also perform many labor and personnel functions for the districts, including the review and audit of negotiated agreements and the interpretation of the various regulations for the divisions and districts. 7/

Furthermore, although the Office of the Chief of Engineers has delegated personnel matters and the authority to enter into negotiated agreements to division engineers, (in turn, district engineers have been granted the authority by delegation from appropriate division engineers) and to commanders of separate Corps of Engineers' installations and activities, the record reveals that the Office of the Chief of Engineers retains substantial and definitive authority in regard to all aspects of labor relations and other personnel matters. Thus, upon the filing of a petition requesting exclusive recognition for a new unit, a component of the Activity receiving the petition is obligated to transmit two copies of such petition to the Office of the Chief of Engineers in Washington, D.C. The local command is given the opportunity to state a position regarding the appropriateness of the proposed unit and the division engineer or engineers involved are directed to indicate their concurrence or non-concurrence, and the Office of the Chief of Engineers is vested with the ultimate authority to review and reply to the proposed determination by a local commander as to appropriateness of the unit sought.

With respect to the negotiation of agreements, the Office of the Chief of Engineers has directed that whenever a notice is received that a labor organization desires to negotiate an agreement--or if either party issues a notice to the other of its intention to renegotiate an agreement--the Personnel Relations and Service Branch, Civilian Personnel Division, Office of the Chief of Engineers, is to be notified by telephone of:

> "...Any significant problems expected or anticipated will be reported and any anticipated assistance needed will be discussed. Appropriate telephone contact with the next higher command echelon will be maintained throughout the negotiations. Two copies of FMCS Form F-53 will be forwarded to HQDA (DAEN-EPC-S) WASH, D.C. 20314 and one copy to the Division Office, where appropriate." 8/

Further, the Office of the Chief of Engineers has directed that local management negotiators are to maintain telephone contact with the next higher command and to call freely upon Command resources for any advice or assistance needed throughout the negotiations. The Office of the Chief of Engineers has directed that before commencing negotiations, local commands attempt to establish a pre-negotiation agreement covering the conditions of negotiations, the composition of the negotiation teams, and the procedures for resolving disagreements. A copy of such a schedule is to be forwarded to the Office of the Chief of Engineers. In addition, local commands are directed, when considering proposals that could have an effect upon operations or practices at other Corps of Engineer activities, to discuss such proposals with the next higher command element with regard to matters involving the operation of hopper dredges, other floating plants, and various other operations. Furthermore, after a negotiated agreement has been tentatively concluded and the districts' personnel officer has reviewed the tentative agreement to ascertain that it is consistent with higher echelon policy requirements, the local commander may affix his signature to the agreement, but only after all other parties have done so. Upon approval of the agreement by a local commander, six copies are to be forwarded directly to the Office of the Chief of Engineers in Washington who reviews the document to determine:

> "...if ...any provision of the Agreement is invalid, because it violates or is inconsistent with a written policy, procedure, regulation or law, the local activity will be so informed in writing." 9/

Based on all of the above circumstances, I find that the petitioned for unit of all of the Activity's licensed marine engineers in the continental United States is appropriate for exclusive recognition. Thus,

7/ The record reveals that the MEBA has been in contact with the Activity headquarters on an informal and unofficial basis regarding matters affecting licensed marine engineers activity-wide, such as shore leave, subsistence and quarters during "lay-up" of vessels, workweek when vessels go certain distances, payment of transportation for engineers who first join vessels, change of pay grade for second assistants on certain vessels and hiring of new employees or licensed engineers in positions in the Activity with the assistance of the MEBA.

8/ Activity Exhibit 9, (ER 690-1-711) entitled, "Office of the Chief of Engineers, Civilian Personnel, LABOR-MANAGEMENT RELATIONS".

9/ See footnote 8, above.

the evidence establishes that all of the claimed licensed marine engineers are supervisors as defined by Section 2(c) of the Order and possess similar skills and functions which are clearly distinguishable from those of other occupational groups of the Activity. All licensed marine engineers perform duties which are similar in nature no matter which type of vessel they work on or in which district they are located. Also, all licensed marine engineers have similar job classifications, duties, and job descriptions and must meet the special requirement of holding either a steam or diesel license from the U.S. Coast Guard. Further, they have separate quarters, recreation rooms, and mess areas, and have transferred between various vessels within the districts and between the various other districts of the Activity. Additionally, all licensed marine engineers are subject to the same labor relations policies set forth in Activity-wide personnel regulations. Under these circumstances, I find that the licensed marine engineers of the Activity in the continental United States constitute a homogenous grouping of employees with a clear and identifiable community of interest separate and distinct from the other employees of the Activity.

I find, further, that the claimed unit will promote effective dealings and efficiency of agency operations. In this regard, it was noted that in its 1975 Report and Recommendations, the Federal Labor Relations Council stated that:

> We believe that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program. We believe that the proposed modifications of the Order and subsequent actions of the Assistant Secretary will facilitate the consolidation of existing units, which will do much to accomplish the policy of creating more comprehensive units. We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units. 10/

The claimed unit would, in my view, meet the objectives of the Order, as explicated by the Council. Presently, there are 8 exclusively

10/ See Section IV of the Council's Report and Recommendations (1975).

recognized units in the 21 districts that employ licensed marine engineers. Of the remaining 13 districts, 8 employ 4 or fewer licensed marine engineers. Thus, the Activity's contention that district-wide units of licensed marine engineers are more appropriate could result in the proliferation of a number of small units of this functional grouping of supervisory employees. On the other hand, the unit claimed by the MEBA would, in effect, not only result in the consolidation of its existing units within the Activity, but would prevent further fragmentation of bargaining units, thereby promoting a more comprehensive bargaining unit structure. Moreover, with respect to effective dealings, negotiations encompassing the more comprehensive unit sought by the MEBA may permit the parties to address a wider range of matters of critical concern to a greater number of these employees who are unique within the Activity and who have the same concerns and problems. Further, negotiations in less fragmented bargaining unit structures established at higher organizational levels will, I believe, result in efficiency of agency operations in terms of cost, productivity and use of resources by allowing the Activity, as well as the MEBA, to concentrate efforts on a single negotiated agreement with respect to the wide range of problems unique to this group of employees, 11/ rather than dissipating resources in negotiating possibly 21 separate agreements. In this regard, as noted above in footnote 7, many of these matters are presently the subject of contact between the Activity and the MEBA on an "informal basis."

Moreover, as noted above, in the negotiation of agreements the Civilian Personnel Division of the Office of the Chief of Engineers is consulted with respect to any significant problems, and anticipated needs are discussed, presumably because of the expertise available at the headquarters office and because of the need to coordinate policy. With regard to the scope of personnel services, although the district engineers are responsible for administering the civilian personnel program as outlined in Engineer Regulation 690-1-272, they must assure strict compliance with Civil Service, Agency and Activity rules, regulations and laws. Thus, while there may be some district variations in personnel and labor relations matters, the evidence establishes that the Office of the Chief of Engineers plays a significant role in the coordination of personnel programs and policies and would be an appropriate bargaining level for a functional Activity-wide grouping of employees. 12/

11/ Although the Activity notes that authority to negotiate agreements has been delegated through the Office of the Chief of Engineers to the district offices, I do not view this as precluding the Office of the Chief of Engineers from itself negotiating agreements in appropriate circumstances.

12/ Cf. Federal Aviation Administration, Department of Transportation, A/SLMR No. 173.

Based on the foregoing, I conclude that the claimed functional unit of all licensed marine engineers of the Activity employed in the continental United States shares a clear and identifiable community of interest and that such a unit will promote effective dealings and efficiency of agency operations. Accordingly, I find the following unit to be appropriate for the purpose of exclusive recogntion under Executive Order 11491, as amended: 13/

> All licensed marine engineers employed by the U.S. Army Corps of Engineers in all districts in the continental United States, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, guards, and other supervisors as defined in Executive Order 11491, as amended.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted, 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 by the National Marine Engineers Beneficial Association, AFL-CIO.

Dated, Washington, D. C.
April 5, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

13/ This is not to say that separate units of licensed marine engineers at the district level might not also be appropriate for the purpose of exclusive recognition.

April 6, 1977

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

PORTSMOUTH NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY
A/SLMR No. 820

This case involved an unfair labor practice complaint filed jointly by the International Federation of Professional and Technical Employees, AFL-CIO, Local 4 (IFPTE) and the American Federation of Government Employees, AFL-CIO, Local 2024 (AFGE) alleging, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally cancelling a written agreement relative to a change in shift hours for employees within three separate units represented exclusively by the IFPTE, the AFGE and the Federal Employees Metal Trades Council, AFL-CIO (MTC). The MTC was not a party to the instant proceeding.

The Administrative Law Judge noted that early in discussions concerning a proposed change in shift hours, the Respondent had advised the Complainants herein and the MTC that no change in the existing shift hours for employees of the three units, provided for in their three respective existing negotiated agreements, would occur unless all three labor organizations reached a common agreement on such change. He found that subsequent to the signing of a written Memorandum of Understanding (Memorandum) regarding a change in existing shift hours by the Respondent and the Complainants, the Respondent and the MTC had at a later meeting, in effect, reached an oral agreement involving a special arrangement concerning the shift assignments of certain MTC unit employees, and that the Respondent and the MTC understood that such agreement had been entered into when the MTC signed the Memorandum at the close of that later meeting. It was found further by the Administrative Law Judge that, thereafter, to avoid certain problems which had occurred, the Respondent decided to withdraw from the oral agreement concerning shift assignments it had reached with the MTC and at a subsequent meeting with the three labor organizations invited the MTC to withdraw its signature from the Memorandum, such action having the further effect, in the Respondent's view, of negating any agreement between the parties, and thus cancelling any obligation the Respondent would have had under the Memorandum with respect to the Complainants. Based on the above circumstances, the Administrative Law Judge concluded, in essence, that the Respondent's conduct herein constituted a failure to bargain in good faith in violation of Section 19(a)(1) and (6) of the Order.

Although the Assistant Secretary agreed with the Administrative Law Judge's conclusion that the Respondent's conduct, with respect to the IFPTE and the AFGE, was violative of Section 19(a)(1) and (6) of the Order, he did so for different reasons than those relied upon by the Administrative Law Judge. Thus, the Assistant Secretary found that the Memorandum, while silent with respect to the existence of an oral agreement between the Respondent and the MTC concerning shift assignments, was clear and unambiguous on its face relative to the subject of a change in shift hours for employees within the Complainants' and the MTC's units and, in the Assistant Secretary's view, constituted a modification of each of the three labor organizations' negotiated agreements and not a separate and independently enforceable agreement. In this regard, he found that when the MTC signed the Memorandum, the only condition precedent to the effectuation of the Memorandum as a modification of the three negotiated agreements was fulfilled, i.e. that all three labor organizations had to agree to the change in shift hours before any individual modification would be effective. Under these circumstances, the Assistant Secretary concluded that when, thereafter, the Respondent issued a notice to all employees cancelling a prior notice which had announced the implementation of the change in shift hours, it violated Section 19(a)(1) and (6) of the Order as such action constituted a failure to comply with the terms of its individual negotiated agreements with Complainants, as amended by the Memorandum.

Accordingly, the Assistant Secretary issued an appropriate remedial order. In this regard, he held that such remedy should apply only to the IFPTE and the AFGE as the MTC was not a party to the instant proceeding.

A/SLMR No. 820

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PORTSMOUTH NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY

Respondent

and Case No. 31-9681(CA)

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS,
AFL-CIO, LOCAL 4

Complainant

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2024

Complainant

DECISION AND ORDER

On September 30, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order, and the Complainants filed a response to the Respondent'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 Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief and the Complainants' response to the Respondent's exceptions, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

The complaint in the instant case alleges, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally cancelling a written agreement relative to a change in shift hours.

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

Involved herein is a proposed change in shift hours which would have had the effect of establishing a split first shift for employees within three separate units represented exclusively by the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, hereinafter called IFPTE, the American Federation of Government Employees, AFL-CIO, Local 2024, hereinafter called AFGE, and the Federal Employees Metal Trades Council, AFL-CIO, hereinafter called MTC. 1/ As noted by the Administrative Law Judge, the record reveals that early in the discussions concerning the proposed change in shift hours, the Respondent advised the Complainants herein and the MTC that no change in the existing shift hours for employees of the three units, provided for in their three respective existing negotiated agreements, would occur unless all three labor organizations reached a common agreement on such change. He noted that the parties' discussions had proceeded on that basis and found that, subsequent to the signing on May 20, 1975, of a written Memorandum of Understanding (hereinafter called the Memorandum) regarding a change in existing shift hours by the Respondent and the Complainants, 2/ the Respondent and the MTC, at a June 6, 1975, meeting, had, in effect, reached an oral agreement involving a special arrangement concerning the shift assignments of certain MTC unit employees. In this regard, he found that the Respondent and the MTC understood that such agreement had been entered into when the MTC signed the Memorandum at the close of the June 6, 1975, meeting. 3/ Moreover, he concluded that even if the Respondent's agent did not have the authority to bind the Respondent on June 6, 1975, to such an oral agreement, the subsequent issuance by the Respondent on June 11, 1975, of a notice to all employees implementing the change of shift hours, effective June 29, 1975, constituted a ratification of the oral agreement. It was found further that, thereafter, to avoid certain problems which had occurred, the Respondent decided to withdraw from the oral agreement concerning shift assignments it had reached with the MTC. Thus, at a June 13, 1975, meeting with the three labor organizations involved, it invited the MTC to withdraw its signature from the Memorandum, such action having the further effect, in the Respondent's view, of negating any agreement between the parties, and thus cancelling any obligation the Respondent would have had under the Memorandum with respect to the Complainants. 4/ Based on the above circumstances, the Administrative Law Judge concluded, in essence, that the Respondent's conduct herein constituted a failure to bargain in good faith in violation of Section 19(a)(1) and (6) of the Order.

1/ As indicated above, the IFPTE and the AFGE are the Complainants in this case, while the MTC is not a party to the instant proceeding.

2/ The Memorandum provided as follows:

> The provisions for a regular day shift of 0730-1600 hours contained in the Shipyard-AFGE Local 2024 and the Shipyard-IFPTE Local 4 collective bargaining Agreements are hereby modified to provide for a regular day shift of 0750-1620 in addition to the present 0730-1600 regular day shift.
>
> The provision for regular day shifts of 0730-1610 or 0800-1630 and for a regular second or afternoon shift of 1600-0030 contained in the Shipyard-Metal Trades Council collective bargaining Agreement is hereby modified to provide for regular day shifts of 0730-1600 or 0750-1620 and a regular second or afternoon shift of 1545-0015.
>
> The undersigned labor organizations recognize that the obligation to meet and confer with them with respect to personnel policies and practices and matters affecting working conditions imposed upon the Shipyard by Section 11(a) of Executive Order 11491, as amended, (Continued)

2/ does not include matters with respect to the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty (as provided in Section 11(b) of the Order) and that the Shipyard therefore will not negotiate with regard to such matters. However, the Shipyard recognizes that it has an obligation to meet and confer with the undersigned labor organizations on those issues covered by Section 11(a) of the Order and not excluded by Section 11(b) of the Order which may arise from the implementation of this Memorandum.

3/ Subsequently, on June 9, 1975, the MTC delivered to the Respondent a letter requesting "verification" of the oral agreement allegedly reached by it and the Respondent on June 6, 1975, concerning shift assignments of certain MTC unit employees. In pertinent part, this letter, addressed to the Respondent's Director of Industrial Relations, stated:

> As per our discussion on 6 June 1975, it is our understanding that the following employees in our bargaining unit will remain on the 0730-1600 hours shift versus the 0750-1620 hours shift....

4/ On June 17, 1975, the Respondent issued a notice to all employees cancelling the notice regarding the change in shift hours it had previously issued on June 11, 1975.

While I agree with the conclusion of the Administrative Law Judge that the Respondent's conduct herein, with respect to the IFPTE and the AFGE, was violative of Section 19(a)(1) and (6) of the Order, I do so for different reasons than those relied upon by the Administrative Law Judge. The Memorandum involved herein, while silent with respect to the existence of an oral agreement between the Respondent and the MTC concerning shift assignments of certain MTC unit employees 5/, was clear and unambiguous on its face relative to the subject of a change in shift hours for employees within the Complainants' and the MTC's units. Moreover, contrary to the Administrative Law Judge, I view the Memorandum solely as a modification of each of the three negotiated agreements and not as a separate and independently enforceable agreement. Thus, upon execution of the Memorandum, each of the respective existing negotiated agreements between the Respondent and the IFPTE, the AFGE, and the MTC was, in effect, modified in accordance with the Memorandum's terms. 6/ In this regard, I find that when the MTC signed the Memorandum on June 6, 1975, the only condition precedent to the effectuation of the Memorandum as a modification of the three negotiated agreements was fulfilled, i.e. that all three labor organizations had to agree to the change in shift hours before any individual modification would be effective. Thereafter, the Respondent, in effect, affirmed the execution of the Memorandum, when, on June 11, 1975, it issued a notice to all employees announcing the implementation of the change in shift hours with such change to be effective on June 29, 1975. Under these circumstances, I conclude that when, on June 17, 1975, the Respondent issued a second notice to all employees cancelling its notice of June 11, 1975, which implemented the change in shift hours, it violated Section 19(a)(1) and (6) of the Order, as, in my view, such action constituted a failure to comply with the terms of its individual negotiated agreements with the

5/ Although not necessary to my conclusion herein, I find that the record fails to clearly establish that the MTC and the Respondent had reached a separate and binding oral agreement during their June 6, 1975, meeting with respect to the shift assignments of MTC unit employees. In this regard, it was noted that at the hearing in this matter only the Respondent's representative at the meeting of June 6, 1975, between the Respondent and the MTC testified as to what occurred at that meeting and the Respondent's representative testified that no such oral agreement had been reached. An MTC representative testified at the hearing herein only with respect to the delivery date of its June 9, 1975, "verification" letter.

6/ The Memorandum specifically provided for the modification of each labor organization's negotiated agreement with respect to shift hours. See footnote 2, above.

Complainants, as amended on June 6, 1975, by the Memorandum. 7/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the Portsmouth Naval Shipyard, Department of the Navy, shall:

1. Cease and desist from:

(a) Failing and refusing to implement its negotiated agreements with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, and the American Federation of Government Employees, AFL-CIO, Local 2024, as amended on June 6, 1975, with respect to the shift hours of those employees represented exclusively by the aforementioned labor organizations, during the term of such negotiated agreements, unless modifications are mutually agreed to by the parties to those agreeements.

(b) In any like or related manner, interfering with, retraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Implement, after proper notification, the terms of its negotiated agreements entered into with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, and the American Federation of Government Employees, AFL-CIO, Local 2024, as amended on

7/ As indicated above, I have found that the evidence fails to clearly establish that the Respondent and the MTC had entered into a separate oral agreement at the June 6, 1975, meeting. I find further that the evidence fails to establish that an oral modification of the Memorandum was entered into at that meeting. In this regard, it was noted that the MTC's subsequent letter to the Respondent dated June 9, 1975, requesting "verification" of the alleged oral agreement does not indicate that the MTC contemplated the alleged oral agreement to be a specific oral modification of the Memorandum at issue in this case. Moreover, even if the existence of an oral agreement between the Respondent and the MTC had been clearly established, enforcement of such oral agreement as a separate agreement or as a modification of the Memorandum would be a matter for resolution solely between the MTC, which is not a party to this proceeding, and the Respondent. Accordingly, the remedial order herein shall apply only to the enforcement of the negotiated agreements, as amended on June 6, 1975, between the Complainants and the Respondent.

June 6, 1975, with respect to the shift hours of those employees represented exclusively by the aforementioned labor organizations, during the term of such negotiated agreements, unless modifications are mutually agreed to by the parties to those agreements.

(b) Post at its facility at the Portsmouth Naval Shipyard 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.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
April 6, 1977

Francis X. Burkhardt, 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 implement the terms of our negotiated agreements with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, and the American Federation of Government Employees, AFL-CIO, Local 2024, as amended on June 6, 1975, with respect to the shift hours of employees represented exclusively by the aforementioned labor organizations, during the term of such negotiated agreements, unless modifications are mutually agreed to by the parties to those agreements.

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 implement the terms of our negotiated agreements with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, and the American Federation of Government Employees, AFL-CIO, Local 2024, as amended on June 6, 1975, with respect to the shift hours of those employees represented exclusively by the aforementioned labor organizations, during the term of such negotiated agreements, unless modifications are mutually agreed to by the parties to those agreements.

_____
(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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor whose address is: Suite 3515, 1515 Broadway, New York, New York 10036.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

PORTSMOUTH NAVAL SHIPYARD,
DEPARTMENT OF THE NAVY,
Respondent

and

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO, Local 4;
Complainant

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Local 2024,
Complainant

Case No. 31-9681(CA)

A. GENE NIRO, Esquire
Area Representative
Office of Civilian Manpower Management
Northern Field Division, Boston Office
495 Sumner Street
Boston, Massachusetts 02210
On Behalf of Respondent

JAMES E. LYONS, Director of Public Employee Affairs
International Federation of Professional and Technical Engineers, AFL-CIO
1126 16th Street, N.W.
Washington, D.C. 20036
On Behalf of Complainant IFPTE

DANIEL J. KEARNEY, National Representative
American Federation of Government Employees, AFL-CIO
512 Gallivan Boulevard
Dorchester, Massachusetts 02124
On Behalf of Complainant AFGE

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case, heard in Portsmouth, New Hampshire on May 6, 1976, arises under Executive Order 11491, as amended (hereinafter called the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint issued on April 6, 1976 with reference to alleged violations of Sections 19(a)(1) and (6) of the Order. The complaint, as amended, filed by International Federation of Professional and Technical Engineers, AFL-CIO, Local 4 (IFPTE) and American Federation of Government Employees, AFL-CIO, Local 2024, (AFGE), hereinafter jointly referred to as Complainants, alleged that Portsmouth Naval Shipyard, Department of the Navy, hereinafter called Respondent or the Activity, violated the Order by unilaterally cancelling an agreement relative to a change of work shifts and failing to give the Unions proper notice prior to announcing the cancellation to employees.

At the hearing the parties were represented and were afforded full opportunity to adduce evidence, call, examine and cross examine witnesses and argue orally.

Upon the entire record 1/ 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

The Portsmouth Naval Shipyard is located in Kittery, Maine and is one of eight naval shipyards under the command of Naval Sea Systems Command Headquarters in Arlington, Virginia. Its mission is to provide logistic support for assigned ships and service craft; to perform authorized work in connection with the construction, conversion, overhaul, repair, alteration, drydocking, and outfitting of ships and craft; to perform manufacturing, research development and test work; and to provide services and material to other activities and units.

IFPTE enjoys exclusive recognition as the bargaining representative of all professional and technical employees (approximately 1,000 in number). Its latest contract went into effect on April 30, 1974 and expires on April 29, 1977.

1/ The unopposed request of IFPTE for corrections in the transcript is hereby granted.

AFGE enjoys exclusive recognition as the bargaining representative of all general schedule employees, excluding professional and technical employees and physical science technicians (approximately 600 in number). Its latest contract went into effect on November 8, 1974 and expires on November 7, 1976.

The Metal Trades Council (MTC) enjoys exclusive recognition as the bargaining representative of all wage grade employees and general schedule physical science technicians (approximately 4,200 in number). Its latest contract went into effect on January 25, 1974 and expires on January 24, 1977.

Prior to the implementation of the agreements which went into effect in 1974, IFPTE and AFGE unit (white collar) employees worked on a day shift commencing 0800 hours and ending at 1630 hours. Also working these hours were certain MTC unit employees numbering approximately 100-planners, estimators, supply and various other employees who, due to the nature of their activities, worked closely with certain IFPTE and AFGE unit employees. However, the vast majority of the employees represented by the MTC (blue collar workers) worked a day shift beginning 0730 hours and ending at 1610 hours. Pursuant to the terms of the collection bargaining agreements which took effect in 1974, IFPTE and AFGE employees began working a day shift from 0730 hours to 1600 hours. In 1974 the Activity and the MTC modified the MTC agreement so that all employees in that Union's unit also worked a 0730 to 1600 hour day shift.

By letter dated January 2, 1975 the AFGE requested Captain McDonough, Commanding Officer of Respondent Activity, to give his "serious consideration" to changing the shift hours of employees to minimize the traffic backup which was occurring due to all employees entering and leaving the facility at the same times. Captain McDonough, by letter dated January 14, 1975, advised the AFGE that he was aware of the traffic problems and employees' desires for staggered shift hours and stated he would give serious consideration to any AFGE suggestion related to specific shift hours and the organizational segments of the Shipyard that might be affected. Subsequently, by letter dated January 24, 1975 AFGE recommended to Captain McDonough that the shift of all classified (general schedule) employees be changed to 8:00 A.M. - 4:30 P.M. and advised him that the IFPTE was in accord with the recommendation.

Respondent, represented by Director of Industrial Relations Donald Holster, met with AFGE, IFPTE and MTC separately or jointly on approximately seven occasions from January through March 1975 in attempt to reach a consensus on shift hours.

Sometime during discussions which took place between February 24 and February 28, and perhaps earlier, the Activity informed the three Unions that all parties must be satisfied with any change from the existing work hours before anyone would be bound. No objection was interposed by the Unions to this condition and thereafter, discussions proceeded on that basis.

By separate letters to Captain McDonough dated March 6, 1975, IFPTE and AFGE proposed that the hours of employees in their respective units be changed to 7:50 A.M. to 4:20 P.M. and employees required to support production be put on a 7:20 A.M. to 3:50 P.M. Captain McDonough responded by letter dated March 27, 1975, advising IFPTE and AFGE of Respondent's position at that time. The letters stated, inter alia:

> "As a result of these meetings, the parties reached an understanding that two day shifts were feasible; one consisting of the current 0730-1600 shift hours and one consisting of an 8 hour shift with a 30 minute lunch starting later than the 0730-1600 shift. The Shipyard proposed the establishment of a second day shift on two occasions but it was not accepted either time, apparently because your organizations were not satisfied with the Shipyard's description of the number and types of employees which would be assigned to the two shifts."

In addition, Captain McDonough informed IFPTE and AFGE that according to his interpretation of the provisions of Section 11(b) of the Order:

> "...if the Shipyard and your organizations open their Agreements for renegotiation of the hours of work Articles, the Shipyard must negotiate what hours of work the second day shift will consist of; however, the Shipyard need not negotiate the number and types of employees or positions to be assigned to these shifts. Since I believe it is necessary to retain the right to determine the number and types of employees and positions which will be assigned to shifts in order to efficiently manage the Shipyard, I am willing to negotiate the hours of work of a second day shift, but will not negotiate the number and types of employees or positions to be assigned to the two shifts."

The letters concluded:

> "The Director of Industrial Relations is prepared to proceed with the discussions on this basis. Please contact him when you are also prepared to meet."

Following meetings in March between Holster and the three labor organizations, Captain McDonough, by letter dated April 15, 1975, presented the three Unions with a proposal for change in the work hours of all employees. The letter offered as "a reasonable solution to the problem" a "compromise" which would retain the existing 0730 to 1600 shift hours and establish a new 0750 to 1620 shift. McDonough informed the Unions that "(a)s nearly as can be determined, the employees in your units who would be assigned to the 0750-1620 shift are those who previously worked the 0800-1630 shift.

Enclosed with the letter was a Memorandum of Understanding which, McDonough's letter provided, required execution by all parties in order to effectuate the change. The Memorandum of Understanding contained blanks for signatures by the Presidents of the three Unions and Director of Industrial Relations Holster and provided as follows:

> "The provisions for a regular day shift of 0730-1600 hours contained in the Shipyard-AFGE Local 2024 and the Shipyard-IFPTE Local 4 collective bargaining Agreements are hereby modified to provide for a regular day shift of 0750-1620 in addition to the present 0730-1600 regular day shift.
>
> "The provision for regular day shifts of 0730-1610 or 0800-1630 and for a regular second or afternoon shift of 1600-0030 contained in the Shipyard-Metal Trades Council collective bargaining Agreement is hereby modified to provide for regular day shifts of 0730-1600 or 0750-1620 and a regular second or afternoon shift of 1545-0015.

> "The undersigned labor organizations recognize that the obligation to meet and confer with them with respect to personnel policies and practices and matters affecting working conditions imposed upon the Shipyard by Section 11(a) of Executive Order 11491, as amended, does not include matters with respect to the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty (as provided in Section 11(b) of the Order) and that the Shipyard therefore will not negotiate with regard to such matters. However, the Shipyard recognizes that it has an obligation to meet and confer with the undersigned labor organizations on those issues covered by Section 11(a) of the Order and not excluded by Section 11(b) of the Order which may arise from the implementation of this Memorandum."

By letter dated May 9, 1975, Respondent informed the three Unions that it has not had an official response from any of them relative to its April 15 proposal. The letter provided, inter alia;

> "...Unless a unanimous response is received by 16 May 1975 I will assume that agreement cannot be reached. If agreement cannot be reached, then the Shipyard will remain on the current 0730-1600 hours first shift.
>
> The Shipyard stands ready to discuss this matter with you so that hours may be achieved that are in the best interest of the Shipyard and the employees in the units that you represent."

Representatives of IFPTE and AFGE met with Respondent on May 20, 1975 and all three parties signed the above Memorandum of Understanding. However, MTC made no official response to the proposal. Accordingly, in a letter dated May 30, 1975 Captain McDonough notified the President of MTC, Raymond Hall, that the Memorandum had been signed by IFPTE, AFGE and managment. McDonough informed Hall that if no reply to the proposal was received from MTC by June 4, McDonough would assume that agreement could not be reached and the facility

would remain on the 0730-1600 hours first shift schedule.

On Friday, June 6, 1975, Director of Industrial Relations Holster met, at his request, with MTC President Hall and MTC Recording Secretary James Bennett. At the meeting, Holster asked Hall why the MTC had not signed the Memorandum of Understanding. Hall replied that MTC would not agree to any change in work schedule unless planners, estimators and the various other employees represented by MTC worked the same hours as the blue collar workers represented by that Union. Holster informed Hall that while he was not negotiating on the matter, he would make some phone calls to various departments to see whether the parties could reach some agreement. Thereupon, Holster called Mr. Krause, the supervisor of planning and estimating; the head of the duplicating section; and the supply officer. Holster explained to them the terms of the Memorandum of Understanding, that IFPTE and AFGE had signed, and the reasons for MTC's refusal to agree. All three informed Holster that due to the relationship of the employees in question with employees represented by IFPTE and AFGE they preferred that the planners and estimators, etc. work the same hours as the employees represented by IFPTE and AFGE. However, these individuals also informed Holster that if they were "compelled" to, they could work around the problem. Holster relayed the responses to the MTC representatives who remained in the room while Holster made the telephone calls. Upon hearing this information Hall signed the Memorandum of Understanding, shook hands and left.

On Monday, June 9, 1975, President Hall had delivered to Holster's office a letter which reiterated his understanding that the change in shift hours would result in those employees represented by MTC remaining on the 0730-1600 hours shift. The letter also indicated that MTC understood that the shift beginning 0750 hours was tentatively scheduled to be implemented on June 22, 1975 and concluded, "We await your verification of the above...." 2/

On June 11, 1975 Respondent issued a "Notice" to employees stating that the change in hours as contained in the Memorandum of Understanding would be effective on June 29, 1975.

2/ Holster testified he first saw the MTC letter on June 11 or 12 after the issuance of the Activity's June 11 "Notice", infra. Holster's handwritten notation on the letter states, "No action required".

After the issuance of the June 11, 1975 "Notice", Shipyard Commander Captain McDonough received numerous calls and complaints from employees, supervisors and managment officials regarding the impending change in hours. Employees were concerned over what shift they would work on, the disruption of car pools, wives and husbands working on different shifts and the like. Managers in some units were dissatisfied with the new arrangement from an efficiency standpoint. Indeed, Holster was informed by the Commanding Officer that Mr. Krause,the supervisor of planning and estimating whom Holster had contacted when meeting with MTC representatives on June 6, did not have authority to commit the Planning Officer, the head of that department. The Planning Officer, Krause's supervisor, was firmly opposed to having planners and estimators working different shift hours from those of the other white collar employees since he felt it would "splinter" his organization.

On June 13, 1975 Holster and Joseph Evans, the Activity's Head of Employee Relations, met with various representatives of IFPTE, AFGE and MTC. At that meeting Holster informed the participants that he had some "bad news" and presented the parties with a draft of a memorandum intended for issuance to Department and Office Heads of the Activity. That memo provided "guidance" for the change by stating:

> "All departments and offices will return to the two shift breakdown in the same manner as they were prior to going to one shift. That is:
>
> a. Those that previously worked 0730 to 1610 will be assigned to the 0730-1600 shift.
>
> b. Those that previously worked 0800 to 1630 will be assigned to the 0750 to 1620 shift."

MTC representatives noticed that the effect of the "guidance" would split planners and estimators and similar MTC unit employees from the blue collar MTC unit employees. Accordingly, MTC representatives protested that such was contrary to what they had agreed upon on June 6. Holster stated that while he felt the parties had an agreement on the hours of work "pandomonium had broken loose" from employees and managers alike. He related the objection of the Planning Officer, supra, and advised the MTC representatives that the discussions were held in good faith and if he misled the MTC or there was a misunderstanding as to what shifts planning and estimating employees and the like would work, the MTC had the right to

revoke it's signature on the Memorandum of Understanding. Thereupon James Bennett, MTC Recording Secretary informed Holster that the signature was revoked. Holster suggested to the MTC representatives that they talk to Shipyard Commander about the matter. Holster was told that the signature was revoked and MTC representatives wished to discuss the matter with their "people" and so declined talking to the Commander at that time. Holster commented that the MTC withdrawal meant there was no agreement among the parties and the representatives of IFPTE and AFGE objected to Holster with regard to permitting the MTC's withdrawal.

Thereafter, in the morning of June 17, 1975, Evans, the Activity's Head of Employee Relations Division showed MTC President Hall a copy of a "Notice" dated for issuance that day which announced the cancellation of the Notice of June 11, above. Around that same time Evans gave IFPTE Local 4 President Peter Matthews a copy of the notice to be issued. Evans also attempted to contact the AFGE President and First Vice-President but was unable to reach them. However, Evans did contact the AFGE Second Vice-President, read her the notice and told her the Activity proposed to issue it that day. Only Matthews objected, taking issue with the Commander's changing his mind.

Sometime during that same day the notice was issued. Sometime shortly before the noon hour of that day AFGE National Representative Flaherty and IFPTE Local 4 President Matthews met with Captain McDonough. Flaherty told McDonough that he heard the Activity was in the process of issuing a notice cancelling the June 16 "Notice" and objected to what he considered the Activity's proposed unilaterally abrogating the agreement on the shift hours. McDonough informed Flaherty that he had received numerous calls expressing adverse reaction to the decision and he was, in effect, "fed up", with the entire matter. McDonough told Flaherty that if he had anything further to say on the matter he should take it up with Holster.

Discussion and Conclusions

In January 1975 when approached by IFPTE and AFGE to change the existing shifts at the Shipyard, the Activity was under no obligation to reopen its agreements with the Unions at that time. Through exploratory communications the Activity concluded that discussions would be worthwhile. Thereafter, the Activity entered negotiations on the matter with the clear

understanding however that no agreement would bind any party unless all parties were satisfied with the final arrangement. During these negotiations Repondent's Director of Industrial Relations Donald Holster was the Activity's representative in discussions with the Unions. Holster acknowledged he normally had authority to bind the Activity in such discussions and at no time relevant hereto did Holster indicate he lacked authority to bind the Activity. Indeed, it was Holster's own opinion that he possessed authority to negotiate with the parties on the shift issue.

At all times while the change of shift was being considered MTC made known its position to the Activity that all MTC unit employees must work the same hours. The June 6, 1975 meeting between Holster and MTC representatives was called by Holster to pursue MTC's failure to sign the Memorandum of Understanding. After Holster mad the calls to the various departments and relayed to the MTC that, if compelled to, the affected departments could live with an arrangement whereby planners and estimators, etc., represented by MTC would not work exactly the same shift hours as those white collar employees represented by the other two Unions, Holster sat by without comment and allowed MTC to sign the Memorandum. While Holster originally stated he was not negotiating on the matter, he nevertheless gave no indicating that his authority to bind the Activity during the discussion was in any way limited, if such was the case, although he had sufficient opportunity at the time to do so. Nor did he give any indication to the MTC representatives that anything remained to be done for an agreement to be consumated between them. Indeed the Memorandum of Understanding bears Holster's signature as well as that of representatives from all three Unions involved and is dated June 6, 1975. 3/ Thus, I conclude that on June 6, 1975 when MTC signed the Memorandum, under the circumstances surrounding that event, both parties present understood that an agreement had been entered into which would keep all MTC unit employees on the same shift. 4/

3/ Joint Exhibit No. 4

4/ While by the terms of the Memorandum of Understanding Respondent reserved to itself certain rights as enumerated in Section 11(b) of the Order, such reservation, if it imposed any limitation on the matter in issue, was clearly bargained away, at least with regard to the shift placement of MTC unit employees in question. See Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656 and decisions
[Cont'd on next page]

I also conclude that, assuming arguendo, Holster did not originally have authority to bind the Activity on June 6, or his actions did not constitute affirmance of an agreement with MTC, the Activity's June 11 issuance of the Notice to its employees announcing the establishment of a second day shift nevertheless constituted a ratification by the Activity of that agreement. The Activity knew of or were chargeable with full knowledge of Holster's agreement with MTC that all MTC unit employees would work on the 0730-1600 hours shift. 5/ In any event, I infer that during the five day period between June 6 and June 11 Holster fully advised his superiors of the terms of the agreement with MTC. When the June 11 Notice, signed by Captain McDonough, was published, the Activity, in such circumstances, announced to the MTC and all employees that it had reached full agreement on the matter including those specific terms which MTC insisted on as a condition precedent to signing the Memorandum of Understanding. 6/

It was not until after June 11 when Captain McDonough began to get inquiries and complaints on the agreement did the Activity decide that a "misunderstanding" had been involved and some "guidance" (the proposed memo of June 13) was necessary. I conclude there was no mistake or misunderstanding. Nor did Holster's agreement with MTC somehow undermine the thrust of the basis terms of the Memorandum of Understanding to resolve the problems resulting from a single day shift or seriously thwart the Activity's carrying out it's legitimate managerial functions. Rather, Respondent withdrew from the agreement it had with the MTC merely to avoid the inconveniences which might have resulted from the Activity's adhering to its agreement. The Activity simply found it more expeditious to unilaterally negate its committment to the MTC and then, in essence, invite MTC to revoke its signature from the Memorandum. Not to revoke its signature would, of course, mean that the MTC was agreeing to terms it had unalterably opposed throughout negotiations on this matter. MTC's revocation, under such conditions, merely meant that it was not in accord with Respondent's

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4/ Cont'd. of the Federal Labor Relations Council cited therein holding that matters within the ambit of Section 11(b) of the Order, although excepted from the obligation to negotiate, may be negotiated if management chooses to do so.

5/ See Federal Aviation Administration, A/SLMR No. 704

6/ I also note that the MTC letter delivered June 9, 1975, setting forth the understanding reached by MTC and the Activity was not challenged but merely contained Holster's notation "No action required".

unilateral modification of the agreement. Accordingly, in these circumstances I find and conclude that Respondent's conduct constituted a failure to consult, confer and negotiate in good faith under Section 19(a)(6) of the Order and resulted in improper interference with, restraint or coercion of unit employees of rights assured under the Order in violation of Section 19(a)(1). 7/

I reject Respondent's contention that on June 13 the Activity was merely presenting a "proposal" to the Unions. The circumstances sorrounding the meeting, including Captain McDonough's position during the June 17 meeting with representatives of IFPTE and AFGE, supra, lead to the conclusion that the Activity was, on June 13, presenting the Unions with a fait accompli, and further efforts to pursue the matter would have been futile.

I also reject Respondent's contention that Complainants IFPTE and AFGE have no standing to file a complaint in this matter. Negotiations between the parties proceeded at the Activity's insistance that all the parties must agree to any change in shift before any party would be bound. In these circumstances IFPTE and AFGE had a substantial and inseparable interest in whether negotiations proceeded in conformance with the terms of the Order. Thus, when Respondent unilaterally withdrew from its agreement with MTC, the effect was to negate the agreement IFPTE and AFGE had with Activity. Accordingly, I find a sufficient nexus existing between the Complainants herein and the alleged wrong thereby giving Complainants ample standing to file the complaint herein. 8/

However, I do not find that Respondent's June 17, 1975 announcement that there would be no change in shifts was an independent violation of the Order. The Activity made it abundantly clear at the meeting of June 13 that there was no agreement between all the parties on the shift change and full agreement was necessary before any such change would be effectuated. Indeed, it would have been appropriate to issue such a notification to employees immediately at the close of the June 13 meeting since the Notice of June 17 did nothing more than recite the effect of the state of affairs at the time. Such does not constitute a violation

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7/ Cf. The Adjutant General, State of Illinois, Illinois Air National Guard, A/SLMR No. 598; and Joint Technical Communications Office (TRI-TAC), Department of Defense, Fort Monmouth, New Jersey, A/SLMR No. 396.

8/ Internal Revenue Service, Chicago District, A/SLMR No. 279.

of the Order. 9/ In any event, the Activity, on the morning of June 17 did notify all three Unions and nothing was said by the representatives of any of the Unions which would indicate that issuance of the Notice was not appropriate, assuming the Activity's withdrawal from the agreement was not violative of the Order.

Recommendation

Having found that Respondent has engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the order as hereinafter set forth which is designed to effectuate the policies of the order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Portsmouth Naval Shipyard, Department of the Navy shall:

1. Cease and desist from:

(a) Withdrawing from and failing and refusing to implement the terms of the Memorandum of Understanding agreed upon with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, the American Federation of Government Employees, AFL-CIO, Local 2024 on May 20, 1975 and the Federal Employees Metal Trades Council, AFL-CIO on June 6, 1975 regarding shift hours and the schedules of employees at the Portsmouth Naval Shipyard.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Implement, after proper notification, the terms of the Memorandum of Understanding agreed upon with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4 and the American Federation of Government

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9/ See Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, FLRC No. 74A-80 (October 24, 1975).

Employees, AFL-CIO, Local 2024 on May 20, 1975 and the Federal Employees Metal Trades Council, AFL-CIO on June 6, 1975 regarding shift hours and the schedules of employees at the Portsmouth Naval Shipyard.

(b) Post at its facility at the Portsmouth Naval Shipyard 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.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: September 30, 1976
Washington, D.C.

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 refuse to meet and confer in good faith by withdrawing from and failing and refusing to implement the terms of the Memorandum of Understanding agreed upon with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, and the American Federation of Government Employees, AFL-CIO, Local 2024 on May 20, 1975 and the Federal Employees Metal Trades Council, AFL-CIO on June 6, 1975 regarding shift hours and the schedules of employees at the Portsmouth Naval Shipyard.

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 implement the terms of the Memorandum of Understanding agreed upon with the International Federation of Professional and Technical Engineers, AFL-CIO, Local 4, and the American Federation of Government Employees, AFL-CIO, Local 2024 on May 20, 1975 and the Federal Employees Metal Trades Council, AFL-CIO on June 6, 1975 regarding shift hours and the schedules of employees at the Portsmouth Naval Shipyard.

_____
(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 Regional Administrator, Labor-Management

Cont'd

Services Administration, United States Department of Labor whose address is: Suite 3515, 1515 Broadway, New York, New York 10036

April 7, 1977

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 GENERAL SUPPLY CENTER
A/SLMR No. 821

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2047, AFL-CIO, (Complainant) alleging, in substance, that Respondent's Director of the Office of Civilian Personnel had misrepresented to the Complainant that certain decisions concerning the area of consideration to be used for filling a vacant supervisory position and the decision to grant 20 hours of administrative leave to six union stewards to attend a labor relations seminar were based on advice and decisions of representatives of the Defense Supply Agency (DSA) and that such misrepresentation constituted bad faith bargaining in violation of Section 19(a)(1) and (6) of the Order.

The Respondent asserted that the complaint should be dismissed because of two procedural deficiencies. First, it contended that Section 19(d) barred the Complainant from raising the issue of the misrepresentation concerning the filling of the vacancy in the instant proceeding because the same issue had been raised and litigated in a prior arbitration proceeding. Second, it contended that the alleged misrepresentation involving the amount of administrative leave for training should be dismissed because the issue had not been specifically raised in a pre-complaint charge.

The Assistant Secretary found, contrary to the Administrative Law Judge, that Section 19(d) did not bar consideration of that aspect of the complaint dealing with the alleged misrepresentation concerning the filling of the supervisory vacancy as the record showed that the arbitrator involved had dismissed the Complainant's grievance on a jurisdictional basis as the parties failed to agree that the questions before him were arbitrable and, therefore, the arbitrator neither reached nor considered the merits of the dispute. Under these circumstances, the Assistant Secretary found that the provisions of Section 19(d) did not bar his consideration of this matter because the arbitration herein had not been in any real sense invoked. Also, the Assistant Secretary agreed with the Administrative Law Judge, but for different reasons, that dismissal on procedural grounds of that aspect of the complaint dealing with the alleged misrepresentation involving administrative leave was not warranted. The Assistant Secretary found that the Respondent had failed to raise this alleged procedural deficiency with the Area Administrator during the investigative stage of the complaint and prior to issuance of the Notice of Hearing.

Regarding the two substantive issues presented by the complaint, the Assistant Secretary found that neither alleged misrepresentation, standing alone, violated 19(a)(1) and (6) of the Order. He found no evidence that either alleged misrepresentation had made further bargaining a futility. With respect to that aspect of the complaint dealing with the alleged misrepresentation involving administrative leave, the Assistant Secretary found, contrary to the Administrative Law Judge, that the alleged statement did not constitute a clear misrepresentation of the facts.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 821

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE GENERAL SUPPLY CENTER

Respondent

and

Case No. 22-6575(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2047, AFL-CIO

Complainant

DECISION AND ORDER

On August 13, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistant herewith.

The complaint alleged, in substance, that the Respondent, specifically Mr. Roger J. Simboli, the Respondent's Director of the Office of Civilian Personnel, had misrepresented to the Complainant that certain decisions concerning the area of consideration to be used for filling a vacant supervisory position and the decision to grant 20 hours of administrative leave to six union stewards to attend a labor relations seminar were based on advice and decisions of headquarters' representatives of the

Defense Supply Agency (DSA) and that such misrepresentations constituted bad faith bargaining in violation of Section 19(a)(1) and (6) of the Order.

The Administrative Law Judge concluded that Section 19(d) of the Order barred the Complainant from raising the misrepresentation issue concerning the filling of the supervisory vacancy because the same issue was raised in a prior arbitration proceeding. 1/ I disagree.

Thus, the record shows that the arbitrator involved did not specifically address or rule on the merits of this issue. Indeed, the arbitrator dismissed the Complainant's grievance on a jurisdictional basis since the parties failed to agree that the questions involved were arbitrable and, therefore, the arbitrator never reached nor considered the merits of the dispute. 2/ Under these circumstances, I find that Section 19(d) does not bar consideration of this matter in the instant proceeding because, under the particular circumstances herein, arbitration was not in any real sense invoked. 3/

As to the merits of the alleged violation, I find that while Mr. Simboli may have misrepresented to the Complainant that he consulted or discussed the application of the CAIRS with Mr. Jones of the DSA, such misrepresentation, standing alone, did not violate Section 19(a)(1) and (6) of the Order. Thus, there is no evidence that the alleged misrepresentation made further bargaining on the matter a futility. In this regard, the evidence establishes that the Complainant did not rely upon the alleged misrepresentation, but instead sought to check the matter with Mr. Jones and that, subsequently, the Complainant did not seek further bargaining on the subject. Further, the record does not reveal that the Respondent precluded further discussions or negotiations in this respect.

With respect to the second allegation in the complaint pertaining to the granting of administrative leave, the Administrative Law Judge rejected the Respondent's contention that as such allegation was not

1/ He noted, however, that if it were found that Section 19(d) of the Order did not bar the raising of the misrepresentation issue concerning the filling of the vacancy in the instant unfair labor practice proceeding, he would have concluded that Mr. Simboli had not consulted or discussed the application of the Central Automated Inventory and Referral System (CAIRS) of the Department of Defense with Mr. Arthur J. Jones, Chief, Staffing and Employee Relations Division, DSA, in deciding what procedure to follow in filling the supervisory vacancy.

2/ The Complainant's petition for review of Arbitrator Daly's award was denied by the Federal Labor Relations Council on October 22, 1976, in Defense Supply Agency and American Federation of Government Employees, Local 2047 (Daly, Arbitrator), FLRC No. 76A-34.

3/ See Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534, wherein it was found that an untimely filed grievance did not in any real sense invoke the grievance procedure.

the subject of a pre-complaint charge it should be dismissed. In this regard, he noted that the August 1, 1975, pre-complaint charge (which did not mention the administrative leave issue) together with the parties' subsequent discussions satisfied the requirements of the Assistant Secretary's Regulations. While I agree with the Administrative Law Judge that dismissal on procedural grounds of this aspect of the instant complaint is unwarranted, I do so for different reasons. Thus, I disagree with the Administrative Law Judge's conclusion that the pre-complaint charge concerning the alleged misrepresentation in filling a vacancy and the parties' subsequent discussions concerning the administrative leave issue satisfied the pre-complaint charge requirement of the latter allegation as, in my view, the two allegations involved clearly separate events and separate issues requiring separate pre-complaint charges. However, as the record reveals that the Respondent failed to raise this alleged procedural deficiency (the failure to raise the matter in the pre-complaint charge) in a timely manner with the Area Administrator during the investigation stage of the complaint and prior to issuance of the Notice of Hearing, I find that dismissal of this aspect of the complaint based on procedural grounds is unwarranted. 4/

As to the merits of the alleged violation, the Administrative Law Judge found that Mr. Simboli had misrepresented to the Complainant that the 20 hour maximum for administrative leave was a determination made at DSA headquarters and not by the Respondent, thus effectively removing the issue of the appropriate amount of administrative leave from the bargaining table. He further concluded that because such conduct undermined the very basis of collective bargaining the Respondent had not engaged in bargaining in good faith and, therefore, violated Section 19(a)(1) and (6) of the Order. I disagree.

Thus, the Administrative Law Judge found, and I concur, that the new Commander, Brigadier General Rufus L. Billups, at an introductory meeting with officials of the Complainant, announced that he would allow 20 hours administrative leave to 6 union stewards to attend a labor relations seminar. After the meeting was adjourned and the attendees were leaving the room, Mr. Adam Wenkus, the Complainant's president, turned and asked Mr. Simboli where the 20 hours had come from. Simboli replied, "from DSA." Wenkus asked Simboli who at DSA had so advised him and Simboli replied "Larry." Wenkus asked which Larry and Simboli replied, "Larry Zdvoracek."

Contrary to the Administrative Law Judge, I do not find the above statements by Simboli to constitute a clear misrepresentation of the facts. Thus, the evidence shows that Simboli telephoned and spoke to Mr. Lawrence W. Zdvoracek, Senior Staff Specialist, DSA, concerning DSA policy in granting administrative leave and specifically mentioned 20 hours. Indeed, Mr. Zdvoracek in his letter to Mr. Wenkus, dated November 5, 1975, stated, in pertinent part:

4/ Cf. New York Army and Air National Guard, Albany, New York, A/SLMR No. 441, and Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

With reference to this particular seminar, Mr. Simboli called to discuss the general DSA policy and how it should be applied. While I did not set any absolute maximum, I do recall that 20 hours was mentioned.*** He mentioned that from his review of agenda topics, approximately 20 hours seemed reasonable. The conversation was concluded with agreement that whatever DGSC deemed "reasonable" would be acceptable from HQ viewpoint.

In addition, there is no evidence that the alleged misrepresentation rendered further bargaining on the amount of administrative leave a futility, or that the Respondent subsequently precluded further discussions or negotiations concerning the amount of administrative leave. Based on all of the above, I find, contrary to the Administrative Law Judge, that Simboli's statements to the Complainant concerning the grant of 20 hours administrative leave did not constitute a failure to bargain in good faith in violation of Section 19(a)(1) and (6) of the Order.

Accordingly, I shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6575(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 7, 1977

F X Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
	:	
Defense General Supply Center	:	
	:	
Respondent	:	
	:	
and	:	Case No. 22-6575(CA)
	:	
American Federation of Government Employees, Local 2047	:	
	:	
Complainant	:	

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For the Respondent

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For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on December 18, 1975 under Executive Order 11491, as amended (hereinafter called the Order) by Local 2047, American Federation of Government Employees, (hereinafter called Union or Local 2047 AFGE) against Defense General Supply Center (hereinafter called the Activity or DGSC) a Notice of Hearing on Complaint was issued by the Regional Administrator for Labor-Management Services for the Philadelphia Region on March 19, 1976.

The complaint alleges, in substance, that DGSC on two occasions misrepresented certain facts during consultations and thereby failed to bargain in good faith in violation of Sections 19(a)(1) and (6) of the Order.

A hearing was held before the undersigned in Richmond, Virginia. Both parties were represented by counsel and afforded full opportunity to be heard, adduce evidence, to examine and cross-examine witnesses, and argue orally. Thereafter both parties filed briefs which have been duly considered.

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

Findings of Fact

I. Background

1. DGSC is located in Chesterfield County, Virginia, and is a primary level field activity of the Defense Supply Agency (hereinafter called DSA).

2. DSA is a componant of the United States Department of Defense (hereinafter called DOD) and DSA's headquarters is located in Alexandria, Virginia, and is responsible for implementing DOD policy, forming DSA-wide policy, promulgating DSA regulations, and providing administrative support to DSA field activities.

3. At all times material herein Local 2047 AFGE has been the exclusive collective bargaining representative in a unit of DGSC's civilian employees. About 2,200 of DGSC's employees make up the unit which is described in the recognition clause of the parties' collective bargaining agreement dated 14 January 1972.

II. The Alleged Misrepresentations

A. Filling the Supervisory Vacancy

4. Sometime during 1974 the Union learned that a vacant supervisory position 1/ was filled by DGSC from outside that facility. 2/ Local 2047 AFGE felt that this violated its

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1/ Supervisory Procurement Analyst, GS 1102-13

2/ In fact the individual chosen, a Mr. Heuermann, was an Army civilian employee.

collective bargaining agreement apparently because it felt DGSC had not properly posted a vacancy notice and because DGSC applicants should receive first consideration. 3/

5. The parties held a series of disucssions concerning the appropriate method of filling the vacancy and finally agreed to submit the matter to arbitration.

6. On May 15, 1975 Arbitrator Strongin rendered his decision deciding in substance that the position should be declared vacant, that the personnel action should be reconstructed and the position filed in accordance with the parties collective bargaining agreement.

7. In developing a vacancy announcment, a dispute arose between the parties as to the interpretation and meaning of Arbitrator Strongin's award. This dispute apparently involved whether, as DGSC contended, in filling the vacancy in question the Activity must utilize and consider all obtained through the C.A.I.R.S. Program 4/ and also post the vacancy DSA wide, and then consider all persons whose names they received, including employees from outside the Activity and DSA, or whether, as the Union contended, in filing the vacancy in question, the Activity's area of consideration was, pursuant to the Activity's policy and the collective bargaining agreement, DGSC wide.

8. Mr. Roger J. Simboli was at all times material DGSC's Director of Civilian Personnel and the Activity's spokesman. Mr. Adam Wenckus was, at the all times material herein, president of Local 2047 AFGE and its spokesman.

3/ Bargaining unit employees are eligible to fill such a supervisory position. DGSC did not claim that the collective bargaining agreement did not apply to filling such positions and did in fact, as described below, agree to deal with the Union concerning filling the position in question.

4/ C.A.I.R.S. is apparently an acronym for a DOD wide civilian career program. It is a DOD wide register of employees who are eligible for certain specific positions.

9. During July 1975 Mr. Simboli and Mr. Wenckus engaged in the discussions described above concerning the meaning of Arbitrator Strongin's decision and the method for filling the vacant supervisory position, with each apparently taking the respective positions described above in paragraph 7.

10. Mr. Simboli told Mr. Wenckus, during early July 1975, that DGSC's position with respect to filling the vacant position and the use of C.A.I.R.S. was required by virtue of advise he had received telephonically from Mr. Arthur Jones, who was DSA's Chief of Staffing, Employee Relations Division.

11. Mr. Wenckus called another AFGE official 5/ apparently at DSA headquarters to check whether Mr. Jones had in fact so telephonically advised Mr. Simboli. Upon receiving a negative reply from his contact at DSA headquarters Mr. Wenckus,, on or about July 30, 1975, approached Mr. Simboli and told him of the reply. Mr. Simboli then advised Mr. Wenckus in the presence of then Union Executive Vice President Seaton Neal, that his conversation with Mr. Jones had been in person rather than on the telephone.

12. The Union checked with Mr. Jones,and he advised Mr. Wenckus that he knew nothing about the vacancy nor the vacancy announcement and had not discussed it. Later in a letter 6/ he also denied ever advising Mr. Simboli about the "Heuermann case" or "whatever vacancy that Mr. Heuermann was involved in..."

13. By letter of August 1, 1975 the Union advised Mr. Simboli that it felt he, and the DGSC had, by misrepresentation during discussions concerning the filing of the supervisory vacancy, failed to bargain in good faith and that the letter was an unfair labor practice charge.

14. DGSC and the Union went to arbitration before Arbitrator J. Harvey Daly. The arbitration hearing was held on January 15, 1976 and the arbitrator's decision was dated February 12, 1976. Clearly the main thrust of the arbitration was, in effect, to get Arbitrator Daly to decide whether the Activity's method of implementing Arbitrator Strongin's

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5/ Mr. Harry Spokowski, president of the DSA-AFGE Council of Locals.

6/ This letter is dated November 12, 1975.

was proper. Because the parties could not agree whether this matter before Arbitrator Daley was in fact arbitrable, the Arbitrator decided to dismiss the matter, without dealing with merits, stating that Section 13(d) of the Order delegates questions of arbitrable to the Assistant Secretary.

15. Based primarily on the Union's opening statement before Arbitrator Daley, the brief it submitted to him and on his decision, it is further concluded that the Union did allege, contend, produce evidence and litigate before the Arbitrator its allegation that Mr. Simboli lied to Mr Wenckus

concerning whether DGSC's action was based on advise from Mr. Jones and that such conduct violated Article III, Sections 1 and 2 of the collective bargaining agreement; more specifically Section 2, which states that the parties shall advise and consult with each other. The Union concluded that this means "in good faith not bad faith consultation coupled with untruth and deceit..."

16. Arbitrator Daley in his award breifly discusses the foregoing Union allegation but does not in his conclusion in any way specifically address or resolve this issue. 7/

B. Administrative Leave

17. Apparently during July and August 1975, DGSC and the Union began discussions concerning the amount of administrative leave the Activity would grant to six union stewards to attend a labor relations seminar at Virginia Polytechnic Institute.

18. Local 2047 AFGE requested that 40 hours of administrative leave be granted and the Activity approved 16 hours of annual leave.

19. On 2 September 1975 DGSC's command changed hands. Shortly thereafter, the new Commander Brigadier General Rufus L. Billups was asked by the Union to consider increasing, from 16 to 40 hours, the amount of administrative leave that Respondent had previously approved for the Union

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7/ Apparently the Union has petitioned the Federal Labor Relation Council (FLRC) to review Arbitrator Daley's award.

stewards to attend the labor-management relations seminar at Virginia Polytechnic Institute. The new commander decided to allow 4 additional hours or a total of 20 hours. However, General Billups, before proceeding to announce his decision to the Union, requested Mr. Simboli to solicit guidance from DSA relative to whether he had latitude to allow the 4 additional hours. Mr. Simboli called and spoke to Mr. Lawrence W. Zdvoracek , a DSA senior staff specialist in DSA's EEO and Labor Division. Mr. Zdvoracek advised Mr. Simboli that whatever DGSC decided was reasonable under the circumstances would be reasonable in DSA's view. Mr. Simboli advised General Billups to proceed with his decision to grant 20 hours.

20. Subsequently, General Billups, at an introductory meeting with Local 2047 AFGE's directors and labor-union officials, announced he would allow the 20 hours administrative leave. After the meeting was adjourned and the attendees were funneling out of the room, Mr. Wenckus turned around and asked Mr. Simboli where the 20 hours had come from. Mr. Simboli replied "From DSA." Mr. Wenckus asked Mr. Simboli who at DSA had so advised him and Mr. Simboli replied "Larry." Mr. Wenckus asked Mr. Simboli which Larry and Mr. Simboli responded, "Larry Zdvoracek.

21. The Union inquired of Mr. Zdvoracek, by Mr. Spokewski, whether he had in fact made the determination that 20 hours of administrative leave was the amount to be granted by DGSC. Upon being advised he did not make such a determination Mr. Wenckus, by letter to Mr. Zdvoracek,dated September 30, 1975, asked whether he had set the 20 hour maximum. Mr. Zdvoracek responded by letter dated November 5, 1975, indicating that he had discussed the matter with Mr. Simboli and that 20 hours had not been mentioned and, in effect, DGSC had to make the determination as to the reasonable amount of administrative leave to grant.

22. During mid September, after having concluded that Mr. Simboli had not told the truth about DSA setting the 20 hour administrative leave, Mr. Wenckus advised Mr. Simboli that he again had not been conferring in good faith and he had not told the truth.

23. The Union subsequently met with General Billups and discussed the unfair labor practice involving the alleged untruth concerning filing the supervisory vacancy. During these discussions the Union discussed the alleged misrepresentation concerning the administrative leave determination and showed him the correspondance from Mr. Zdvoracek.

Conclusions of Law

I. Section 19(d)

The Activity contends that the Union litigated and raised the issue of Mr. Simboli's misrepresentation concerning the filing of the vacancy during the Daley arbitration proceeding. Therefore DGSC contends that, pursuant to Section 19(d) of the Order, the Union cannot raise it again in this unfair labor practice proceeding. The Union contends that this alleged misrepresentation was raised in the arbitration proceeding solely as background and was not submitted to Arbitrator Daley for decision.

Section 19(d) of the Order provides in pertinent part that:

> "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."

In the subject case it seems clear that the Union did in fact raise the issue of Mr. Simboli's alleged misrepresentation before Arbitrator Daley and contended that such alleged deceit constituted failure to consult and confer in good faith and thus violated "Article III Sections 1 and 2 of the AFGE-DGSC Agreement..." Therefore since the Union elected to and did raise the issue of Mr. Simboli's alleged untruthfulness with respect to the filling of the vacancy as an alleged violation of the collective bargaining agreement, it is concluded that Section 19(d) of the Order bars the Union from raising that same issue in an unfair labor practice procedure. 8/

8/ The fact that the arbitrator did not rule on the issue is not controlling. The Union did raise it and once it elected to follow that route it had to pursue it to the end, including perhaps petitioning the arbitrator to rule on this issue or to appeal to the FLRC, etc. The Union cannot because it is dissatisfied with the way the arbitrator dealt with this issue now pursue the unfair labor practice route.

Because of all of the foregoing it is concluded that aspect of the complaint dealing with Mr. Simboli's alleged misrepresentation concerning the filing of the supervisory vacancy should be dismissed.

In light of the conclusion it is unnecessary to conclude whether or not Mr. Simboli did in fact tell an untruth when he advised Mr. Wenckus that the DGSC decision had been reached by virtue of a decision by Mr. Jones. 9/

II. Administrative Leave Issue

The Activity contends that the aspect of the complaint dealing with Mr. Simboli's alleged misrepresentation concerning the administrative issue should be dismissed because it was never specifically the subject of an unfair labor practice charge.

Section 203.2(3) of the Assistant Secretary's Rules and Regulations sets forth the requirements for the contents of a charge, requiring that a charge "shall contain a clear and concise statement of the facts constituting the unfair labor practice, including the time and place of occurrence of the particular acts."

The real purpose of the charge is to apprise the prospective respondent of the alleged unfair labor practice, before it becomes the subject of a formal proceeding, so that the parties can informally explore the issues and hopefully resolve the matter without having to resort to any formal proceeding.

9/ If it were found however that Section 19(d) of the Order did not bar the raising of this issue in an unfair labor practice procedure, I would have concluded that, in fact, Mr. Simboli had not consulted or discussed the application of C.A.I.R.S. etc., with Mr. Jones in deciding what procedure to follow in filling the supervisory vacancy. This conclusion is based primarily on Mr. Jones' testimony and because Mr. Simboli's testimony seemed evasive and confused and therefore was not credited.

In the subject case the Union did advise the Activity by its August 1, 1975 letter that it was charging the Activity with an unfair labor practice based on a failure to bargain in good faith because of Mr. Simboli's misrepresentations concerning the filling of the supervisory vacancy. While the parties were in the process of informally meeting to resolve that charge, based on Mr. Simbili's alleged untruthfulness, he allegedly engaged in the same kind of conduct with respect to the administrative leave issue. Therefore during the informal discussions the Union advised the Activity that it felt Mr. Simboli had again engaged in the same type of conduct. When the parties were unable to resolve these matters informally, the Union filed the subject unfair labor practice complaint, which clearly specifies both incidents involving Mr. Simboli's alleged untruthfulness. It is concluded that the August 1 charge together with the subsequent discussions satisfied the requirements of Section 203.2 of the Rules and Regulations. To hold otherwise would be to require a party to be constantly amending charges, if the other party was engaged in a continuing course of and series of conduct, all of essentially the same nature, which is alleged to be an unfair labor practice. Rather than result in the parties getting together to informally resolve these issues, such a strict requirement would involve continuous and extensive paper work, that would interfer with such informal resolutions, without serving any real purpose.

Therefore it is concluded that the allegation concerning the alleged misrepresentation involving the administrative leave issue is properly before me.

Section 19(a)(6) of the Order mandates that an activity not refuse to consult, confer and negotiate with a labor organization as required by the Order. It is clear and undisputed that the amount of administrative leave to be granted Union stewards to attend a training program is a proper subject of bargaining between the Activity and the Union.

In the public sector if an activity advises a union that, with respect to an appropriate issue of bargaining, it, the activity, does not have authority to make any decisions concerning the issue, because such determination has already been made by the activity's parent organization, that issue has been effectively removed from bargaining between the union and the activity. In effect the union has been told by the

activity that the activity cannot meaningfully bargain concerning the issue because the activity's position has already been determined from above. For the parties to be able to bargain in good faith, therefore, the union must know what issues an activity can and cannot bargain about meaningfully. It must follow then, that where an activity has removed from meaningfull bargaining an issue, otherwise appropriate for bargaining, by misrepresenting that it does not have the authority and cannot bargain about that issue, the activity is not bargaining in good faith concerning that issue. 10/

It is concluded that in the subject case Mr. Simboli clearly represented to the Union that the 20 hour maximum for administrative leave was a determination made at DSA headquarters and not at the DGSC level. By so doing Mr. Simboli, admittedly DGSC's spokesman, effectively removed that issue of the appropriate amount of administrative leave from bargaining between DGSC and the Union. However, it further concluded that DSA did not make such a determination and Mr. Simboli did misrepresent the facts. In so doing it is clear, and it is so concluded, that the Activity was engaged in conduct which undermined the very basis of collective bargaining and was not engaged in good faith bargaining with the Union. 11/

10/ This does not mean that all misrepresentations or "puffing" during collective bargaining negotiations would be an unfair labor practice. Rather, as here, only where the misrepresentations goes to the heart of the bargaining itself and would, in effect, foreclose meaningful bargaining.

11/ It need not be decided whether the misrepresentation was intentional or not because, in either case, it had the result of removing an appropriate issue from bargaining where such a removal was in no way privileged.

It is concluded, in the light of the foregoing, that by reason of the misrepresentations of its representative concerning DSA's position with respect to administrative leave, the Activity was not bargaining in good faith with the Union and therefore violated Section 19(a(6) of the Order.

It is further concluded such conduct also would tend to interfer with, restrain and coerce employees in the exercise of rights protected by the Order and would thus violate Section 19(a)(1) of the Order.

Recommendations

Having found that DGSC cannot be held to have violated the Order with respect to its conduct concerning the filling of the supervisory vacancy, it is recommended that the Assistant Secretary dismiss that portion of the complaint.

Having found that DGSC has engaged in conduct, with respect to the administrative leave issue, which is violative of Sections 19(a)(6) and (1) of the Order, I recommend the Assistant Secretary doopt 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(b) of the Regulations, the Assistant Secretary of Labor for the Labor-Management Relations hereby orders that the Defense General Supply Center, Richmond, Virginia, shall:

1. Cease and desist from:

(a) Making misrepresentations with respect to its authority to bargain concerning the amount of administrative leave it can grant union stewards to attend a labor training program or other appropriate matters for bargaining or otherwise refusing to or failing to bargain in good faith with Local 2047, American Federation of Government Employees.

(b) In any like or related manner interferring 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) Upon request bargain in good faith with Local 2047, American Federation of Government Employees concerning the amount of administrative leave to be granted union stewards to attend labor training programs and other appropriate matters for bargaining.

(b) Make whole and reimburse any employee for any loss of benefits incurred because of its failure to bargain in good faith with Local 2047, American Federation of Government Employees concerning the amount of administrative leave to be granted employees to attend a labor training program.

(c) Post at its facility copies of the attached 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 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.

(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.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: August 13, 1976
Washington, D.C.

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, AD AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT make misrepresentations with respect to our authority to bargain concerning the amount of administrative leave we can grant union stewards to attend labor training programs or other appropriate matters for bargaining or otherwise refuse to bargain in good faith with Local 2047, American Federation of Government Employees.

WE WILL NOT in any like or related manner interfer with, restrain or coerce our employees in the exercise of rights assured by Executive Order 11491, as amended.

WE WILL, upon request bargain in good faith with Local 2047, American Federation of Government Employees concerning the amount of administrative leave to be granted union stewards to attend labor training programs and other appropriate matters for bargaining.

WE WILL make whole and reimburse any employee for any loss of benefits incurred because of our failure to bargain in good faith with Local 2047, American Federation of Government Employees, concerning the amount of administrative leave to be granted employees to attend a labor training program.

_____
(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 of 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: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 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

EDUCATION DIVISION,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,
WASHINGTON, D. C.
A/SLMR No. 822

This case involved a petition for consolidation of units filed by the American Federation of Government Employees, Local 2607, AFL-CIO (AFGE) seeking to consolidate three units for which it is the current exclusive representative the employees of the Office of the Assistant Secretary for Education (OASE), the employees of the Office of Education (OE), and the employees of the National Institute of Education (NIE) - into a consolidated unit consisting of all the employees of the Education Division, Department of Health, Education and Welfare. The Activity asserted, essentially, that the components which constitute the Education Division are separate and distinct "agencies" with independent programmatic functions and delegations of administrative authority and that the current recognitions, which are along the lines of these agencies, reflect the limited community of interest among the employees of the three agencies. Furthermore, the Activity contended that the proposed consolidation would impair effective dealings and the efficiency of the agency's operations by breaching the legislative intent and the regulations issued by the Secretary of the Department of Health, Education and Welfare (DHEW), which, in its view, require the separation of the education agencies.

The Assistant Secretary noted that the Report and Recommendations of Federal Labor Relations Council, which accompanied the issuance of Executive Order 11838, indicated the Council's desire to further a reduction in unit fragmentation in the Federal sector, thereby creating a more comprehensive bargaining unit structure and that Section 10(a) of the Order was therefore amended so as to provide a procedure for the consolidation of existing exclusively recognized units. While the Council indicated that proposed consolidated units would be required to conform to the appropriate unit criteria contained in Section 10(b) of the Order, it also indicated that it was "convinced" that the Federal labor-management relations program would be improved by a reduction in unit fragmentation. In the Assistant Secretary's view, given these clear policy guidelines in the consolidation of units area, there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. This presumption may be rebutted only where it is found that the proposed consolidated unit is so inconsistent with the criteria contained in Section 10(b) of the Order that the

overriding objective of creating a more comprehensive bargaining unit structure would be undermined by such a finding.

In the context of these policy considerations, the Assistant Secretary found that the petitioned for consolidated unit is appropriate for the purpose of exclusive recognition under the Order. He concluded that the employees in the unit sought constitute all of the eligible employees of the Education Division, DHEW. As such, they share a common mission, common supervision, common work classifications, essentially common working conditions, and essentially similar personnel and labor relations practices in accordance with DHEW delegations of authority. Under these circumstances, he found that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest. Furthermore, he found that the evidence established that the OE Personnel Office presently services employees in both the OE and the OASE; the memoranda of agreement signed by the AFGE with the OASE and with the NIE reflect much of the same language contained in the negotiated agreement between the AFGE and the OE; the NIE and the OASE have used the services of the OE's labor relations specialist in preparing their labor relations positions; the scope of labor relations authority in each agency is based on similar DHEW regulations; and promotions within the Division are based on a Division-wide area of consideration. Based on these factors, he further found that the proposed consolidated unit will promote effective dealings. Additionally, as the legislation creating the Education Division provided for the Assistant Secretary to serve as its principal officer and as the evidence shows that, at a minimum, the Assistant Secretary acts to coordinate certain activities of all of the component agencies within the Division, he found that the proposed consolidated unit bears "some rational relationship to the operational and organizational structure" of the Education Division, DHEW and will therefore promote the efficiency of the agency's operations. Finally, the Assistant Secretary found that the petitioned for consolidated unit, which provides for bargaining in a single, rather than in the existing three, bargaining units will promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order set forth above.

A/SLMR No. 822

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

EDUCATION DIVISION,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,
WASHINGTON, D. C.

Activity

and Case No. 22-6797(UC)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES,
LOCAL 2607, AFL-CIO

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 Bridget Sisson. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. 1/

The Petitioner, American Federation of Government Employees, Local 2607, AFL-CIO, herein called AFGE, seeks to consolidate three units for which it is the current exclusive representative. Such units encompass: (1) the employees of the OASE; (2) the employees of the OE; and (3) the employees of the NIE. The petitioned for consolidated unit would consist of all professional and nonprofessional General Schedule and Excepted Service employees of the Education Division, Department of Health, Education and Welfare (DHEW), located in the Washington, D. C. metropolitan area as well as employees of the NIE whose duty station is outside the Washington, D. C. metropolitan area, excluding all management

1/ The Hearing Officer denied the Activity's motion that the case be recaptioned because the Office of the Assistant Secretary for Education (OASE), the Office of Education (OE) and the National Institute of Education (NIE) are separate "agencies." In its brief, the Activity requested reconsideration of the Hearing Officer's ruling, contending additionally that the manner in which the case is captioned is prejudicial. In view of the disposition herein, the Activity's request for reconsideration is denied.

officials, confidential employees, Wage Grade employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, temporary employees with no reasonable expectation of continued employment, and supervisors as defined in the Order.

The Activity contends that the proposed consolidated unit is inappropriate because the OASE, the OE and the NIE are three separate and distinct "agencies" with independent programmatic functions and delegations of administrative authority, and that there is, therefore, only a limited community of interest among the employees of the three education agencies involved herein. Furthermore, the Activity contends that the proposed consolidation would impair effective dealings and the efficiency of the agency's operations by breaching the legislative intent and the regulations issued by the Secretary of the Department of Health, Education and Welfare (DHEW), which, in its view, require the separation of the education agencies. The AFGE, on the other hand, takes the position that the employees in the proposed consolidated unit have a definable community of interest, that the consolidation would promote effective dealings, and that the Activity's contention that the proposed consolidated unit would impair the efficiency of the agency's operations is unfounded. Alternatively, the AFGE indicated its willingness to represent consolidated units consisting of any two of the three units herein for which it is currently the exclusive representative.

The mission of the Education Division, DHEW, which was created pursuant to the Education Amendments of 1972, 2/ is to coordinate and generally supervise the education activities of the DHEW. The record reveals that the legislation creating the Education Division provided that the Assistant Secretary for Education should be "the principal officer in the Department of Health, Education and Welfare to whom the Secretary shall assign responsibility for the direction and supervision of the Education Division." In this capacity, the Assistant Secretary provides leadership for the education activities of the DHEW, serves as the key advocate for assuring that the DHEW provides professional and financial assistance to strengthen education in accordance with Federal laws and regulations, and serves as the principal advisor to the Secretary, DHEW, on education affairs. The Assistant Secretary also coordinates the program operations of the Education Division agencies so as to assure maximum use of resources and to avoid disparities in the interprogram functions.

As noted above, the Education Division includes the OASE, the OE and the NIE. In addition to its immediate staff functions for the Assistant Secretary, the OASE contains two operating components - the National Center for Education Statistics (NCES), whose purpose is to collect and disseminate education statistics and other data, and the Fund for the Improvement of Postsecondary Education, which makes awards

2/ 86 Stat. 327; 20 U.S.C. 1221e.

with the intention of fostering change and innovation in postsecondary institutions. The majority of the employees assigned to the OASE, approximately 168 of the 230, work for the NCES and, of these, approximately half are classified as Statisticians (Education). The remainder of the NCES's personnel consists of supportive employees. The OE, headed by the Commissioner of Education, is by far the largest operating component within the Education Division. It consists of approximately 3300 employees nationwide. There are some 2200 employees within its National Office which is represented by the AFGE. The OE administers programs of financial assistance, principally through grants, for the educational agencies, institutions and organizations which are the Division's principal clients. The NIE, the third component of the Education Division, has approximately 340 employees, and its function is to support research and development projects in the field of education. Policy for the NIE, within the parameters of its enabling legislation, is established by a body consisting of 15 Presidential appointees, the National Council on Education Research. The record indicates, however, that the Council does not involve itself with the day-to-day functioning of the NIE, this responsibility being handled by the Director, NIE, and his staff.

The record reveals that the Commissioner, OE, the Director, NIE, and the Assistant Secretary, as regards OASE, act pursuant to independent delegations of authority from the Secretary, DHEW, with respect to such matters as deciding grievances, authorizing incentive awards, position classification, establishment of the workweek and work schedules, selection and retention of personnel, and approval of labor-management agreements. These delegations of authority, however, are essentially similar. While the Assistant Secretary exercises responsibility for personnel policies and practices within the OASE, the actual personnel servicing of OASE employees is handled by the OE Personnel Office. The record discloses that each component agency of the Education Division has a separate individual designated as its "Collective Bargaining Official," who is responsible for the administration of labor-management relations within that particular agency. The OE and the AFGE have negotiated two successive collective bargaining agreements, while the OASE and the NIE have negotiated a number of separate Memorandums of Understanding with the AFGE. While the OE is the only component within the Education Division which has a full-time labor-management relations position, the record reveals that the incumbent is consulted by officials of the OASE and the NIE in the pursuit of their bargaining obligations. The record discloses also that the work related relationships between employees of the OASE, the OE and the NIE are supportive rather than integrated, and that all employees of the Education Division work in essentially similar job classifications, are required to have essentially similar training, and that they share essentially similar working conditions. In this regard, the record shows that most of the professional employees of the Division are classified either in the 1720 series, with such titles as Education Research Specialist and Education Program Specialist, or the 301 series, with such titles as Research Specialist, Education Program Specialist and Program Specialist. While work related interchange

between OASE, OE and NIE employees is not common or frequent, there are a number of joint committees which have been established to coordinate the research, statistical and programmatic impacts of certain programs. Particular projects also have required the coordination of the activities of the Division's components. While the evidence shows a small number of employees receiving either temporary details or permanent reassignments/promotions between the three agencies, and that the area of consideration for reduction-in-force procedures is agency-wide, rather than Division-wide, the area of consideration for promotions is Division-wide. The record further discloses that most of the employees within the proposed consolidated unit are located in downtown Washington, D. C., although the NIE is located across town from the OASE and the NIE.

The Report and Recommendations of the Federal Labor Relations Council, which accompanied the issuance of Executive Order 11838, indicated the Council's desire to foster a reduction in unit fragmentation in the Federal sector, thereby creating a more comprehensive bargaining unit structure. Section 10(a) of the Order was therefore amended so as to provide a procedure for the consolidation of existing exclusively recognized units. While the Council indicated that proposed consolidated units would be required to conform to the appropriate unit criteria contained in Section 10(b) of the Order, it also indicated that it was "convinced" that the Federal labor-management relations program would be improved by a reduction in unit fragmentation. 3/ In my view, given these clear policy guidelines in the consolidation of units area, there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. This presumption may be rebutted only where it is found that the proposed consolidated unit is so inconsistent with the criteria contained in Section 10(b) of the Order that the overriding objective of creating a more comprehensive bargaining unit structure would be undermined by such a finding.

In the context of the foregoing policy considerations, I find that the petitioned for consolidated unit is appropriate for the purpose of exclusive recognition under the Order. Thus, as noted above, the employees in the unit sought constitute all of the eligible employees of the Education Division, DHEW. As such, they share a common mission, common overall supervision, common work classifications, essentially common working conditions, and essentially similar personnel and labor relations practices in accordance with DHEW delegations of authority. Under these circumstances, I find that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest. Furthermore, the evidence establishes that the OE Personnel Office presently services employees in both the OE and the OASE; the Memoranda of Agreement signed by the AFGE with the OASE and with the NIE reflect much of the same language contained in the negotiated agreement between the AFGE and the OE; the NIE and the OASE have used the services of the OE's labor relations specialist in preparing their labor relations positions; the

3/ See, in this regard, Section IV of the Report and Recommendations.

scope of labor relations authority in each agency is based on similar DHEW regulations; and promotions within the Division are based on a Divison-wide area of consideration. Based on these factors, I further find that the proposed consolidated unit will promote effective dealings. Additionally, as the legislation creating the Education Division provided for the Assistant Secretary to serve as its principal officer and as the evidence shows that, at a minimum, the Assistant Secretary acts to coordinate certain activities of all of the component agencies within the Division, I find that the proposed consolidated unit bears "some rational relationship to the operational and organizational structure" of the Education Division, DHEW, and will therefore promote the efficiency of the agency's operations. 4/ Finally, I also find that the petitioned for consolidated unit, which provides for bargaining in a single, rather than in the existing three, bargaining units, will promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order set forth above.

Accordingly, I find that the following unit is appropriate for the purposes of exclusive recognition under Executive Order 11491, as amended: 5/

> All General Schedule and professional employees in the Office of Education, Washington, D. C., all professional and nonprofessional employees of the Office of the Assistant Secretary for Education, all professional and nonprofessional GS and Excepted employees of the National Institute of Education, Washington, D. C. Metropolitan Area and duty stations out of the Washington, D. C. Metropolitan Area, including temporary employees with appointments in excess of either 90 days or 700 hours, excluding supervisors, management officials, guards and employees engaged in Federal personnel work in other than a purely clerical capacity, temporary and Wage Board employees of the Office of Education, temporary employees of less

4/ In this regard, see Defense Supply Agency, et al, FLRC Nos. 75A-14, 75A-128, and 76A-4, at page 13.

5/ The proposed consolidated unit appears to include certain employees who are not currently represented by the AFGE in its existing exclusively recognized units. For example, the current OE unit excludes temporary employees; the current NIE unit excludes temporary employees with less than 90-day or 700 hour appointments; and the current OASE unit excludes temporary employees with less than 90-day appointments. The proposed consolidated unit would exclude only those temporary employees who have no reasonable expectation of continued employment. It should be noted that the consolidation procedures are applicable only with respect to existing exclusively recognized units. Therefore, proposed consolidated units would be limited to and/or defined by the parameters of the existing exclusively recognized units at the time of the filing of the instant consolidation petition.

than 90 days and confidential employees of the Office of the Assistant Secretary for Education, and temporary employees with appointments of 90 days or 700 hours, or less, Presidential appointees, confidential employees, and student aides in the National Institute of Education.

Under the Order, absent the expression of the affected employees' desire for an election, an agency may accord exclusive recognition to a labor organization, without an election, where the appropriate unit, as above, has been established through the consolidation of existing exclusively recognized units represented by that organization and the parties have bilaterally agreed to consolidation without an election. In the instant case, neither party requested an election to determine whether or not the employees desire to be represented in the proposed consolidated unit by the AFGE. Therefore, I shall order the appropriate Area Administrator to request that the Activity post copies of a Notice to Employees, in places where notices are normally posted affecting employees in the proposed consolidated unit, which states that if, within ten days from the date of posting of such notice, 30 percent or more of the employees in the proposed consolidated unit have notified the Area Administrator in writing that they desire the Assistant Secretary to hold an election on the issue of the proposed consolidation, such an election will be supervised by the Area Administrator.

If 30 percent or more of the employees in the proposed consolidated unit do not seek an election and the professional employees in such unit do not exercise their option, as set forth below, to be included with the nonprofessional employees, a certification will be issued by the Area Administrator to the AFGE for the nonprofessional employee consolidated unit which I find to be appropriate for the purpose of exclusive recognition.

It is further 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 a unit with employees who are not professionals, unless a majority of the professional employees votes for inclusion in such a unit. The Federal Labor Relations Council specifically recommended that this policy be extended to include the unit consolidation procedures. Accordingly, the desires of the professional employees as to inclusion in a unit with nonprofessional employees must be ascertained.

Thus, if 30 percent or more of the employees in the proposed consolidated unit timely notify the Area Administrator of their desire to have the Assistant Secretary hold an election on the issue of the proposed consolidation, there will be elections in the following voting groups:

Voting Group (a): All General Schedule professional employees in the Office of Education, Washington, D. C., all professional employees of

the Office of the Assistant Secretary for Education, all professional GS and Excepted employees of the National Institute of Education, Washington, D. C. Metropolitan Area and duty stations out of the Washington, D. C. Metropolitan Area, including temporary employees with appointments in excess of either 90 days or 700 hours, excluding nonprofessional employees, supervisors, management officals, guards and employees engaged in Federal personnel work in other than a purely clerical capacity, temporary and Wage Board employees of the Office of Education, temporary employees of less than 90 days and confidential employees of the Office of the Assistant Secretary for Education, and temporary employees with appointments of 90 days or 700 hours, or less, Presidential appointees, confidential employees, and student aides in the National Institute of Education.

Voting Group (b): All nonprofessional General Schedule employees in the Office Education, Washington, D. C., all nonprofessional employees of the Office of the Assistant Secretary for Education, all nonprofessional GS and Excepted employees of the National Institute of Education, Washington, D. C. Metropolitan Area and duty stations out of the Washington, D. C. Metropolitan Area, including temporary employees with appointments in excess of either 90 days or 700 hours, excluding professional employees, supervisors, management officials, guards and employees engaged in Federal personnel work in other than a purely clerical capacity, temporary and Wage Board employees of the Office of Education, temporary employees of less than 90 days and confidential employees of the Office of the Assistant Secretary for Education, and temporary employees with appointments of 90 days or 700 hours, or less, Presidential appointees, confidential employees, and student aides in the National Institute of Education.

Employees in the nonprofessional voting group (b) will be polled whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the American Federation of Government Employees, Local 2607, AFL-CIO.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the American Federation of Government Employees, Local 2607, AFL-CIO, and (2) whether or not they desire to be represented in a separate consolidated professional unit if the proposed consolidated unit is approved by a majority of all the employees voting.

The valid votes cast by all the eligible employees will be tallied to determine if a majority of the valid votes have been cast in favor of the proposed consolidated unit. If a majority of the valid votes have not been cast in favor of the proposed consolidated unit, the employees will be taken to have indicated their desire to continue to be represented in their current units of exclusive recognition. If a majority of the valid votes are cast in favor of the proposed consolidated unit, the ballots of the professional employees in voting group (a) will then

be tallied to determine whether they wish to be included in the same consolidated unit with the nonprofessional employees. Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same consolidated unit as the nonprofessional employees, they will be taken to have indicated their desire to constitute a separate consolidated professional unit, and an appropriate certification will be issued by the Area Administrator.

It should be noted that an election among the professional employees will take place if: (1) no timely request from 30 percent or more of the employees in the proposed consolidated unit for an election on the issue of the proposed consolidated unit is received by the Area Administrator or, (2) such an election is requested by 30 percent or more of the employees in the proposed consolidated unit and a majority of the valid votes are cast in favor of the proposed consolidated unit. In either case, the unit determination of the subject case will then be based, in part, 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 the following units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All General Schedule professional employees in the Office of Education, Washington, D. C., all professional employees of the Office of the Assistant Secretary for Education, all professional GS and Excepted employees of the National Institute of Education, Washington, D. C. Metropolitan Area and duty station out of the Washington, D. C. Metropolitan Area, including temporary employees with appointments in excess of either 90 days or 700 hours, excluding nonprofessional employees, supervisors, management officials, guards and employees engaged in Federal personnel work in other than a purely clerical capacity, temporary and Wage Board employees of the Office of Education, temporary employees of less than 90 days and confidential employees of the Office of the Assistant Secretary for Education, and temporary employees with appointments of 90 days or 700 hours, or less, Presidential appointees, confidential employees, and student aides in the National Institute of Education.

(b) All nonprofessional General Schedule employees in the Office of Education, Washington, D. C., all nonprofessional employees of the Office of the Assistant Secretary for Education, all nonprofessional GS and Excepted employees of the National Institute of Education, Washington, D. C. Metropolitan Area and duty stations out of the Washington, D. C. Metropolitan Area, including temporary employees with appointments in excess of either 90 days or 700 hours, excluding professional employees, supervisors, management officials, guards and employees engaged in Federal personnel work in other than a purely clerical capacity, temporary

and Wage Board employees of the Office of Education; temporary employees of less than 90 days and confidential employees of the Office of the Assistant Secretary for Education; and temporary employees with appointments of 90 days or 700 hours, or less, Presidential appointees, confidential employees, and student aides in the National Institute of Education.

2. If a majority of the professional employees votes for inclusion in the same consolidated 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 General Schedule and professional employees in the Office of Education, Washington, D. C., all professional and nonprofessional employees of the Office of the Assistant Secretary for Education, all professional and nonprofessional GS and Excepted employees of the National Institute of Education, Washington, D. C. Metropolitan Area and duty stations out of the Washington, D. C. Metropolitan Area, including temporary employees with appointments in excess of either 90 days or 700 hours, excluding supervisors, management officials, guards and employees engaged in Federal personnel work in other than a purely clerical capacity, temporary and Wage Board employees of the Office of Education, temporary employees of less than 90 days and confidential employees of the Office of the Assistant Secretary for Education, and temporary employees with appointments of 90 days or 700 hours, or less, Presidential appointees, confidential employees, and student aides in the National Institute of Education.

DIRECTION OF ELECTION

The Activity shall post, as soon as possible, copies of a Notice to Employees, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the consolidated unit found appropriate. Such notice shall conform in all respects to the requirements of Section 202.2(h)(4) of the Assistant Secretary's Regulations. If, within ten days from the date of posting of such notice, 30 percent or more of the employees in the consolidated unit found appropriate above have notified the Area Administrator in writing that they desire to hold an election on the issue of the proposed consolidation, 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 the posting period for the Notice to Employees is completed. If such a request is not timely received by the Area Administrator, an election by secret ballot shall be conducted among the professional employees in voting group (a) as early as possible but not later than 60 days from the date the posting period for the Notice to Employees is completed, to determine whether they wish to be included in the proposed consolidated unit with nonprofessional employees for the purpose of exclusive recognition.

The appropriate Area Administrator shall supervise the election(s), subject to the Assistant Secretary's Regulations. Eligible to vote are those in the voting group(s) 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 or not they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the American Federation of Government Employees, Local 2607, AFL-CIO.

Dated, Washington, D. C.
April 7, 1977

F. X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

April 18, 1977

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 HEALTH, EDUCATION AND WELFARE,
FOOD AND DRUG ADMINISTRATION,
REGION I, BOSTON REGIONAL FIELD OFFICE,
BOSTON MASSACHUSETTS
A/SLMR No. 823

This case arose as a result of a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 2405, (AFGE) and a petition for an election filed by the Government Employees Assistance Council, Local G3-N1 (GEAC).

In its CU petition, the AFGE seeks to clarify its existing exclusively recognized unit at the Boston Regional Field Office to include all eligible employees of the Winchester Engineering and Analytical Center (WEAC) who have been administratively transferred to the Boston Regional Office through a reorganization. The Activity agreed with the proposed clarification. The GEAC, on the other hand, seeks an election in a unit of all General Schedule (GS) employees of the WEAC, who are under the direct supervision of the Director, WEAC.

The Assistant Secretary found that, subsequent to a reorganization, the WEAC became an integral part of the unit represented by the AFGE. In this regard, he found that the WEAC employees share a clear and identifiable community of interest with other Boston Regional Field Office employees exclusively represented by the AFGE. He noted that the employees involved share a common mission, personnel policies and similar skills and working conditions; that they share the same merit promotion plan and reduction-in-force procedure; and that there is a high degree of interchange and work contacts, including joint projects and training sessions, among the WEAC employees and other Boston Regional Field Office employees. It was also determined that the clarified unit will promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary ordered that the exclusively recognized unit represented by the AFGE be clarified to include the employees in the WEAC.

With regard to the GEAC's representation petition, the Assistant Secretary concluded that dismissal of the petition was warranted. In this connection, he found that the GEAC's petition was tantamount to a request for severance of the WEAC employees from the AFGE's exclusively recognized unit at the Activity. As he did not find "unusual circumstances" justifying severance from the established more comprehensive unit, the Assistant Secretary dismissed the GEAC's petition.

A/SLMR No. 823

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, FOOD AND DRUG ADMINISTRATION, REGION I, BOSTON REGIONAL FIELD OFFICE, BOSTON, MASSACHUSETTS

Activity

and Case No. 31-9818(CU)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2405

Petitioner

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, WINCHESTER ENGINEERING AND ANALYTICAL CENTER, WINCHESTER, MASSACHUSETTS

Activity

and Case No. 31-10397(RO)

GOVERNMENT EMPLOYEES ASSISTANCE COUNCIL, GEAC - G3-N1

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 William T. Koffel. 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. 31-9818(CU), the American Federation of Government Employees, AFL-CIO, Local 2405, herein called AFGE, seeks to clarify its existing exclusively recognized unit by the inclusion of all employees of the Winchester Engineering and Analytical Center, herein called WEAC, who are under the administrative authority of the Director, WEAC. 1/ In this connection, the AFGE contends that, as a result of a reorganization, the approximately 40 eligible and previously unrepresented employees of the WEAC have "accreted" to the AFGE's existing exclusively recognized unit at the Boston Regional Field Office 2/ and do not constitute a separate and viable unit but share an identifiable community of interest with the regional office employees. The AFGE further contends that the inclusion of the subject employees in its existing unit would promote effective dealings and efficiency of agency operations. The Activity agrees with the AFGE's contentions.

In Case No. 31-10397(RO), the Government Employees Assistance Council, GEAC-G3-N1, herein called GEAC, seeks an election in a unit consisting of all General Schedule employees under the administrative authority of the Director, WEAC, excluding Wage Grade employees, supervisors, management officials, professional employees, and employees engaged in Federal personnel work in other than a purely clerical capacity as defined in the Order. 3/ The GEAC contends that the proposed unit is appropriate in that the employees involved share a clear and identifiable community of interest apart from other employees in the regional unit. In this connection, it asserts that the duties performed by WEAC employees remained essentially the same as those they performed prior to the reorganization and that such duties are substantially different from those performed by Boston Regional Field Office employees.

1/ There are some eight persons located at the WEAC who are not administratively responsible to the Director of the WEAC.

2/ The record reveals that on December 13, 1967, the AFGE was recognized as the exclusive representative of all employees of the Boston District of the Food and Drug Administration (FDA), excluding management officials, supervisors, guards and employees engaged in Federal personnel work in other than a purely clerical capacity as defined in the Order. The record reflects further that thereafter, the Boston District was redesignated the Boston Field Office and subsequently redesignated again as the Boston Regional Field Office. The parties entered into a negotiated agreement, dated October 19, 1972, which had a term of two years and was automatically renewable on an annual basis. The record indicates the negotiated agreement has been renewed and has continued in effect up to the present time.

3/ The GEAC's petition apparently was filed on July 30, 1976. The unit claimed by the GEAC appears as described in its amended petition.

The Boston Regional Field Office is one of ten FDA Regional Offices, each having a Regional Food and Drug Director who reports directly to the Executive Director of Regional Operations in Rockville, Maryland. The mission of a Regional Office is to assure that industries within the Region comply with the laws and regulations enforced by the FDA. In the performance of its mission a Regional Office is required to carry out a program of investigation, scientific testing, and compliance activities. Within the Boston Region is the Boston District Office managed by the Deputy Regional Food and Drug Director who reports to the Regional Director and in which the day-to-day field operations are carried out.

Through a reorganization, effectuated July 1, 1973, the Northeastern Radiological Health Laboratory of the Bureau of Radiological Health, Public Health Service, was redesignated the Winchester Engineering and Analytical Center and transferred to the control of the FDA and to the administrative authority of the Boston Regional Food and Drug Director. The record indicates that the reorganization substantially modified the mission of the WEAC. Thus, prior to the reorganization, the WEAC was primarily a research facility devoted to conducting scientific research activities in the field of radiology, but, subsequent to July 1, 1973, the primary activities at the WEAC have been concentrated on testing consumer and industrial products for compliance with laws and regulations enforced by the FDA. 4/ In addition, it was noted that the WEAC now serves as the procurement center for the FDA's Boston Region and that all equipment, chemicals, and supplies are ordered and procured through the facilities of the WEAC. Further, all fiscal accounting records for the Region, including the WEAC, are processed and stored at the Boston District Office. 5/

Under all the circumstances, I find that the WEAC is an integral part of the Boston Regional Field Office unit exclusively represented by the AFGE. Thus, in my view, subsequent to the reorganization, the employees of the WEAC have been administratively and functionally integrated into the AFGE's existing unit of Boston Regional Field Office

4/ These include, among others, product testing of television receivers; cold cathode demonstration tubes; compliance testing of microwave ovens; automated analysis of drugs, radiopharmaceuticals, and radionuclides in foods and media; and developing engineering evaluation and compliance testing procedures.

5/ These include, among others, payroll records, expense accounts and payments, and an assignment and productivity tracking system. However, personnel records for both the WEAC and the Boston District Office are handled by the Regional Personnel Office of the Department of Health, Education, and Welfare.

employees and share a clear and identifiable community of interest with such employees. In this regard, the evidence establishes that the WEAC employees have similar job skills, functions, and working conditions as other employees in the AFGE's unit; they share the same Regional personnel policies and practices, delegated by the Regional Food and Drug Director to the directors of the WEAC and the Boston District Office; and they share a common Regional merit promotion plan and reduction-in-force procedure. Moreover, there is a high degree of interchange among the WEAC employees and employees in the Boston District as reflected by the fact that employees of the Boston District Office and the WEAC routinely work on joint projects and training sessions and that transfers and details between stations are frequent and routine. Moreover, the inclusion of the WEAC employees into the unit represented by the AFGE, under the circumstances outlined above, will, in my view, promote effective dealings and efficiency of agency operations by reducing unit fragmentation in an activity where the components are so functionally integrated and where the success of the Activity's mission requires close cooperation and interaction between its component parts. Accordingly, I shall order that the existing exclusively recognized unit represented by the AFGE be clarified to include all eligible employees of the WEAC.

As the employees sought herein by the GEAC have accreted to the existing AFGE unit at the Activity, the GEAC's petition, which appears to be timely filed with respect to the AFGE's negotiated agreement, is tantamount to a request for severance of the subject employees from the existing exclusively recognized unit at the Activity. In this regard, it has been held previously that absent "unusual circumstances", severance from an established more comprehensive unit will not be permitted. 6/ I find no unusual circumstances in the instant case warranting a severance of the WEAC employees. Thus, the record evidence indicates that the AFGE has, since the reorganization, considered the WEAC employees to be part of its exclusively recognized unit of the Boston Regional Field Office and that it has represented a WEAC employee when it was requested to do so. Further, there is no evidence that the AFGE has failed to represent WEAC employees or that it has treated them in a manner inconsistent with its representation of other unit employees. 7/ Accordingly, I shall order that the GEAC's petition in Case No. 31-10397(RO) be dismissed.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which the American Federation of Government Employees, AFL-CIO, Local 2405, was recognized in 1967 as the exclusive representative, be, and it hereby is, clarified to include in said unit the employees of the

6/ See United States Naval Construction Battalion Center, A/SLMR No. 8.

7/ Cf. United States Air Force, Fairchild Air Force Base, Washington, A/SLMR No. 719.

Winchester Engineering and Analytical Center under the administrative authority of the Director of the Center.

IT IS FURTHER ORDERED that the petition in Case No. 31-10397(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 18, 1977

Francis X. Burkhardt, 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 EXECUTVE ORDER 11491, AS AMENDED

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION HOSPITAL,
NORTHPORT, NEW YORK
A/SLMR No. 824

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees (NFFE) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by changing the workweek for the firefighters represented by NFFE Local 387, thereby violating the parties' negotiated agreement, without negotiating with the NFFE Local 387 either about the decision to initiate such a change or about its impact and implementation.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. He found that, under the circumstances of this case, the change was integrally related to the staffing patterns of the Respondent and thus fell within the exclusionary language of Section 11(b) and relieved the agency from the duty and/or obligation to bargain thereon. Contrary to the contention of the Complainant, he also found that the Respondent had not clearly and unmistakably waived its Section 11(b) rights by virtue of its action in signing a negotiated agreement containing provisions relating to work schedules and tours of duty. Further, he found that the Respondent had fulfilled its obligations imposed by the Order to bargain with the exclusive representative with respect to the impact of the change in the firefighters' workweek.

The Assistant Secretary noted that, in his view, the gravamen of the complaint in this case was that the Respondent's unilateral decision to change the work hours of the firefighters was contrary to the parties' negotiated agreement. He further noted that it had been held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not violative of the Order and that, under such circumstances, the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures. Accordingly, as the issues in the instant case involved essentially different interpretations of the parties' rights and obligations under the negotiated agreement, the Assistant Secretary ordered that the complaint be dismissed.

A/SLMR No. 824

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION HOSPITAL,
NORTHPORT, NEW YORK

Respondent

and Case No. 30-6573(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES

Complainant

DECISION AND ORDER

On January 28, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, as modified herein.

The gravamen of the complaint herein is that the Respondent's unilateral decision to change the work hours of the firefighters represented by the Complainant was contrary to the parties' negotiated agreement and, thus, violative of the Order. The Administrative Law Judge, in recommending dismissal of the complaint, concluded that the Respondent had not clearly and unmistakably waived its Section 11(b) rights by virtue of its action in signing a negotiated agreement containing provisions relating to work schedules and tours of duty.

It has been held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not violative of the Order and that, under such circumstances, the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures. 1/ As the issues involved in the instant proceeding involve essentially a differing interpretation of the parties' rights and obligations under their negotiated agreement, and as, in my view, the Respondent's conduct did not constitute a clear, unilateral breach of that agreement, I concur in the recommendation of the Administrative Law Judge and shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-6573(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 18, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ See Department of the Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624, and Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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Washington, D.C. 20036

In the Matter of	:	
	:	
VETERANS ADMINISTRATION VETERANS ADMINISTRATION HOSPITAL NORTHPORT, NEW YORK	:	
	:	
Respondent	:	
	:	
and	:	Case No. 30-6573(CA)
	:	
NATIONAL FEDERATION OF FEDERAL EMPLOYEES	:	
	:	
Complainant	:	

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For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on September 19, 1975, under Executive Order 11491, as amended, by the National Federation of Federal Employees (hereinafter called the Union or NFFE) against the Veterans Administration, Veterans Administration Hospital, Northport, New York (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Acting Regional Administrator of the New York, New York, Region on September 14, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in unilaterally changing the firefighters' workweek from 40 to 60 hours without first negotiating with the Union concerning both the change and its impact on unit personnel.

A hearing was held in the captioned matter on November 18, 1976, in Northport, New York. 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. Following the close of the hearing Counsel for both parties filed briefs which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

At all times relevant hereto the Union has been the exclusive representative of the non-supervisory firefighters employed at the Veterans Administration Hospital in Northport, New York. The Union and the Respondent are parties to a collective bargaining agreement dated November 29, 1974.

Prior to about November of 1974, the firefighters at the VA Hospital in Northport, New York performed both guard and firefighting duties. However, in about November 1974, separate police officer positions were established, which resulted in a reduction in the number of firefighters required, since the firefighters were no longer required to serve dual functions.

In April or May 1975 an audit team from the Veterans Administration's Central Office determined, following a

fire drill, that there was insufficient firefighter coverage to insure the safety of the installation. Thereafter, pursuant to a recommendation from the audit team, management decided that a change from the then existing 40 hour workweek to a 60 hour workweek for firefighters would provide the additional coverage necessary to guarantee the safety of the installation. The only other alternative available to management was the hiring of additional firefighters.

On July 3, 1975, the vice-president of Local 387, Mr. Vonderhulls, was called into a meeting with management representatives and informed that the Respondent was considering a change in the workweek for firefighters from 40 to 60 hours. Mr. Vonderhulls, who had no advance notice of the proposed change and who was scheduled to go on annual leave for two weeks later in the afternoon, informed the Respondent that he would canvas the employees concerning the proposed change.

On July 9, 1975, while Mr. Vonderhulls was on annual leave, Respondent issued a memorandum to the firefighters informing them that effective September 7, 1975, the firefighters would be scheduled for a 60 hour workweek.

On July 28, 1975, representatives of the Respondent and the Complainant met and discussed the proposed change from the current forty to a sixty hour workweek for firefighters. The impact of the change on the unit employees was also discussed.

On July 30, 1975, the Respondent issued a memorandum to the firefighters wherein they were informed that the implementation of the 60 hour workweek was postponed to September 14, 1975.

Representatives of the Respondent and the Complainant met again on August 27, 1975 and discussed the reasons for Respondent's proposal and the impact upon the employees. The Respondent agreed to furnish a written breakdown of the anticipated impact of the proposed change on the unit employees to the union. Such breakdown was to include pay, eating facilities, sleeping quarters and staffing patterns. Additionally, the Respondent agreed to send a memorandum to the firefighters wherein the effective date of the proposed change would be extended to October 1, 1975.

On September 10, 1975, the parties again met. At this time, the Respondent gave the union the information it had promised in the earlier meeting and also furnished the Union with a copy of the audit report which had precipitated the proposed change.

The 60 hour workweek finally became effective as of January 4, 1976.

The collective bargaining agreement in effect between the parties provides in relevant part as follows:

Article 6 - MUTUAL RIGHTS AND OBLIGATIONS

1. The Hospital and the Local, on behalf of the employees it represents, accept responsibility to abide by all of the provisions set forth in this agreement. The Hospital and the Local shall not change the conditions set forth in this agreement and amendments except by the methods provided herein, or as required by law or regulation.

Article 7 - SUBJECT AREAS OF NEGOTIATION

1. Appropriate subjects for consultation and/or negotiation are, but are not limited to: work environment, supervisor-employee relations, leave scheduling, holiday work scheduling, grievance procedures including arbitration as defined in Executive Order 11491, promotion program, safety, health, and welfare of employees, training, labor-management relations, orderly procedures of appeals in adverse actions, and other matters consistent with the provisions of Executive Order 11491, as amended, and within the administrative authority of the Hospital Director.

2. The parties recognize that the obligation to meet and confer does not include matters with respect to the mission of the VA, 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. However, this does not preclude the parties from consulting and negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.

Article 15 - CHANGES IN PERSONNEL POLICIES AND PROCEDURES

1. The Hospital agrees to provide an opportunity to the

Local to comment on the formulation and implementation of Hospital policies and procedures affecting members of the unit.

Article 25 - REST PERIODS

The Hospital agrees to permit employees of the unit to interrupt, wherever possible, their normal work activities for a ten (10) minute period of time for relief of fatigue or to obtain refreshment. There will be no more than two (2) such periods during any eight (8) hour work tour, one in the first four hours and one in the second four hours.

Article 31 - WORK SCHEDULES-TOURS OF DUTY

1. Each employee will be assigned a given tour of duty; however, management reserves the right to reassign any employee to a different tour of duty as required to meet the needs of the Hospital.

2. The Hospital agrees to consider the Local proposal for a change in a tour of duty for the work group when the Local indicates that such a change is desired by a majority of the employees concerned. It is understood by both parties that any proposed change in tours of duty shall not interfere with the operation of the Hospital and the department concerned.

3. New schedules involving days off and change in tour of duty shall be posted not less than two (2) calendar weeks in advance.

4. The Hospital will schedule employees to provide for a break of two work tours after completion of a regular eight hour tour of duty, except in case of emergency or schedule change as outlined in Section 1.

Discussion and Conclusions

Respondent contends that in view of Section 11(b) of the Order it was not obligated to bargain about the decision to change the tours of duty of the firefighters from 40 hours to 60 hours, that Respondent did not waive its 11(b) rights by virtue of the various cited provisions of the collective bargaining agreement, and that it fulfilled the obligations imposed by the Order to bargain with the Union concerning the impact of its unilateral decision on the unit employees. The Union, on the other

hand, takes the position that the Respondent, by virtue of the above cited provisions of the collective bargaining agreement, waived any rights it may have had to unilaterally change the tours of duty. The Union further contends that Respondent failed in any event to fulfill its obligations to bargain with respect to the impact of the change in the tours of duty on unit personnel.

Section 11(b) of Executive Order 11491, as amended, provides that management is not obligated to bargain "with respect to the mission of an agency; it budget; and the numbers types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty."

To the extent that a change in a tour of duty is integrally related to the staffing pattern of the agency involved, the Federal Labor Relations Council has held that such change in a tour of duty falls within the exclusionary language of Section 11(b) and relieves the agency from the duty and/or obligation to bargain thereon. Plum Island Animal Disease Laboratory, Department of Agriculture, FLRC No. 74A-11 (July 9, 1971). However, where a proposal relating to the basic workweek and hours of duty is not integrally related to and consequently not determinative of the staffing patterns of the agency, the Council has found such proposal is not excepted from an agency's bargaining obligation by virtue of Section 11(b) of the Order. Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972, Report No. 31).

In the instant case the evidence establishes that the alternative to a sixty hour workweek for the firefighters was the hiring of additional employees. Accordingly, I find that the change in the tours of duty for the firefighters was integrally related to the staffing patterns of the Respondent and hence non-negotiable under Section 11(b) of the Executive Order.

Contrary to the contention of the Complainant, I find that the Respondent has not waived its Section 11(b) rights by virtue of its action in signing the collective bargaining agreement containing the provisions cited above in the

factual portion of this decision. While it is true that Articles 25 and 31 speak in terms of a tour of duty being an eight hour work period and Article 6 binds both parties not to change the terms of the agreement except by specific methods, the fact remains that Article 7 provides that the "obligation to meet and confer does not include matters with respect to .... work project or tour of duty ...." Moreover, the record is barren of any evidence bearing on the parties intent with respect to Articles 25 and 31. In fact, Complainant's representatives conceded that there was no discussion of hours of work or the workweek in the negotiations leading up to the execution of the collective bargaining agreement. In view of the foregoing, it can not be said that the alleged waiver of the Respondent was "clear and unmistakable." Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223.

Lastly, contrary to the contention of the Complainant, I find that the Respondent has fulfilled its obligations imposed by the Executive Order to bargain with the Union with respect to the impact of its decision to change the tour of duty for firefighters from 40 to 60 hours. In this latter context I note that the Respondent met on several occasions with the Union, listened to is proposals, supplied all requested materials, and even postponed any final decision on the change in the tour of duty for several months.

Recommendation

Having found that Respondent has not engaged in conduct violative of Sections 19(a)(1) and (6) of the Order, I recommend that the complaint herein be dismissed in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: January 28, 1977
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

DEPARTMENT OF DEFENSE,
DEPENDENTS SCHOOLS, EUROPE,
[SIGONELLA SCHOOL]
A/SLMR No. 825

This case involved a petition for clarification of unit (CU) filed by the Overseas Education Association, National Education Association (OEA) and a representation petition (RO) filed by the Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO (OFT). Essentially, the OEA sought to clarify its existing exclusively recognized bargaining unit to include the nonsupervisory professional school personnel hired as a result of the addition of grades 11 and 12 to the Sigonella School. The OFT, on the other hand, sought an election in a unit consisting of all nonsupervisory professional school personnel employed at the Sigonella High School. The OFT argued that the addition of two grades to the school created a separate high school which constituted an appropriate unit for the purpose of exclusive recognition. The Activity took a neutral position with respect to both petitions.

The Assistant Secretary found that the addition of the two grades to the Sigonella School did not result in substantial or material changes in the scope or character of the existing exclusively recognized bargaining unit. In this regard, he noted that the newly hired employees worked in the same physical location as the other unit employees, that many of them taught across all grades or across the high school grades, that they were all subject to the same general supervision, and that they shared common personnel policies, practices and working conditions. Accordingly, he ordered that the existing exclusively recognized bargaining unit represented by the OEA be clarified to include the employees hired as a result of the addition to the Sigonella School.

With regard to the OFT's representation petition, the Assistant Secretary concluded that the petition was untimely filed inasmuch as it was not filed during the valid challenge period as provided for in the Assistant Secretary's Regulations. In this connection, the record revealed that the OEA and the Activity were parties to a negotiated agreement which became effective on September 27, 1973, for a two year period and was extended by the parties to September 27, 1976, and the petition herein was filed on September 2, 1976. Accordingly, the Assistant Secretary ordered that the OFT's (RO) petition be dismissed.

A/SLMR No. 825

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
DEPENDENTS SCHOOLS, EUROPE,
[SIGONELLA SCHOOL] 1/

Activity

and Case No. 22-7326(CU)

OVERSEAS EDUCATION ASSOCIATION,
NATIONAL EDUCATION ASSOCIATION

Petitioner

DEPARTMENT OF DEFENSE,
DEPENDENTS SCHOOLS, EUROPE,
[SIGONELLA HIGH SCHOOL]

Activity

and Case No. 22-7454(RO)

OVERSEAS FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

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 Carol M. Rollins. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

1/ At the hearing, the parties agreed that the correct name of the Activity is Department of Defense, Dependents Schools, Europe.

Upon the entire record in these cases, including a brief filed by the Overseas Federation of Teachers (OFT), the Assistant Secretary finds:

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

2. In Case No. 22-7326(CU), the Overseas Education Association (OEA) seeks to clarify its existing exclusively recognized unit to include nonsupervisory professional school personnel hired as a result of the addition of two grades to the Sigonella School. In Case No. 22-7454(RO), the OFT seeks an election in a unit consisting of all nonsupervisory professional school personnel who are employed at the Sigonella High School. Essentially, the OFT argues that the addition of the two grades at the Sigonella School resulted in the creation of a new and separate high school, which constituted an appropriate unit for the purpose of exclusive recognition. The Activity took a neutral position with respect to the subject petitions.

In July 1967, the OEA was granted exclusive recognition by the U.S. Dependents Schools, European Area, for a unit of all nonsupervisory professional school personnel at a number of its overseas dependents schools in Europe, including the Sigonella School. Thereafter, the parties executed a two year negotiated agreement which became effective on September 27, 1973. By mutual assent, the parties extended their agreement to September 27, 1976.

The record indicates that at the time it granted exclusive recognition in 1967, the Sigonella School consisted of grades 1 through 8. It expanded to grades kindergarten through 9 in school year 1973-74, and added a 10th grade the following school year. Finally, in 1976-77, grades 11 and 12 were added making Sigonella a complete elementary and high school. Sometime in 1975, a new addition was built onto the existing structure to accommodate the addition of grades 11 and 12. Some of the added rooms were to be used exclusively for the elementary portion of the school, while others, such as the music, art rooms and gymnasium, were to serve students in all grades. 2/

The employee complement for the school year 1976-77 consists of ten staff positions in the elementary school and ten staff positions in the high school, with six of the latter positions being new. Several of these new positions are occupied by teachers who teach exclusively in the high school while others are held by teachers with teaching responsibilities in all grades. The elementary teachers generally are assigned teaching responsibilities in one grade. Other teachers have responsibilities across grades 7 through 12, while still other teachers, notably those for art and music, teach across all grades. Faculty

2/ At the time of the hearing herein, plans were being made to divide the library into separate elementary and high school libraries with one librarian to oversee both.

meetings are held either jointly or divided along elementary and high school lines. The record reveals that the addition of the two grades to the Sigonella School resulted in several academic and extracurricular changes, including a special testing program for high school students and participation in interscholastic sports competition. However, all teachers are under the direction of the principal of the Sigonella School who retains the authority in matters of hiring, performance evaluations and grievance handling. The record further indicates that all teachers, including those hired as a result of the addition of two grades to the school, share common personnel policies, practices and working conditions.

Based on the foregoing, I find that the addition of two grades to the Sigonella School did not result in substantial or material changes in the scope or character of the existing exclusively recognized bargaining unit. Thus, as noted above, the personnel hired as a result of the expansion of the Sigonella School work in the same physical location as the other unit employees, have teaching responsibilities across all grades or across the high school grades, are subject to the same general supervision and share common personnel policies, practices and working conditions. Under these circumstances, I find that the newly hired school personnel share the same community of interest with the other employees in the existing exclusively recognized unit. Furthermore, in view of the fact that all of the employees involved at the Sigonella School share the same personnel policies, practices and conditions of employment, I find that the inclusion of grades 11 and 12 into the present unit will promote effective dealings and efficiency of agency operations. 3/ Accordingly, I shall order that the existing exclusively recognized bargaining unit represented by the OEA be clarified to include the nonsupervisory professional school personnel hired as a result of the addition of two grades to the Sigonella School. 4/

With respect to the OFT's petition in Case No. 22-7454(RO) seeking an election among the nonsupervisory professional school personnel at the Sigonella High School, I find that further processing is barred by the negotiated agreement between the Activity and the OEA which was in effect at the time the instant petition was filed on September 2, 1976, and which, as found above, covered the claimed employees. As noted previously, the OEA and the Activity entered into a negotiated agreement which became effective on September 27, 1973, for a period of two years and was extended by the parties to September 27, 1976. In order to be considered timely, a representation petition must be filed within the valid challenge period as provided for in Section 202.3(c) of the

3/ Cf. United States Dependents Schools, European Area, Upper Heyford High School, A/SLMR No. 770.

4/ In view of the fact that the unit inclusions of the OEA's existing exclusively recognized bargaining unit adequately encompass the above-noted clarification, I find it unnecessary to specify the OEA's clarified unit in terms of the school's grade structure.

Assistant Secretary's Regulations. 5/ As the instant petition was not filed within the valid challenge period, I shall order that the OFT's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified by the petition in Case No. 22-7326(CU) be, and it hereby is, clarified to include in said unit the nonsupervisory professional school personnel hired as a result of the addition of two grades to the Sigonella School.

IT IS FURTHER ORDERED that the petition in Case No. 22-7454(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 18, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

5/ Section 202.3(c) states, in pertinent part: "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition 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 and dated by the activity and the incumbent exclusive representative;...."

April 19, 1977

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 GEOLOGICAL SURVEY,
DEPARTMENT OF THE INTERIOR,
WATER RESOURCES DIVISION,
CENTRAL REGION, UTAH DISTRICT
A/SLMR No. 826

This case involved a petition filed by the National Federation of Federal Employees, Local 1830 (NFFE) seeking a unit of all professional and nonprofessional employees of the U.S. Geological Survey, Water Resources Division, Utah District Office. The Activity contended that the petitioned for unit was not appropriate as the employees involved did not possess a clear and identifiable community of interest separate and distinct from other employees in the Central Region, and such a unit would not promote effective dealings and efficiency of agency operations. The Utah District is one of 15 such districts within the Central Region.

Applying the three criteria found in Section 10(b) of the Order, the Assistant Secretary found that the unit sought was not appropriate for the purpose of exclusive representation. In this regard, he noted that the claimed employees did not share a clear and identifiable community of interest in that the unit sought shared a common mission, common overall supervision, generally similar job classifications, skills and duties, as well as uniform personnel policies and practices with substantial interchange and transfer with other employees of the Region. In addition, the Assistant Secretary found that the proposed unit would not promote effective dealings and efficiency of agency operations since such a unit would lead to the fragmentation of employees within the Region.

A/SLMR No. 826

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES GEOLOGICAL SURVEY,
DEPARTMENT OF THE INTERIOR,
WATER RESOURCES DIVISION,
CENTRAL REGION, UTAH DISTRICT

Activity

and

Case No. 61-2992(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1830

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 Kathleen M. Snead. The Hearing Officer's rulings made at the the hearing are free from prejudicial error and are hereby affirmed. 1/

Upon the entire record in this case, including the 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, National Federation of Federal Employees, Local 1830, herein called NFFE, seeks an election in a unit consisting of all professional and nonprofessional employees of the U.S. Geological Survey, Water Resources Division, Utah District Office. The Activity contends that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the Order. In this regard, it asserts that the only appropriate unit is one which will include all the U.S. Geological Survey employees of the Central Region serviced by the Regional Personnel Office.

The U.S. Geological Survey, hereinafter called the Survey, is one of the seven major bureaus of the Department of the Interior. It was established to classify public lands and to examine the geological

1/ At the hearing, the Hearing Officer excluded as irrelevant the Activity's offer of evidence concerning its experience with an exclusively recognized bargaining unit located in the Water Resources Division, Austin District Office. In this regard, the Activity indicated that it sought to demonstrate that District Office units would not promote effective dealings or efficiency of agency operations. In view of the disposition of the instant petition, it was considered unnecessary to decide whether the Hearing Officer's ruling was erroneous.

structure, mineral resources, and products of the lands in the national domain. The Water Resources Division, hereinafter referred to as the Division, is one of the six major divisions of the Survey, 2/ and its mission includes the determination of the sources, quantity, quality, distribution, movement, and availability of above-surface and ground waters. The work of the Division includes, among other things, investigation of floods and shortages of water supply; evaluation of available water in river basins and ground water provinces; determination of the chemical, physical, and biological quality of water resources; and determination of the relationship of water quality to various parts of the hydraulic cycle. The Division also furnishes scientific and technical assistance in hydrologic fields to other Federal agencies and licensees of the Federal Power Commission. The headquarters of the Division is located in Reston, Virginia, and it is administered by a Chief Hydrologist. The Division is organized into four regions, each headed by a Regional Hydrologist. Each region is further divided into districts each headed by a District Chief, and each district is subdivided into sub-districts, or field offices. The Utah District, one of 15 such districts within the Central Region, has its headquarters at Salt Lake City, Utah, and has five sub-district offices, located within Utah, in Cedar City, Logan, Salt Lake City, Vernal and Moab. The record discloses that although there is no bargaining history in either the Utah District or the Central Region, full authority for labor relations matters has been delegated to the Regional Personnel Officer.

The record reveals that hydrology is a multi-discipline science, involving the combined efforts of engineers, geologists, chemists, physicists, and other specialized scientists. Because of the multi-discipline nature of the work, as well as the fact that there are scientific specialities within specialities, and because water projects frequently involve more than one district, 3/ there is extensive integration, interchange and transfer of individual employees among district offices within the Region. The record further reveals that there has been substantial detailing of personnel from the Division to other Divisions of the Survey, and also the funding by one Division of a portion of another Division's project. 4/

2/ The record reveals that the other five divisions of the Survey are: the Geologic Division, the Conservation Division, the Topograpic Division, the Computer Center Division and the Administration Division.

3/ For example, the research for the Missouri Basin Commission and the planning and execution for the Yellowstone Basin each involves three districts. National projects coordinated at the Regional level also affect more than one district, e.g., the Oil Shale Project and the Coal and Flood Programs.

4/ The Conservation Division is funding a Water Resources Division survey on the Bonneville Salt Flats.

Although the Region encompasses a large geographical area, the evidence establishes that it is highly centralized because of the interrelated, multi-discipline nature of the Division's operations. Thus, the Regional Hydrologist has overall supervision of District Projects. He controls the personnel ceilings, promotions, and reassignments within each district. Upon completion of a project, the District Chief must receive permission from the Regional Hydrologist to reassign District employees to other projects within his District. The Regional Hydrologist also has promotional authority for nonprofessional employees above the grade of GS-10 and for all professional employees, with the District Chief having final promotional authority for nonprofessional employees GS-9 and below. Additionally, the Regional Hydrologist determines which positions are to be subject to reductions-in-force.

Employees throughout the Region share generally uniform job classifications, skills, and duties. They are also subject to common personnel policies and practices established at the Regional and National levels. For example, the area of competition for the reduction-in-force of nonprofessional employees is a 30 mile commuting area, while that for professionals is nationwide.

Based on the foregoing, I find that the unit sought by the NFFE is not appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. Thus, it was particularly noted that the employees of the Water Resources Division, Central Region, have a common mission, are subject to common overall supervision, have generally similar job classifications, skills and duties, enjoy uniform personnel policies and practices, and experience extensive integration of operations and substantial interchange and transfer of personnel.

Under all of these circumstances, I find that the employees of the Water Resources Division, Central Region, Utah District do not share a clear and identifiable community of interest separate and distinct from other Region employees. Moreover, in my view, such a fragmented unit could not reasonably be expected to promote effective dealings and efficiency of agency operations. Accordingly, I shall order that the NFFE's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 61-2992(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 19, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

April 19, 1977

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. NAVAL WEAPONS STATION,
SEAL BEACH, CALIFORNIA,
DEPARTMENT OF THE NAVY
A/SLMR No. 827

This case involved an unfair labor practice complaint filed by Local 2161, American Federation of Government Employees, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1), (5) and (6) of the Order when it unilaterally revoked dues withholding for two employees after they were selected for newly created Equal Employment Opportunity (EEO) Specialist positions. The Respondent contends that it acted properly because the EEO Specialists' jobs are managerial and, therefore, not in the unit. The Complainant argued that the EEO Specialists are merely supportive assistants to the Commanding Officer and that the two employees remain in the unit it exclusively represents.

The Administrative Law Judge found it unnecessary to decide whether the two positions were managerial. He reasoned that if they were managerial the Respondent properly terminated their dues withholding. On the other hand, even if the dues withholding termination was improper under a mistaken belief as to the unit status of the two, he found that such an act would amount to a simple breach of the dues withholding agreement. He concluded, therefore, that the termination, if erroneous, was simply a violation of the agreement concerning differing and arguable interpretations, rather than a clear, unilateral breach of the agreement which could support a violation of the Order. Accordingly, he recommended dismissal of the complaint.

The Assistant Secretary noted that it is well established that an agency acts at its peril when it unilaterally determines the unit status of employees. Thus, the unilateral removal of a unit employee without justification would be viewed as tantamount to the unilateral withdrawal of recognition with respect to part of an exclusively recognized unit.

The Assistant Secretary reviewed the duties of the employees in question and concluded that they were engaged in Federal personnel work in other than a purely clerical capacity, and, therefore, pursuant to Section 10(b)(2) of the Order, were excluded from the Complainant's exclusively recognized bargaining unit. Therefore, the Respondent's termination of dues withholding was considered to be privileged.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. NAVAL WEAPONS STATION,
SEAL BEACH, CALIFORNIA,
DEPARTMENT OF THE NAVY

Respondent

and Case No. 72-5855(CA)

LOCAL 2161, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On January 3, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order 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. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The amended complaint alleged that the Respondent violated Section 19(a)(1), (5) and (6) of the Order when it unilaterally revoked dues withholding for two employees who had been in a unit represented by the Complainant. The Respondent took the action after the two employees involved were selected to fill newly created jobs which the Respondent contends are managerial and, therefore, not in the unit. If the Respondent is correct, and by virtue of their new jobs the two employees are no longer in the unit, clearly no violation has been established

herein. On the other hand, it is well established that when an agency unilaterally determines the unit status of employees, it acts at its peril, and an erroneous determination could support a violation of the Order. U.S. Marine Corps Air Station, El Toro, A/SLMR No. 560, FLRC No. 75A-115. This is so because an erroneous determination would be viewed as tantamount to a unilateral withdrawal of recognition with respect to part of an exclusively recognized unit. 1/

As detailed more fully in the attached Administrative Law Judge's decision, the Commanding Officer of the Respondent is also its Equal Employment Opportunity (EEO) Officer. The Deputy EEO Officer is his principal advisor on the program and is the operating director. Immediately responsible to him are two EEO Specialists, Wright and Jiminez, in their respective positions of coordinators of the Women's and Spanish-Speaking programs. The revocation of dues withholding which led to the unfair labor practice complaint herein occurred when Wright and Jiminez were selected to fill the two newly created EEO Specialist positions.

Among other duties, the evidence establishes that Wright and Jiminez actively participate in the development of EEO policy and programs, have full access to confidential employee information and personnel records which are not accessible to any unit members, and take turns substituting for and performing the duties of the Deputy EEO Officer in his frequent absences. When fulfilling this substitute function, Wright and Jiminez supervise the Deputy's clerical staff. They also attend meetings of department heads on occasion. While they are not authorized to expend the Respondent's funds without approval of the Deputy EEO Officer, the evidence establishes that their recommendations in this regard generally are accepted.

Under these circumstances, I find that the two EEO Specialists involved herein are engaged in Federal personnel work in other than a purely clerical capacity, 2/ and, therefore, pursuant to Section 10(b)(2) of the Order, are excluded from the Complainant's exclusively recognized unit. 3/ Consequently, I find that the Respondent's termination of dues withholding for the two EEO Specialists was privileged. Therefore, I shall order that the instant complaint be dismissed.

1/ Viewed in this context, it is clear that the unilateral termination of dues withholding would be more than a mere potential violation of the negotiated agreement as indicated by the Administrative Law Judge.

2/ Cf. Department of Health, Education and Welfare, U.S. Office of Education, Headquarters, A/SLMR No. 803.

3/ In view of this disposition, I find it unnecessary to determine whether the EEO Specialists involved herein qualify for exclusion from the unit as management officials.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-5855(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 19, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

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In the Matter of :

U.S. NAVAL WEAPONS STATION
SEAL BEACH, CALIFORNIA :
DEPARTMENT OF THE NAVY
Respondent : Case No. 72-5855

and :

LOCAL 2161, AMERICAN FEDERATION :
OF GOVERNMENT EMPLOYEES, AFL-CIO
Complainant :
. . . . . .

Clarence L. Gemeinhardt
President, Local 2161, AFGE
4616 East 15th Street
Long Beach, California 90804
For the Complainant

James C. Causey
Labor Relations Advisor
Western Field Division
Office of Civilian Personnel
Department of the Navy
880 Front Street, Room 4-S-21
San Diego, California 92188
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated and filed January 20, 1976 alleging violations of Sections 19(a)(1), (2), and (6) of the Executive Order. On January 26, 1976 the Complainant filed an amended complaint dated January 23, 1976 alleging that Sections 19(a)(1) and (5) had been violated. The Complaint and amended complaint allege that the Respondent violated Section 19(a) of the Order by unilaterally terminating the dues withholding under a negotiated agreement of two employees covered by the agreement. Under date of February 20, 1976 the Respondent filed a response asserting that the two employees had been promoted to managerial positions, that such positions were not part of the bargaining unit and thus not within the dues-withholding agreement, and that there was no obligation to consult concerning the termination of dues-withholding of employees not within the bargaining unit.

On July 28, 1976 the Regional Administrator issued a Notice of Hearing to be held on September 10, 1976 in Santa Ana, California. Hearings were held on that day and at that place. The Complainant was represented by its President; a National Representative of A.F.G.E. was also present for the Complainant. The Respondent was represented by a Labor Relations Advisor of the Department of the Navy. Without objection the complaint was orally amended to reinstate the allegation that Section 19(a)(6) had been violated. The Complainant called three witnesses who were examined and cross-examined, and the parties introduced exhibits which were received in evidence. Both sides made closing arguments and filed timely briefs.

The Dues Withholding Agreement

During the course of the hearing the parties and I discussed and read from what both of them represented to me was the collective agreement of the parties, including Appendix B thereto. 1/ Appendix B was entitled "Dues Withholding Procedure". However, neither the entire agreement nor Appendix B was made part of the record. The only reservation the union expressed concerning the authenticity of the agreement was uncertainty whether Appendix B was negotiated contemporaneously with or was added later to the basic agreement. 2/

Since the provisions of the agreement might have a bearing on the proper resolution of this case, before arriving at a Recommended Decision, on November 8, 1976 I issued an

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1/ At various places in the transcript, especially pp. 89-92.
2/ Tr. 90.

Order to Show Cause on or before November 18 why the agreement (including Appendix A and Appendix B) should not be made part of the record as Exhibit ALJ-1. The Respondent made no response to the Order to Show Cause. The Complainant responded by stating that the basic agreement was signed by the parties but that some time later Appendix A and Appendix B were added by some "person or persons unknown", that those appendices were never concurred in by the Complainant, and that the agreement should not be made part of the record. In view of express concessions and stipulations by the Complainant 3/ in the course of the hearing, the basic agreement and Appendix B, but not Appendix A, are made part of the record as Exhibit ALJ-1.

In view of the Complainant's response to the Order to Show Cause, on November 30, 1976 I issued an Order Reopening Record ordering that the Complainant, on or before December 10, 1976, (1) assert that the parties have or do not have a dues-withholding agreement, and (2) if it asserts that the parties do have such an agreement, it shall submit what it asserts to be a copy. In response to that Order, the Complainant submitted a copy of an agreement dated February 7, 1964 which it asserted had been in effect since that date although at the hearing it had repeatedly asserted that the current dues-withholding agreement had been entered into sometime after March 6, 1975.

The agreement so submitted is made part of the record as Exhibit ALJ-2. The record is reopened for the purpose of receiving Exhibits ALJ-1 and ALJ-2 and the orders and responses referred to above, and is again closed. It makes no difference which of the two asserted agreements was in effect at the relevant times. The operative language of Appendix B and the agreement of February 7, 1964, and even the section numbers, are identical; the only differences are such as the former referring to the "Union", the "Station", and social security numbers while the latter refers to "Lodge 2161", the "Employer" (defined as the Station), and employee payroll numbers. Thus for the purposes of this case it need not be determined which is the authentic dues-withholding agreement.

3/ E.g., Tr. 18-19, 91-92.

FACTS

The Complainant is the exclusive representative under the Executive Order of a unit of employees of Respondent excluding, inter alia, managerial employees. The parties have a collective agreement executed March 6, 1975 approved and effective April 3, 1975. They also have a dues withholding agreement. 4/ It applies to "Unit employees who voluntarily authorize" withholding of dues from their pay "and who are employed within the recognized Unit. ..." 5/ The Agreement provides also 6/ that an employee's allotment for dues withholding terminates automatically when he is transferred outside the Unit.

In addition to the terms of the agreement, the Executive Order provides in Section 21(a) that an exclusively recognized union and an agency may agree to dues withholding "from the pay of members ... in the unit of recognition who make a voluntary allotment for that purpose" but that such allotment "terminates when - (1) the dues withholding agreement ... ceases to be applicable to the employee. ..."

Ms. Shirley Wright and Mr. Rudolfo Jiminez were employed in the Unit, were members of the organization, and made allotments for dues withholding. In September 1976 they were promoted to newly-created positions of Equal Employment Opportunity Specialist, Wright to the position of Federal Women's Program Coordinator and Jiminez to the position of Spanish-Speaking Program Coordinator.

The Respondent believed that in their new positions Wright and Jiminez were managerial employees and therefore no longer in the bargaining unit. Therefore, on or about September 19, 1975, it stopped withholding their dues and advised them and the Complainant that it had done so because they were no longer in the bargaining unit. The Complainant took the position that Wright and Jiminez are merely supportive assistants to the Commanding Officer and that the Respondent was obligated to consult with the Complainant before terminating the dues withholding of Wright and Jiminez. This proceeding eventuated.

4/ Exhibit ALJ-1, App. B; Tr. 90-91; Exhibit ALJ-2.
5/ Exhibit ALJ-1, App. B, Sec. 1, p. 44; Exhibit ALJ-2, Section 1.
6/ Sec. 7, p. 45, Exh. ALJ-1; Exh. ALJ-2, Sec. 7.

The Commanding Officer of the Respondent is its Equal Employment Opportunity Officer. He has a Deputy Equal Employment Opportunity Officer, Robert T. Burns. Under Burns are Wright and Jiminez one of whom acts as Deputy in Burns' frequent absences and makes the decisions the Deputy is required to make at such times and supervises his clerical staff.

Wright and Jiminez, each in his or her own field of special interest, develop goals, plans, and programs to achieve the goals with Burns. They actively participate in the development of policy and programs. They are under the direct supervision of the Commanding Officer and his Deputy EEOO and not under the supervision of the Civilian Personnel Office. Each of them has a part-time deputy program coordinator at Respondent's annexes at locations other than Seal Beach.

The Respondent maintains in its files certain coded confidential information concerning its employees such as their ethnic background and other matters pertaining to equal employment opportunity. Only the EEO officer, his Deputy, the Civilian Personnel Officer, and the two Program Coordinators have access to such information. Under the Navy Department's EEO procedure governing the Respondent Activity, an employee or applicant for employment who believes he or she was unlawfully discriminated against must first bring the matter to the attention of an EEO Counsellor and then, within fifteen days of his final interview with the Counsellor, must file his complaint with one of only five people: the Director of EEO in the Office of Civilian Manpower Management in Washington, the EEO Officer of the Respondent, his Deputy, and one of the two Program Coordinators. 7/

Under the Respondent's internal procedures, the Deputy EEO Officer or one of the Program Coordinators (Wright and Jiminez) is required to be present at meetings of department heads. The Program Coordinators represent the Respondent at meetings and conferences in their area of special concern. Each of them is a member of the Federal Executive Board of Los Angeles.

Neither Wright nor Jiminez is authorized to expend the Respondent's funds without the approval of the Deputy EEO Officer. They make recommendations for the allocation of

7/ Exh. R-1, p. II-4-1; Tr. 49.

resources and their recommendations are generally adopted without change. Except when serving as Acting Deputy EEO Officer, they do not supervise the work of other employees at Seal Beach.

The conclusion that the Program Coordinators were managerial employees was first reached by a Labor-Management Relations Specialist of the Respondent, Eleanor June Reinhardt. She recommended to the Civilian Personnel Officer, Guy H. Morley, that their dues withholding be cancelled. He adopted her recommendation and acted accordingly. Neither Reinhardt nor Morley conferred with the Complainant on the matter before the dues withholding of Wright and Jiminez was cancelled.

Discussion and Conclusions

It is unnecessary to a determination of this case to decide whether Wright and Jiminez occupy managerial positions. The collective bargaining unit expressly excludes managerial employees. If Wright and Jiminez are managerial employees the Respondent properly terminated the dues withholding; both the collective agreement and the Executive Order required it under their provisions set forth above under the heading Facts. If the Respondent improperly terminated their dues withholding in the mistaken belief that they were managerial employees, it committed a simple breach of the dues withholding agreement.

Not every breach of contract is an unfair labor practice. 8/ Under certain circumstances it can be an unfair labor practice. For example, if sufficiently flagrant so that it appears so unreasonable as to cast doubt on the sincerity of the respondent's position, it may rise to the seriousness of a unilateral change in the contract and hence a violation of Section 19(a)(6) of the Executive Order. 9/ But, as the

8/ General Services Administration, Region 5, Public Buildings Service, Chicago Field Office, A/SLMR No. 528, p. 4 of ALJ Decision; Aerospace Guidance and Metrology Center, Newark Air Force Station, A/SLMR No. 677.

9/ Other examples would be a breach of contract prompted by anti-union motivation to discourage union membership, of which there is no indication here, which would violate Section 19(a)(2); or a breach of contract motivated by considerations in violation of Section 19(a)(4), or which there is also no intimation in this record.

Assistant Secretary said in Aerospace Guidance and Metrology Center, Newark Air Force Station, A/SLMR No. 677:

> "... alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order."

The issue before us, then, is whether the unilateral termination of the dues withholding for Wright and Jiminez, if erroneous, was simply a violation of the agreement concerning "differing and arguable interpretations" or whether it constituted a "clear, unilateral" breach of the agreement. There is no obligation imposed by the Executive Order to withhold dues from a unit employee, nor is there an obligation imposed by the Executive Order not to commit a breach of contract except for "clear, unilateral breaches of the agreement. ..."

I conclude that under the criteria for determining whether an employee is a "management official", established in what are probably the two leading decisions on that issue by the Assistant Secretary, 10/ the Respondent's interpretation is at least arguable as the duties and responsibilities of Wright and Jiminez are described above and in the record.

In such situation, there was no obligation to bargain about whether Wright and Jiminez were employed in managerial positions for the purpose of terminating their dues withholding. Either they were or were not management employees, and bargaining could not change the fact. If they were, the Respondent not only had the right to take the action it did but was required by the Executive Order (as well as the agreement) to do so. In U.S. Marine Corps Air Station, El Toro, A/SLMR No. 560, the respondent terminated dues withholding of an employee on his being promoted to a supervisory position without conferring with the union on his status. It was

10/ Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, A/SLMR No. 135; Department of the Army, Tooele Army Depot, A/SLMR No. 717.

held there was no violation of the duty to confer. If the Program Coordinators were managerial employees, they were no longer in the unit. If they were not managerial employees, the Respondent committed a simple breach of contract and there is no obligation imposed by the Order on an agency or activity to meet and confer on whether it shall commit a good faith, simple breach of contract.

This case is to be distinguished from U.S. Army Electronics Command, Fort Monmouth, A/SLMR No. 691. In that case the respondent activity refused to continue to recognize the complainant's local president as the local president because he had become a supervisor. In that case it was indicated that when the Activity took such position it acted "at its peril when it unilaterally determines supervisory status since an erroneous determination could support a violation of the Order." 11/ There the right to engage in union activities by a non-supervisor is a right conferred by the Executive Order, and an interference with that right would be a violation of Section 19(a)(1). Here the right of the Complainant to dues withholding from Wright and Jiminez, if there was such a right, was a right conferred not by the Order but by the dues-withholding agreement permitted but not required by the Order, and an impingement of that right would not be a violation of the Order but of the contract, in this case a good-faith violation.

At the hearing 12/ and in his brief the respresentative of the Complainant asserted that the action of the Respondent was taken because of anti-union animus of those who acted for it. There is not a shred of evidence in the record to support such assertion.

The Complainant protested at the hearing that a simpler resolution of this controversy would have been achieved by the Respondent filing a petition for unit clarification. To be sure, such a procedure would have been preferable and would have removed any doubt whether Wright and Jiminez were or were not managerial employees for all purposes, in a proceeding directed solely to that question, while here, because of the context and manner in which the question is presented, we are deciding only whether the Respondent reasonably

11/ Footnote 1 of Assistant Secretary's Decision.
12/ See esp. T. 10.

believed they were managerial employees for the purpose of the dues-withholding agreement. But the Regulations 13/ confer just as much right on the Complainant as on the Respondent to file a petition for clarification of the unit. It is not an unfair labor practice for a respondent not to avail itself of an alternative, even preferable, procedure, especially when the complainant has the same right to avail itself of the alternative procedure. Nor was such a violation alleged.

RECOMMENDATION

Since there was no violation of the Executive Order either in the Respondent terminating its dues withholding of Wright and Jiminez nor in its failure to confer with the Complainant before doing so, I recommend that the complaint be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: January 3, 1977
Washington, D.C.

13/ Section 202.1(d)

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

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 828

This case involved two unfair labor practice complaints filed by the American Federation of Government Employees, Local 3615, AFL-CIO, (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally changing the procedure for issuing visiting parking passes to unit employees, and by moving personnel to other buildings without meeting and conferring with the Complainant.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain with the Complainant prior to the issuance of the memorandum which outlined a new procedure for obtaining visitor parking passes by employees. The Administrative Law Judge noted that the procedure contained in the memorandum represented a significant shift from the past practice of obtaining a pass. With respect to the personnel move, the Administrative Law Judge found that the Complainant had no knowledge of the move until after it had been implemented and that, therefore, the Respondent violated Section 19(a)(1) and (6) of the Order by failing to afford the Complainant timely notice of the move in order that the Complainant might request bargaining over the procedure involved and the impact of the move on adversely affected unit employees. In this regard, the Administrative Law Judge rejected the Respondent's argument that because a unit employee who later became a member of the union's contract negotiating team knew of the move prior to its implementation, that this served as notice to the union.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions.

A/SLMR No. 828

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

and

Case Nos. 22-6767(CA) and
22-6768(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3615, AFL-CIO

Complainant

DECISION AND ORDER

On December 30, 1976, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceedings, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order. The Complainant subsequently filed an answering brief to the Respondent'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 Recommended Decision and Order and the entire record in the subject cases, including the exceptions and supporting brief filed by the Respondent, and the answering brief to the exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

With respect to the Administrative Law Judge's finding that the Respondent had violated Section 19(a)(1) and (6) of the Order by failing to inform the Complainant of the personnel move involved prior to its effectuation and its failure thereby to afford the Complainant a reasonable opportunity to request bargaining over the procedures to be utilized in effectuating the decision and on the impact of such move on adversely affected employees, I note additionally that the record revealed that the Complainant had no knowledge of the personnel move until after its effectuation and, therefore, had no opportunity to request bargaining on the matter prior to such date.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Bureau of Hearings and Appeals, shall:

1. Cease and desist from:

(a) Instituting changes in the procedures, or the enforcement of procedures, with respect to obtaining and using visitor parking passes, expected to be observed by employees represented exclusively by the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, without first meeting and conferring with the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of its employees.

(b) Failing to notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of its employees, of a decision to move personnel to another building prior to its effectuation, and, upon request, affording such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on employees adversely affected by such action.

(c) In any like or related matter interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the American Federation of Government Employees, Local 3615, AFL-CIO,

or any other exclusive representative of its employees, with respect to changes in the procedures, or the enforcement of procedures, with respect to obtaining and using visitor parking passes, expected to be observed by employees represented exclusively by the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative.

(b) Notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of the employees, of any future decision to move personnel to another building prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(c) Post at the facilities of the Social Security Administration, Bureau of Hearings and Appeals, Arlington, 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, 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.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
April 19, 1977

Francis X. Burkhardt, 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 institute changes in the procedures, or the enforcement of procedures, with respect to obtaining and using visitor parking passes, expected to be observed by employees represented exclusively by the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, without first meeting and conferring with the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of our employees.

WE WILL NOT fail to notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of our employees, of a decision to move personnel to another building prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of our employees, with respect to changes in the procedures, or the enforcement of procedures, with respect to obtaining and using visitor parking passes, expected to be observed by employees in the bargaining unit represented exclusively by the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative.

RECOMMENDED DECISION AND ORDER

Statement of the Case

This proceeding arose pursuant to Executive Order 11491, as amended. It was initiated by complaints filed on March 26, 1976 by the American Federation of Government Employees, Local 3615, AFL-CIO (hereinafter called the Complainant or Union) against the Social Security Administration, Bureau of Hearings and Appeals (hereinafter called the Respondent or Activity), (Asst. Sec. Ex. 1 and 2). Portions of the alleged violations contained in the complaints were dismissed by the Regional Administrator for the Philadelphia Region. (Asst. Sec. Ex. 12; 14). After an order consolidating the two cases was entered (Asst. Sec. Ex. 13), the Regional Administrator issued a Notice of Hearing on Complaint. (Asst. Sec. Ex. 15).

The portions of the complaints now before the Assistant Secretary allege, in substance, that the Respondent violated the Executive Order by changing the procedure for issuing visiting parking passes to employees and by moving personnel to other buildings without meeting and conferring with the Union on these matters.

Procedural Matters

Respondent moved that the complaint in Case No. 22-6768 (CA) be dismissed in accordance with 29 CFR 203.2(b)(1), on the grounds that a violation of Section 19(a)(1) was alleged in the complaint, but not in the pre-complaint charge. I find this motion to be without merit. The facts allegedly constituting the alleged unfair labor practice as to the "parking pass" issue were described with sufficient particularity in the pre-complaint charge pursuant to 29 C.F.R. §203.2(a). That violations of Sections 19(a)(5) and (6) were alleged in the pre-complaint charge, but not subsection 19(a)(1) is not significant.

The Assistant Secretary has held that a violation of any subsection of Section 19(a), other than Section 19(a)(1), necessarily is violative of Section 19(a)(1) of the Order, Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454, and such an additional violation of Section 19(a)(1) of the Order may be found although

not specifically alleged in the complaint. Small Business Administration, Richmond, Virginia, District Office, A/SLMR No. 674. It follows that if Section 19(a)(1) need not be specifically alleged in the complaint in order to find a violation, it need not be specifically alleged in the charge as long as violations of another subsection of Section 19(a) is alleged. The underlying facts are the most important part of the charge, and as noted, these were adequately stated in the charge.

The Respondent also moved to dismiss the complaint in Case No. 22-6767 (CA) on the ground that the "movement of personnel to BCT III" was alleged in the pre-complaint charge, but was not specifically alleged in the complaint. I find this motion also to be without merit. The complaint alleges that "personnel have been moved to other buildings, and plans are underway for movement of personnel to IBM Building, and Ms. Schuttle still has not met or conferred with the Local on these issues." (emphasis added). I conclude that the allegation that "personnel have been moved to other buildings" was sufficient to preserve the "movement of personnel to BCT III" issue contained in the pre-complaint charge, and that the BCT III move was not outside the scope of the complaint. Moveover, the Activity did not request any additional time to defend against this allegation, and the matter was litigated fully at the hearing.

Both parties were afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter, the parties submitted briefs.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Since July 1975 the Complainant has been the exclusive representative of a unit of federal employees employed by the Respondent.

WE WILL notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of our employees, of any future decision to move personnel to another building prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the 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 communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
SOCIAL SECURITY ADMINISTRATION, BUREAU OF HEARINGS AND APPEALS	:	
Respondent	:	
	:	Case Nos. 22-6767 (CA)
and	:	22-6768 (CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 3615, AFL-CIO	:	
Complainant	:	

Douglas H. Kershaw
National Representative
American Federation of Government Employees
8020 New Hampshire Avenue
Hyattsville, Maryland 20783

For the Complainant

Irving L. Becker
Labor Relations Officer
Social Security Administration
6401 Security Boulevard
Room G-2608, West High Rise Building
Baltimore, Maryland 20235

For the Respondent

Before: GARVIN LEE OLIVER
Administrative Law Judge

I. Movement of Personnel to Balston Center Tower III

The Balston 1/ Center Tower complex is a group of three separate buildings in Arlington, Virginia connected by a common underground garage and served by a common inner parking court. The three buildings, known as Balston Center Tower (BCT) I, II, and III, occupy most of a city block and are bounded, in part, by Quincy Street, Wilson Boulevard, and Randolph Street.

In approximately August 1975 the Respondent had a severe shortage of space and secured some temporary space on the seventh floor of BCT II from the Department of the Navy with the understanding that the Respondent would relinquish the space on short notice when it was again required by the Navy. The Navy requested the space back around the middle of October 1975. In order to find adequate room for personnel, Respondent then made arrangements with the Department of Interior on short notice for some space in BCT III.

In early November 1975 Respondent informed several GS-9 senior correspondence analysts of the availability of space in BCT III and asked for volunteers for assignment to that space. Mr. Steven M. Despot, a member of the Union, who subsequently became a member of the bargaining committee, attended this meeting, and he, along with about two other GS-9 analysts and several GS-5 clerks, agreed to move to the new space. A total of about 30 members of the bargaining unit were moved to the new space in early November 1975. These employees remained in BCT III until approximately June 1976.

There was never an attempt to discuss the move with the Union nor to inform the Union of the move prior to its implementation in early November 1975.

1/ Balston is spelled erroneously throughout the transcript as "Boston."

Evelyn D. Bethel, president of the Complainant, and Albert Carrozza, chief steward, became aware of the move after it had taken place in November 1975 when they received such information from members of the bargaining unit. Some members of the bargaining unit were concerned about such matters as how employees were selected for the move, the length of time they would be assigned to BCT III, and the work flow from the master work station in BCT II to BCT III. Mr. Steven Despot testified that the move improved his own working conditions, as far as space in which to work was concerned, but it required analysts to assume new duties of pushing carts containing the workload back and forth between the buildings. Most of this work was performed voluntarily by the male employees as the female employees had been instructed to avoid entering the lower garage levels by themselves in order to protect their personal security.

II. Alleged Change of Procedure for Issuing Visitor Parking Passes to Employees

Automobile parking at the Balston Center complex is handled by a private firm, the Sarbov Corporation. The General Services Administration, which obtains parking permits for official government use, secured and issued five permits to the Respondent for the parking of government-owned vehicles in BCT II. These permits have been consistently used by the Respondent for visitor parking, since the Sarbov Corporation has not enforced the requirement that government vehicles display the permits.

Prior to December 31, 1975, an employee of the Respondent, located in another building, who had official business at BCT II, could call the Facilities Branch Office of the Respondent and request the use of one of the five passes. In actual practice, however, employees on official business were instructed to, and did, merely drive over to BCT II, ask the parking attendant for the pass, and the pass would be issued to them.

On December 31, 1975 the Assistant Bureau Director, Management and Administration, for the Respondent issued the following memorandum under the subject, "Visitor Parking Passes for Balston Tower II":

Effective immediately visitor parking passes will only be issued to visitors of BCT-II with the prior approval of one of the following:

	Phone
Bureau Director's Office	58333
Assistant Bureau Director Management and Administration	51208
Chief, Facilities Branch	51111

To have a pass issued the requestor must furnish name, make of auto, auto license and reason for the visit.

Please provide this information to all members of your staff.

The Union was not notified in advance of the issuance of the memorandum and had no information concerning a change in parking procedures until after issuance of the memorandum.

Mr. William H. Pack, Jr., Chief, Facilities Branch, testified that the memorandum did not change policy whatsoever with respect to obtaining parking passes; that the memorandum was issued merely to give two other locations to call, in addition to the Facilities Branch, from which parking passes could be obtained.

Evelyn D. Bethel and Huston Worthey testified, in effect, that since the memorandum was issued, there has been strict compliance with its provisions. Parking passes must be cleared through the section chief or branch chief. Ms. Bethel is required to furnish information as to the time of her appointment in BCT II, the person to be contacted, and the topic of conversation to be discussed.

I find that the memorandum did change existing policy. Based upon the testimony of Evelyn D. Bethel and Huston Worthey, I find that the Respondent was lax in enforcing its previous parking policy, if, indeed, a similar one existed. A reasonable reading of the December 31, 1975 memorandum shows that it was intended to result in strict enforcement of the procedures set

forth in the memorandum. The testimony of Evelyn D. Bethel and Huston Worthy demonstrates that it had this result. This strict enforcement of parking procedures represented a significant shift from past practices.

Discussion, Conclusions, and Recommendations

Section 11(a) of Executive Order 11491, as amended, imposes upon any Agency the obligation to meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees. It is expressly provided in Section 11(b) of the Order that the obligation to meet and confer does not include matters in regard to the mission of an agency; its organization; 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. 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. Further, management is accorded the right under Section 12(b)(1)(4)(5) and (6) of the Order to direct employees of the Agency; maintain the efficiency of the Government operations entrusted to them; to determine the methods, means and personnel to which such operations are to be conducted; and, to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

The use of visitor parking passes by employees and the related procedures whereby employees may secure such passes are matters "affecting working conditions" of unit employees within the meaning of Section 11(a) of the Order. Cf. U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 653; General Services Administration, Region 3, Public Buildings Service, Central Support Field Office, A/SLMR No. 583. The evidence establishes that the Respondent did not previously notify the Complainant of the matters contained in the December 31, 1975 memorandum despite the fact that the policy contained therein represented a significant shift from past practices. In my view, such conduct by the Respondent was in

derogation of its bargaining obligation under the Order. Cf. New Mexico Air National Guard, Sante Fe, New Mexico, A/SLMR No. 362. Under these circumstances, I find that the Respondent violated Section 19(a)(6) of the Order. I further find that such action tends to interfere with, restrain or coerce employees in the exercise of their rights assured by the Order, in violation of Section 19(a)(1).

The evidence also establishes that although Respondent became aware of the necessity to make a building move in the middle of October 1975 and subsequently moved personnel to new space in BCT III in early November 1975, the Respondent did not notify the Union qua Union of its intention to move personnel, and the Union did not have actual knowledge of the move until after it had been implemented. I find no merit to Respondent's argument that because Mr. Steven Despot, a union member who subsequently became a member of the bargaining committee, knew of the move, that this was sufficient notice to the Union. Cf. U.S. Army Electronics Command, Fort Monmouth, New Jersey, supra; General Services Administration, Region 3, Public Building Service, Central Support Office, supra.

Accordingly, although Respondent was not obligated to meet and confer with the Complainant concerning its decision to effectuate the move to BCT III, in my view, it was obligated under the Order to afford the Complainant timely notice of its decision and, upon request, meet and confer on the procedures management intended to use in implementing the move, and on the impact of the move on adversely affected employees.

While there is evidence that the decision concerning what to do about finding new space for personnel and the decision to relocate to BCT III was of an emergency nature, and had to be made on short notice, there is no evidence that there was any overriding exigency which precluded Respondent from providing Complainant with notice of its decision at least as of the same time that it notified employees of the change and sought volunteers to relocate to BCT III.

In my view, Respondent violated Section 19(a)(6) of the Order by failing to inform the Complainant of the move to BCT III prior to its effectuation and, thereby, failed to 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 decision and on the impact of this decision on adversely affected employees. Further, such refusal to meet and confer with the bargaining representative necessarily tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order and, therefore, also is violative of Section 19(a)(1) of the Order.

Recommendations

Upon the basis of the aforementioned findings, conclusions, and the entire record, I recommend that the Assistant Secretary deny Respondent's motions to dismiss and adopt the following Order designed to effectuate the purposes of Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Bureau of Hearings and Appeals, shall:

1. Cease and desist from:

   (a) Instituting changes in the procedures or the enforcement of procedures, with respect to obtaining and using visitor parking passes, expected to be observed by employees represented exclusively by American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, without first meeting and conferring with the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of its employees.

(b) failing to notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, of a decision to move personnel to another building prior to its effectuation, and, upon request, affording such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(c) In any like or related matter interferring with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of its employees, with respect to changes in the procedures, or the enforcement of procedures with respect to obtaining and using visitor parking passes, expected to be observed by employees represented excusively by the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative.

(b) Notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, of

a decision to move personnel to another building prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

(c) Post at the facilities of the Social Security Administration, Bureau of Hearings and Appeals, Arlington, 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, 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.

(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 herein.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 30, 1976
Washington, D. C.

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 institute changes in the procedures, or the enforcement of procedures, with respect to obtaining and using visitor parking passes, expected to be observed by employees represented exclusively by American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, without first meeting and conferring with the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of its employees.

WE WILL NOT fail to notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, of a decision to move personnel to another building prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the employees adversely affected by such action.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, upon request, meet and confer with the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative of its employees, with

respect to changes in the procedures or the enforcement of procedures, with respect to obtaining and using visitor parking spaces, expected to be observed by employees represented exclusively by the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative.

WE WILL notify the American Federation of Government Employees, Local 3615, AFL-CIO, or any other exclusive representative, of any decision to move personnel to another building prior to its effectuation, and, upon request, afford such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the decision and on the impact such decision will have on the 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: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19194.

April 20, 1977

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 NAVAL SHIPYARD,
U.S. DEPARTMENT OF THE NAVY
A/SLMR No. 829

This case involved an unfair labor practice complaint filed by the Bremerton Metal Trades Council (Complainant) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally initiating a new leave restriction policy contrary to the terms of the parties' negotiated agreement.

The Administrative Law Judge found that the issue in the instant proceeding involved essentially a differing interpretation of the parties' negotiated agreement and noted that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order. The Administrative Law Judge further noted that there was insufficient evidence to support the Complainant's other contention that the Respondent had departed from its pre-existing policy in regard to leave restrictions. Accordingly, he recommended that the complaint be dismissed.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation and ordered that the complaint be dismissed.

A/SLMR No. 829

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND NAVAL SHIPYARD,
U.S. DEPARTMENT OF THE NAVY

Respondent

and Case No. 71-3733

BREMERTON METAL TRADES COUNCIL,
BREMERTON, WASHINGTON

Complainant

DECISION AND ORDER

On February 3, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order, the entire record in the subject case, 1/ and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

1/ The formal documents in the instant case were not formally introduced into the record by the Administrative Law Judge. However, he indicated that such documents, while not formally introduced, would be considered part of the record. In these circumstances, and as the record in the instant case transferred to the Assistant Secretary included such formal documents, they are deemed to be properly included in the record within the meaning of Section 203.23(b) of the Assistant Secretary's Regulations. Cf. Charleston Naval Shipyard, A/SLMR No. 1.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 71-3733 be, and it hereby is, dismissed.

Dated, Washington, D. C.
April 20, 1977

Francis X. Burkhardt, Assistant Secretary
of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

PUGET SOUND NAVAL SHIPYARD, :
U.S. DEPARTMENT OF THE NAVY
Respondent :

Case No. 71-3733

and :

BREMERTON METAL TRADES COUNCIL :
BREMERTON, WASHINGTON
Complainant :

William K. Holt, President
Metal Trades Council
P.O. Box 448
Bremerton, Washington 98310
For the Complainant

Richard C. Wells
Labor Relations Advisor
Office of Civilian Personnel
Western Field Division
Department of the Navy
760 Market Street, Suite 865
San Francisco, California 94102
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint filed March 1, 1976 and amended July 7 and July 12, 1976. As amended, the complaint alleged that the Respondent had taken "numerous actions" on August 18, 1975 and December 4, 1975 concerning leave policies in violation of Sections 19(a)(1) and (6) of the Executive Order.

On July 19, 1976 the Regional Administrator issued a Notice of Hearing to be held September 13, 1976 in Bremerton, Washington. Hearings were held on that day in that City. The Complainant was represented by its President and the Respondent by a Labor Relations Advisor of the Navy Department. Both parties examined and cross-examined witnesses and introduced exhibits; both parties waived closing arguments and filed briefs.

Facts and Discussion

The Complainant has been the exclusive representative of a defined unit of Respondent's employees (including the employees involved in this case) since 1962. The parties entered into their first collective bargaining agreement in 1963. The current agreement, executed June 5, 1975, is their sixth comprehensive agreement. It contains provisions concerning the administration of sick leave, annual leave, and leaves of absence in general. 1/

On February 1, 1974 John W. Evans, an employee in the unit, was given a memorandum entitled "Restrictions on Leave". It recited that because of his past pattern of sick leave and call-ins for emergency annual leave, any future sick leave would require a doctor's certificate, and his call-in privileges for annual leave were cancelled. It stated also that unless annual leave was approved in advance, absence by Evans would result in his being marked absent without leave and appropriate disciplinary action taken. The final paragraph stated that the restrictions would remain in effect until Evans' improvement in leave usage warranted their removal. Prior to the issuance of that memorandum he had been counselled many times concerning his use of sick leave. Thereafter, Evans on several occasions called in for emergency annaul leave and on some occasions was marked AWOL.

On June 4, 1975 Evans was issued a memorandum confirming a discussion with him on June 3 concerning his violation of the restriction on his sick leave, advising him that disciplinary action would be proposed, and warning him that a future violation could result in a more severe penalty possibly including a recommendation for his removal.

1/ Exhibit J-1, Articles Twelve, Thirteen, and Fourteen.

On August 28, 1975 Evans received two memoranda. One reimposed the restrictions on his annual leave for a maximum period of one year at which time another review of his record would be made to determine whether there was sufficient improvement to warrant removal of the restrictions. The other memorandum took the same action with respect to his sick leave.

Similar actions were taken with respect to a number of other employees. In some cases some of such actions were rescinded for procedural defects. In others there is a conflict in the evidence on whether the counselling called for in the agreement was given. It is unnecessary to resolve such conflict. 2/ There is no evidence or even a suggestion that anti-union animus was a motivating factor or present. The parties disagree on when counselling is required and on what constitutes "counselling".

There is no contention that the Respondent's position was not sincere. The Complainant contends only that it was wrong.

We need not decide whether it was wrong. Even assuming it was wrong, not every breach of contract is an unfair labor practice. 3/ Under certain circumstances it can be an unfair labor practice. For example, if sufficiently flagrant so that it appears so unreasonable as to cast doubt on the sincerity of the respondent's position, it may rise to the seriousness of a unilateral change in the contract and hence a violation of Section 19(a)(6) of the Executive Order. 4/ But as the Assistant Secretary said in Aerospace Guidance and Metrology Center, Newark Air Force Station, A/SLMR No. 677:

> "... alleged violations of a negotiated agreement which concern differing and

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2/ Were it necessary to resolve such conflict I would find that the counselling was given.

3/ General Services Administration, Region 5, Public Buildings Service, Chicago Field Office, A/SLMR No. 528, p. 4 of ALJ Decision; Aerospace Guidance and Metrology Center, Newark Air Force Station, A/SLMR No. 677.

4/ Other examples would be a breach of contract prompted by anti-union motivation to discourage union membership, of which there is no indication here, which would violate Section 19(a)(2); or a breach of contract motivated by considerations in violation of Section 19(a)(4), of which there is also no intimation in this record.

arguable interpretations of such agreement, as distinguished from alleged actions which constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order."

This case presents just such a disagreement, and hence the disputed conduct described above, even if in violation of the agreement, does not constitute a violation of Section 19 (a) of the Agreement.

The Complainant argues also that the procedure followed in the cases here involved constituted the initiation of a new policy and a departure from pre-existing policy in dealing with the imposition of restrictions on the use of leave. But such argument is only an assertion not supported by any evidence. The only witnesses who testified on past policy were Respondent witnesses who uniformly testified that the policy and practice prior to the incidents here involved were the same as the policy and practice covering the incidents here involved. In the absence of any contrary evidence, I so find. A mere assertion by counsel in pleadings or agrument is not evidence, and fails to support Complainant's burden of proof. 5/

Since the Complainant failed to prove a violation of Section 19(a) of the Executive Order, the complaint should be dismissed.

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: February 3, 1977
Washington, D.C.

5/ 29 C.F.R. §203.15.

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,
McCLELLAN AIR FORCE BASE, CALIFORNIA
A/SLMR No. 830

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1857, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) by questioning three bargaining unit employees one hour before they were to appear as witnesses for a grievant in an arbitration hearing, without giving prior notification to the AFGE and according it an opportunity to be present at the interviews. In this regard, the AFGE contended that after a grievance is filed, any meeting or discussion regarding that grievance is a formal discussion and, therefore, management has an obligation to notify the Union and accord it an opportunity to be present at such discussions. On the other hand, the Respondent contended that the subject interviews were not formal discussions since the investigation did not concern the grievant; the grievant was not present at the interviews; and the Respondent's counsel, who conducted the interviews, did not have authority to resolve the grievance.

The Administrative Law Judge concluded that the questioning of the grievant's witnesses by the Respondent's counsel was not violative of Section 19(a)(1) and (6) of the Order because: (1) the discussions did not concern a grievance within the meaning of Section 10(e) of the Order; (2) personnel policies and practices or other matters affecting working conditions were not discussed; and (3) the discussions were not formal in nature.

Contrary to the Administrative Law Judge, the Assistant Secretary found that, under the particular circumstances of this case, the Respondent had violated Section 19(a)(1) and (6) of the Order by failing to afford the AFGE the opportunity to be represented at the interviews conducted herein. Citing earlier decisions, he found that the interviews were formal discussions concerning a pending grievance within the meaning of Section 10(e) of the Order. In the instant case, he found that the Complainant, as the exclusive representative of the employees in the unit, had a legitimate interest in being represented at the interviews of the unit employees involved which were conducted in connection with the processing of the pending grievance. In this regard, the Assistant Secretary noted that, clearly, the information discussed could potentially have affected the disposition of the pending grievance. Moreover, in his view, under the circumstances herein, including the fact that the witnesses interviewed were those of the grievant, the Complainant's representational responsibility, which under Section 10(e) of the Order extends to all employees in the bargaining unit, outweighed any impact its presence during the interviews might have on the Respondent's preparation of its case for arbitration. Consequently, the Assistant Secretary found that by failing to afford Complainant an opportunity to

be represented at the interviews of the unit employees, the Respondent violated Section 19(a)(6) of the Order. Further, as such failure had the concomitant effect of indicating to unit employees that the Respondent could bypass their exclusive representative, it thereby interfered with, restrained, or coerced unit employees in the exercise of their rights assured under the Order in violation of Section 19(a)(1).

A/SLMR No. 830

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES AIR FORCE,
McCLELLAN AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 70-5099(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1857, AFL-CIO

Complainant

DECISION AND ORDER

On August 27, 1976, Administrative Law Judge Milton Kramer issued his Report and Recommendation in the above-entitled proceeding, finding that the Respondent had not engaged in violative conduct as 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, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, only to the extent consistent herewith.

The amended complaint herein alleged, in substance, that on October 21, 1975, the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, when it questioned three bargaining unit employees just prior to their scheduled appearance as witnesses for a grievant in an arbitration hearing, without giving prior notification to the American Federation of Government Employees, Local 1857, AFL-CIO (Complainant), the exclusive bargaining representative of certain employees of the Respondent, and according it an opportunity to be present at the interviews.

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

The record reveals that on October 21, 1975, a grievance filed by an employee of Respondent was scheduled to be heard by an arbitrator. Captain James B. Dumerer, Assistant Staff Judge Advocate of the Respondent,

was designated as the Respondent's counsel for the arbitration hearing. On the afternoon of October 20, 1975, the grievant's representative gave the Respondent's Personnel Office a list of witnesses to be called on the grievant's behalf at the arbitration hearing. Later that same day, the Personnel Office gave Captain Dumerer this information. Captain Dumerer noted that among the grievant's list of prospective witnesses were three of the Respondent's employees, B. Dennis, C. Widman and H. Butterfield, about whom he had no knowledge. Accordingly, Captain Dumerer requested the Personnel Office to have the three employees report to his office the following morning, just prior to the scheduled arbitration hearing.

The next day, at approximately 8:00 A.M., the employees reported to the office of Captain Dumerer. Dennis and Widman arrived first, and Butterfield, who is also a steward for the Complainant, arrived later. The record discloses that, essentially, Dumerer and the employees exchanged information relative to the grievance which was the subject of the scheduled arbitration hearing, such as what matters the three employees would testify to, and what was expected of the employees as to their role in the hearing.

In his Report and Recommendation, the Administrative Law Judge concluded that the questioning of the grievant's witnesses by the Respondent's counsel was not violative of Section 19(a)(1) and (6) of the Order because: (1) the discussion did not concern a grievance within the meaning of Section 10(e) of the Order; (2) personnel policies and practices or other matters affecting working conditions were not mentioned; and (3) the discussion was not formal in nature. In the Administrative Law Judge's view, the essence of the discussion was simply an exchange of information and such a conversation is not the type of discussion envisioned by Section 10(e) of the Order.

Contrary to the Administrative Law Judge, I find that the interviews conducted by Respondent's counsel, as set forth above, constituted a formal discussion concerning a grievance within the meaning of Section 10(e) of the Order, 1/ to which the Complainant was entitled to be afforded the opportunity to be represented. Thus, it has been held previously that discussions between employees and management with respect to pending grievances are formal discussions within the meaning of Section 10(e), whether or not such discussions are at the informal or formal stage of the grievance procedure, 2/ and irrespective of the general

1/ Section 10(e) states, in pertinent 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. . . . The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, . . ."

2/ See Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448.

impact on unit employees of the grievance involved. 3/ In the instant case, I find that the Complainant, as the exclusive representative of the employees in the unit, had a legitimate interest in being represented at the interviews of the unit employees involved which were conducted in connection with the processing of a pending grievance. Thus, clearly, the information discussed could potentially have affected the disposition of the pending grievance. Moreover, in my view, under the circumstances herein, including the fact that the witnesses interviewed were those of the grievant, the Complainant's representational responsibility, which under Section 10(e) of the Order extends to all employees in the bargaining unit, outweighed any impact its presence during the interviews might have had on the Respondent's preparation of its case for arbitration. Consequently, I find that by failing to afford the Complainant an opportunity to be represented at the interviews of unit employees Dennis, Widman and Butterfield, 4/ the Respondent violated Section 19(a)(6) of the Order. 5/ Further, I find that such failure had the concomitant effect of indicating to the unit employees that the Respondent could bypass their exclusive representative, thereby interfering with, restraining, or coercing unit employees in the exercise of their rights assured under the Order in violation of Section 19(a)(1).

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Air Force, McClellan Air Force Base, California, 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 affording the American Federation of Government Employees, Local 1857, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions.

3/ See U.S. Department of the Treasury, Internal Revenue Service, Pittsburgh District, Pittsburgh, Pennsylvania, A/SLMR No. 498.

4/ It is clear from the record that Butterfield attended the interviews as a potential witness at the arbitration hearing and not in his capacity as a representative of the Complainant. Therefore, he was not fulfilling the role of the chosen representative of the exclusively recognized labor organization as contemplated by Section 10(e) of the Order. Cf., in this regard, U.S. Army Headquarters, U.S. Army Training Center, Infantry, Fort Jackson Laundry Facility, Fort Jackson, South Carolina, A/SLMR No. 242.

5/ Cf. U.S. Army Civilian Appellate Review Agency, Department of the Army, Sacramento, California, A/SLMR No. 488.

b. Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Order by failing to afford the American Federation of Government Employees, Local 1857, 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. 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. Notify the American Federation of Government Employees, Local 1857, AFL-CIO, of, and afford 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 McClellan Air Force Base, McClellan Air Force Base, 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, McClellan Air Force Base, California, 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.

c. Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been take to comply herewith.

Dated, Washington, D.C.
April 21, 1977

F X Burkhardt

Francis X. Burkhardt, 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 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 affording the American Federation of Government Employees, Local 1857, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Order by failing to afford the American Federation of Government Employees, Local 1857, 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.

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 any of its provisions, they may communicate directly with the Regional Administrator 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
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

UNITED STATES AIR FORCE :
McCLELLAN AIR FORCE BASE
Respondent :

and :

AMERICAN FEDERATION OF GOVERNMENT :
EMPLOYEES, LOCAL 1875, AFL-CIO
Complainant :

Case No. 70-5099(CA)

James M. Hopperstead
President, Local 1857
American Federation of
Government Employees,
AFL-CIO
P.O. Box 1037
North Hylands, California 95660
For the Complainant

Capt. Thomas J. Moholt
Labor Relations Counsel
Office of the Staff Judge Advocate
Scramento Air Logistics Center
McCellan Air Force Base, CA. 95652
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 December 19, 1975 and filed December 24, 1975 alleging violations of Section 19(a)(1) and (4) of the Executive Order. Under date of January 5, 1976 the Respondent filed a response to the complaint and a motion to dismiss. On April 5, 1976 the

Complainant filed an amended complaint dated April 13, 1976 alleging substantially the same facts as the original complaint and asserting that they constituted violations of Sections 19(a)(1) and (6) of the Executive Order. Over date of April 28, 1976 the Respondent filed an Amended Motion to Dismiss and Response and a Memorandum in Support of Motion to Dismiss. The record does not show that the Area Director or Regional Administrator took any action on either Motion to Dismiss.

The amended complaint alleged that about an hour before an arbitration hearing on a grievance, the witnesses who were listed to testify on behalf of the grievant were ordered to report to the offices of the Staff Judge Advocate where they were questioned on the testimony there were going to give, that the office of the Staff Judge Advocate had the Civilian Personnel Office call the supervisors of the witnesses to tell them to have the witnesses in the office of the Staff Judge Advocate, and that the witnesses were there questioned without advising the union and giving it an opportunity to be present.

On June 10, 1976 the Regional Administrator issued a Notice of Hearing to be held on July 15, 1976 in Sacramento, California. The hearing was held that day. The Complainant was represented by the President of the Complainant. The parties entered into a number of stipulations. The Respondent called one witness who was examined and cross-examined, and a Joint Exhibit was introduced. The Complainant made a closing argument and the Respondent adopted his opening statement as his closing argument. At the close of the hearing the time for filing briefs was extended to August 12, 1976. Both parties filed briefs.

FACTS

Local 1857 of the American Federation of Government Employees, AFL-CIO is the exclusive representative for three units of civilian employees of the Sacramento Air Logistics Center of the Respondent. The parties have a collective agreement which includes a negotiated grievance procedure. Step 4 of the negotiated grievance procedure is binding arbitration which may be invoked either by "the Employer or by the Union."

An employee in one of the units represented by the Complainant, John Corrie, presented a grievance. It was processed to Step 4 and an Arbitrator was appointed. The nature of the grievance is undisclosed in this record.

A hearing was held before the Arbitrator on October 21, 1975. Captain James E. Dumerer, Assistant Staff Judge Advocate of the Respondent, was appointed to represent the Respondent in the hearing before the Arbitrator.

The negotiated grievance procedure provides that grievances will be processed during regular working hours. It provides also that employees who are made available as witnesses at any step in the procedure would be in a duty status while so serving if they otherwise would have been in a duty status.

The day before the arbitration hearing the grievant's representative, G. Granados, gave Mrs. Fries, an Employment Relations Assistant in Respondent's Personnel Office, a list of the witnesses for the grievant, having discussed it with her several days earlier. Mrs. Fries informed Captain Dumerer of the names on the list late in the afternoon of October 20, the day before the hearing. Captain Dumerer had been studying the file in the grievance and the names of three employees on the list had nowhere appeared in the file or been mentioned before in his preparation for the hearing. Captain Dumerer asked Mrs. Fries and another employee in the Personnel Office the purpose of the testimony of those three employees, and neither could tell him. Captain Dumerer then asked Mrs. Fries to request the three employees to come to his office at 8:00 A.M. the next morning. The arbitration hearing was to be held later in the morning.

The next morning Mrs. Fries notified the three employees that Captain Dumerer wanted them to come to his offices at 8:00 A.M. The three employees were Mr. B. Dennis, Mr. C. Widman, and Mr. H. Butterfield. Each of them was an Item Management Specialist and Butterfield was also a union steward to whom the other two would normally go with their problems. The record does not establish whether Mrs. Fries notified them of Captain Dumerer's request directly or through their supervisor or supervisors. 1/

1/ There was no direct testimony on this point. Neither Mrs. Fries nor any of the three individuals testified. The facts found in this paragraph and the preceding paragraph are taken from Exh. AS-8, the report of a joint fact-finding committee established to ascertain the facts with respect to the unfair-labor-practice charge. The parties stipulated that the statements contained in that report are true. Tr. 7-8.

Widman and Dennis arrived at Dumerer's office at 8:00 A.M. and Butterfield shortly thereafter. Their conversation with Dumerer was brief. Dumerer asked them what evidence they could give relevant to the Corrie grievance. Widman and Dennis said they did not know. Butterfield, the union steward, said he knew he was to be a witness and also was to act as a technical advisor to Granados, the grievant's representative. The three employees then asked Captain Dumerer what would be expected of them and he replied that if they were asked to testify it would be their duty to do so. Essentially, Dumerer and the three employees exchanged information, scanty as it may have been.

The record does not show whether the three individuals in fact testified at the arbitration hearing.

Captain Dumerer did not have authority to settle the Corrie grievance nor to require the three employees to answer his questions nor did he purport to have such authority.

DISCUSSION AND CONCLUSIONS

The only contention of illegality asserted in the complaint is that the questioning of the three employees without advising the union and giving it the opportunity to be present violated Sections 19(a)(1) and (6) of the Executive Order. That in turn turns on whether the discussions fall within the last sentence of Section 10(e) of the Executive Order, i.e., whether they were

> "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."

If they were such discussions, the Complainant was entitled to be represented. I conclude that they were not discussions within the meaning of Section 10(e) of the Executive Order both because they were not about the subject matter described in the last sentence of Section 10(e) nor were they formal in nature.

There was only one discussion, with Captain Dumerer talking with the three employees at the same time. Although it concerned a grievance, I do not believe it was a discussion "concerning grievances" as that term is used in Section 10(e). None of the employees was the grievant. The merits of the grievance were not discussed; the record does not even disclose what the grievance was. Captain Dumerer, the only

representative of management who was present, did not have authority to settle or dispose of the grievance. He simply asked the three employees what evidence they could give at the arbitration hearing about the grievance that was relevant. Two of them said they did not know, and the record does not show that the third answered that question at all. Nor does the record show that "personnel policies" or personnel "practices" or "other matters affecting general working conditions" was so much as mentioned. Cf. United States Air Force, Lackland Air Force Base, Headquarters Military Training Center, A/SLMR No. 652.

Nor was the discussion formal in nature. It does not appear that any notes were taken or transcript prepared. Captain Dumerer did not have authority to do anything to or about the three employees. He was simply trying to obtain some information better to prepare himself for the arbitration hearing on a grievance of a fourth employee to be held later that morning. He was a lawyer preparing himself for a hearing and seeking information to be better prepared. He spoke to all three employees in a simple brief meeting. Cf. Department of Health, Education and Welfare, Social Security Administration Great Lakes Program Center, A/SLMR No. 419. He had no relevant authority other than to represent the Respondent at the arbitration later that morning. It was stipulated, and I have found, that the essence of the conversation was simply an exchange of information. Such a conversation is not the kind of discussion envisioned by Section 10(e) of Executive Order 11491.

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: August 27, 1976
Washington, D.C.

April 21, 1977

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

INTERNAL REVENUE SERVICE,
WASHINGTON, D. C.
A/SLMR No. 831

This case involved a petition for consolidation of units filed by the National Treasury Employees Union (NTEU) on behalf of itself and/or its constituent local chapters seeking to consolidate 13 units for which the NTEU and/or its constituent local chapters are the current exclusive representatives at nine of the ten Internal Revenue Service (IRS) Service Centers, the IRS Data Center and the IRS National Computer Center. Through the subject petition, the NTEU sought to establish a consolidated unit consisting of all the professional and nonprofessional employees of the IRS Service Centers, the IRS Data Center, Detroit, Michigan, and the IRS National Computer Center, Martinsburg, West Virginia, who are currently represented exclusively by the NTEU and/or its constituent local chapters. The IRS contended, essentially, that the NTEU was without standing to file the instant petition on behalf of its exclusively recognized local chapters as, among other things, the Executive Order requires that consolidation may be sought only by exclusive representatives and the NTEU has not, as a minimum, sought authorization from its exclusively recognized local chapters to file the present petition. Furthermore, the IRS asserted that the proposed consolidated unit was not appropriate because it did not meet the criteria established by Section 10(b) of the Order and that the consolidation of existing bargaining units herein will not promote the goal of fostering more comprehensive collective bargaining as the parties already have a successful history of multi-unit bargaining.

With respect to the IRS' threshold contention that the NTEU was without standing to file the instant petition, the record showed that the vast majority of the exclusive recognitions for the units sought to be consolidated herein are held by the individual chapters of the NTEU. The Assistant Secretary found that, while, as the IRS indicates, Section 10(a) of the Order speaks of "the consolidation of existing exclusively recognized units represented by that [labor] organization," in his view, there is nothing in the Order, the Report and Recommendations of the Council, or the Assistant Secretary's Regulations, which requires the Assistant Secretary to challenge the constitutional authority of a national labor organization, such as the NTEU, to file a unit consolidation petition on behalf of its exclusively recognized local chapters. While, under certain circumstances, it may be necessary to review the constitutional authority of a national labor organization to take such an action where the constitution of the labor organization involved is unclear in this regard or appears to delimit such authority, the Assistant Secretary noted that there was no contention herein, nor did it appear, that the Constitution and Bylaws of the NTEU precluded the NTEU from filing a consolidation petition on behalf of its constituent local chapters. He noted additionally that the affected employees would be protected from arbitrary action by a national labor organization in seeking to consolidate the exclusively recognized units of its constituent locals by the provisions of the Executive Order and the Assistant Secretary's Regulations which provide for an election on the question of any proposed consolidation at the request of either party or 30 percent or more of the affected employees. Under all of these circumstances, the Assistant Secretary found that the NTEU had standing to file the instant petition on behalf of its exclusively recognized local chapters.

The Assistant Secretary noted a recent decision in which he had found that in view of the clear policy guidelines in the consolidation of units area formulated by the Federal Labor Relations Council, there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. He further found therein that this presumption may be rebutted only where it is found that the proposed consolidated unit is so inconsistent with the criteria contained in Section 10(b) of the Order that the overriding objective, established by the Council, of creating a more comprehensive bargaining unit structure in the Federal sector would be undermined by such a finding. Given these policy considerations, he found that the consolidated unit petitioned for by the NTEU was appropriate for the purpose of exclusive recognition under the Order. Thus, he found that the employees in the unit sought constitute all of the eligible employees in the IRS's computer oriented Center-type operations. As such, they share a common mission and common supervision on a nationwide level, common job classifications, common types of working conditions, and similar personnel and labor relations practices pursuant to the multi-Center negotiated agreement between the parties. Under these circumstances, he concluded that the employees in the petitioned for consolidated unit shared a clear and identifiable community of interest. Furthermore, as the evidence established that the parties had successfully negotiated at the national level two successive multi-unit agreements covering all the employees sought herein by the NTEU, he found that the proposed consolidated unit would promote effective dealings. Moreover, noting the scope and history of the parties' current collective bargaining relationship, he found that the proposed consolidated unit has already demonstrated the benefits to be derived from a unit structure related to a combination of employees of the IRS's Service Centers, Data Center and National Computer Center. Consequently, he concluded that the proposed consolidated unit will continue to promote the efficiency of the agency's operations. Finally, although the parties have been voluntarily bargaining on a multi-unit basis, the Assistant Secretary determined that the petitioned for consolidated unit, which will provide bargaining for employees on a nationwide basis under a single unit structure, will reduce fragmentation, promote a more comprehensive bargaining unit structure, and is consistent with the policy of the Order set forth by the Council.

A/SLMR No. 831

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
WASHINGTON, D. C.

Activity

and

Case No. 22-6486(UC)

NATIONAL TREASURY EMPLOYEES
UNION

Petitioner

DECISION AND DIRECTION OF ELECTION

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

The Petitioner, National Treasury Employees Union, herein called NTEU, which filed the instant petition on behalf of itself and/or its constituent local chapters, seeks to consolidate 13 units for which the NTEU and/or its constituent local chapters are the current exclusive representatives at nine of the ten Internal Revenue Service (IRS) Service Centers, the IRS Data Center and the IRS National Computer Center. Through the subject petition, the NTEU seeks to establish a consolidated unit consisting of all the professional and nonprofessional employees of the IRS Service Centers, the IRS Data Center, Detroit, Michigan, and the IRS National Computer Center, Martinsburg, West Virginia, excluding all employees of the Andover, Massachusetts, IRS Service Center, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The IRS contends that the NTEU is without standing to file the instant petition on behalf of its exclusively recognized local chapters as, among other things, the Executive Order requires that consolidation may be sought only by exclusive representatives and the NTEU has not, as a minimum, sought authorization from its exclusively recognized chapters to file the instant petition. The IRS further asserts that the proposed consolidated unit is not appropriate because it does not meet the criteria established by Section 10(b) of the Order. The IRS argues also that the consolidation of the existing bargaining units herein will not promote the goal of fostering more comprehensive collective bargaining as the parties already have a successful history of multi-unit bargaining. The NTEU, on the other hand, takes the position that its standing to file the subject petition on behalf of its constituent chapters is an internal matter not subject to challenge by either the IRS or the Assistant Secretary, that the Report and Recommendations of the Federal Labor Relations Council (1975), which set forth the consolidation procedures, established a presumption favoring consolidation, and that the IRS has not produced evidence which rebuts this presumption. In this latter regard, it contends that the parties' successful history of multi-unit bargaining at the level of the Commissioner, IRS, is the best evidence that recognition at this level will promote effective dealings and the efficiency of the agency's operations.

The mission of the IRS, which is an organizational component of the Department of the Treasury, is the administration of the tax laws of the United States. The IRS is headed by the Commissioner of Internal Revenue who reports to the Secretary of the Treasury. There are three organizational levels within the IRS. The first level, the National Office, located in Washington, D. C., develops nationwide policies and programs for the administration of the Internal Revenue laws and provides overall direction to the field organization. The second level, the Regional Offices, is composed of seven Regional Offices which supervise and evaluate the operations of the District Offices and Service Centers within their geographical purview. The third level, the District Offices and Service Centers, constitute the IRS' field operation. The 58 District Offices implement the programs and policies established by the National Office and the Regional Offices. They have initial taxpayer contacts in the areas of taxpayer assistance, audit of tax returns, collection of delinquent tax returns and/or revenue, and settlement efforts of tax disputes.

The record reveals that the function of the Service Centers is to process tax returns and related documents and maintain accountability records for the taxes collected. Programs include the processing, verification, and accounting control of tax returns, the assessment and refund of taxes, and the preparation of audit selection lists. Each Service Center is headed by a Director who reports to the Regional Commissioner for his region. The Service Centers range in size from approximately 2400 unit employees at Ogden, Utah, to approximately 3300 unit employees at Philadelphia. 1/ Although there are some specific

1/ The record reveals that all of the Service Centers employ WAE (when actually employed) employees during the peak tax filing season. The WAEs are career employees who agree to work only part of the year subject to recall or hiring based on the exigencies of the tax filing season. The number of WAEs employed at the Service Centers varies from a low of some 1150 to a high of some 2750 during the latest annual period. The average number of days the WAEs were employed during the same period varied from 55 days at one Center to 101 days at another Center.

programs assigned to only one Service Center, such as exempt organization returns at Philadelphia, the record shows that all of the Service Centers are engaged in essentially similar operations, are organized along similar lines, and utilize employees in similar job classifications, who are required to have similar training and who share similar working conditions.

The National Computer Center (NCC) is the repository for the master tax files for the entire country. The Director, NCC, reports to the Tax Administration Systems Division, Office of the Assistant Commissioner for Accounts, Collections, and Taxpayer Service (ACTS) in the National Office of the IRS. The input of the NCC is based, in large part, on the product produced by the Service Centers. The NCC is a computer operation employing some 330 bargaining unit employees, whose functions, the record reveals, are essentially similar to the employees engaged in computer operations at the Service Centers.

The mission of the Data Center is to handle those automatic data processing responsibilities necessitated by the IRS's operations other than revenue processing or tax administration. The Director of the Data Center reports to the Assistant Commissioner, ACTS. About half of its resources are devoted to handling the centralized IRS payroll capability. Despite differences in computer hardware or the paperwork being processed for computer input between the Data Center and the Service Centers, the record shows that the Data Center's approximately 1300 bargaining unit employees share many essentially similar job functions, training and working conditions with the Service Center employees.

As noted above, the IRS has raised a threshold question in this matter that the NTEU was without standing to file the instant petition. The parties herein stipulated that the NTEU's contention that the instant petition was filed on behalf of its exclusively recognized local chapters was based on the NTEU's interpretation of the authority delegated to the national organization by the NTEU's Constitution and Bylaws, which govern all of the NTEU's local chapters. The stipulation also noted that the NTEU had not requested that its exclusively recognized local chapters signify their agreement or disagreement regarding the filing of the instant petition on their behalf.

The record shows that the vast majority of the exclusive recognitions for the units sought to be consolidated herein are held by the individual chapters of the NTEU. While, as the IRS indicates, Section 10(a) of the Order speaks of "the consolidation of existing exclusively recognized units represented by that [labor] organization," in my view, there is nothing in the Order, the Report and Recommendations of the Council, or the Assistant Secretary's Regulations, which requires the Assistant Secretary to challenge the constitutional authority of a national labor organization, such as the NTEU, to file a unit consolidation petition on behalf of its exclusively recognized local chapters. While, under certain circumstances, it may be necessary to review the constitutional

authority of a national labor organization to take such an action where the constitution of the labor organization involved is unclear in this regard or appears to delimit such authority, there is no contention herein, nor does it appear, that the Constitution and Bylaws of the NTEU precludes the NTEU from filing a consolidation petition on behalf of its constituent local chapters. Moreover, it should be noted that the affected employees would be protected from arbitrary action by a national labor organization in seeking to consolidate the exclusively recognized units of its constituent locals by the provisions of the Executive Order and the Assistant Secretary's Regulations which provide for an election on the question of any proposed consolidation at the request of either party or 30 percent or more of the affected employees.2/ Under all of these circumstances, I find that the NTEU had standing to file the instant petition on behalf of its exclusively recognized local chapters.

With respect to the appropriateness of the proposed consolidated unit, the IRS contends that it is an essentially decentralized organization which has delegated primary authority for those decisions concerning the terms and conditions of employment for its employees to its field level management. In this regard, the record shows that all the Center Directors have been delegated and effectively exercise day-to-day authority with respect to such matters as hiring, firing, transfer, reassignment, promotion, reduction-in-force, furloughing and recall of WAE employees, resolution of grievances and unfair labor practice complaints, and other matters affecting employee interests. Furthermore, the record shows that only a small number of employees receive either temporary details or permanent reassignments/promotions between any of the Centers herein and that the effective areas of consideration for both reduction-in-force procedures and promotions are Center-wide. Based on these considerations, the IRS argues that consolidation will require the centralization of its decision-making authority with respect to all matters affecting employee terms and conditions of employment.

The IRS' contention that consolidation will necessarily result in centralization of decision-making authority must be viewed, however, in the context of the recent bargaining history between the IRS and the NTEU. In 1973, and again in 1975, the IRS and the NTEU negotiated multi-Center collective bargaining agreements encompassing all of the employees sought to be incorporated in the proposed consolidated unit. Some of the subjects covered by the agreements, as shown by the record evidence, indicates the extent to which the parties herein have dealt at a national level with problems concerning the terms and conditions of employment of the employees sought to be consolidated herein. Thus, among the subjects covered by the most recent agreement are promotions, details, evaluations of performance, annual ratings, training, position classification, equal employment opportunity, leave, health and safety, hours of work, etc. The IRS contends that multi-Center agreements are based on the active

2/ See Section 10(d)(4) of the Order and Section 202.2(h)(4)(ii)(C) of the Assistant Secretary's Regulations.

input of the Center Directors and were negotiated and signed on their behalf, with the central Union Relations Branch staff merely acting as the agents for the Center Directors. The IRS contends, further, that it will be unable to continue to do this should the proposed consolidation be approved. However, no evidence was presented to show that the IRS could no longer continue, as before, to utilize its field personnel and use their input as the basis for negotiations with the NTEU at the national level, or that any agreement negotiated at the national level could not continue to delegate to field level managers certain authority, such as the resolution of grievances and the scheduling of meetings with local union representatives to deal with local problems, which currently are incorporated into the present agreement.

In a recent decision, I found that in view of the clear policy guidelines in the consolidation of units area formulated by the Federal Labor Relations Council, there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. 3/ I further found that this presumption may be rebutted only where it is found that the proposed consolidated unit is so inconsistent with the criteria contained in section 10(b) of the Order that the overriding objective, established by the Council, of creating a more comprehensive bargaining unit structure in the Federal sector would be undermined by such a finding. Given these policy considerations, I find that the petitioned for consolidated unit is appropriate for the purpose of exclusive recognition under the Order. Thus, as indicated above, the employees in the unit sought constitute all of the eligible employees in the IRS's computer oriented Center-type operations. As such, they share a common mission and common supervision on a nationwide level, common job classifications, common types of working conditions, and similar personnel and labor relations practices pursuant to the multi-Center negotiated agreement between the parties. Under these circumstances, I find that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest. Furthermore, as the evidence establishes that the parties have successfully negotiated at the national level two successive multi-unit agreements covering all of the employees sought herein by the NTEU, I find that the proposed consolidated unit will promote effective dealings. Moreover, noting the scope and history of the parties' current collective bargaining relationship, I find that the proposed consolidated unit has already demonstrated the benefits to be derived from a unit structure related to a combination of employees of the IRS's Service Centers, Data Center and National Computer Center. Consequently, I find that the proposed consolidated unit will continue to promote the efficiency of the agency's operations. Finally, although the parties have been bargaining voluntarily on a multi-unit basis, I also find that the petitioned for consolidated unit, which will provide bargaining for employees on a nationwide basis under a single unit structure, will reduce fragmentation, promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order set forth above.

3/ Education Division, Department of Health, Education and Welfare, Washington, D. C., A/SLMR No. 822.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 4/

> All professional and nonprofessional employees of the Internal Revenue Service Service Centers, the Data Center, Detroit, Michigan, and the National Computer Center, Martinsburg, West Virginia, excluding employees of the Andover, Massachusetts, Service Center, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The IRS requested that, in the event the proposed consolidated unit was found to be appropriate, an election be held to determine whether or not the employees involved desire to be represented in the proposed consolidated unit by the NTEU. As noted 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 voting groups:

Voting Group (a): All professional employees of the Internal Revenue Service Service Centers, the Data Center, Detroit, Michigan, and the National Computer Center, Martinsburg, West Virginia, excluding all nonprofessional employees, employees of the Andover, Massachusetts, Service Center, management officials, guards, employees engaged in Federal prsonnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the Internal Revenue Service Service Centers, Data Center, Detroit, Michigan, and the National Computer Center, Martinsburg, West Virginia, excluding all professional employees, employees of the Andover, Massachusetts, Service Center, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors 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 in the proposed consolidated unit by the National Treasury Employees Union.

4/ The certifications or grants of exclusive recognition held by the NTEU were not made part of the record herein. As noted in the Education Division decision, cited above, proposed consolidated units are limited to and/or defined by, the parameters of the existing exclusively recognized units at the time of the filing of a consolidation petition. Insofar as the actual state of the exclusively recognized units at the time of the filing of the instant petition may differ, if at all, from the unit found appropriate herein, the unit description should be so modified.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Treasury Employees Union, and (2) whether or not they desire to be represented in a separate consolidated professional unit if the proposed consolidated unit is approved by a majority of all the employees voting.

The valid votes cast by all the eligible employees will be tallied to determine if a majority of the valid votes have been cast in favor of the proposed consolidated unit. If a majority of the valid votes have not been cast in favor of the proposed consolidated unit, the employees will be taken to have indicated their desire to continue to be represented in their current units of exclusive recognition. If a majority of the valid votes are cast in favor of the proposed consolidated unit, the ballots of the professional employees in voting group (a) will then be tallied to determine whether they wish to be included in the same consolidated unit with the nonprofessional employees. Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same consolidated unit as the nonprofessional employees, the professional employees will be taken to have indicated their desire to constitute a separate consolidated professional unit, and an appropriate certification will be issued by the Area Administrator.

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 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 Internal Revenue Service Service Centers, the Data Center, Detroit, Michigan, and the National Computer Center, Martinsburg, West Virginia, excluding all nonprofessional employees, employees of the Andover, Massachusetts, Service Center, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

(b): All nonprofessional employees of the Internal Revenue Service Service Centers, the Data Center, Detroit, Michigan, and the National Computer Center, Martinsburg, West Virginia, excluding all professional employees of the Andover, Massachusetts, Service Center, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

2. If a majority of the professional employees votes for inclusion in the same consolidated 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 of the Internal Revenue Service Service Centers, the Data Center, Detroit, Michigan, and the National Computer Center, Martinsburg, West Virginia, excluding employees of the Andover, Massachusetts, Service Center, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors 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 election, 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 or not they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Treasury Employees Union.

Dated, Washington, D. C.
April 21, 1977

F X Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

April 27, 1977

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,
BUREAU OF FIELD OPERATIONS, REGION V-A,
CHICAGO, ILLINOIS
A/SLMR No. 832

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1395 (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to meet and confer with the AFGE for the purpose of developing ground rules for the negotiation of a collective bargaining agreement covering the AFGE's Cook County district office unit, one of the Social Security Administration (SSA) units in Illinois represented exclusively by the AFGE. In this regard, the Respondent contended that it was not obligated to negotiate with the AFGE concerning the Cook County district office unit because of a pending decertification (DR) petition in one of the other SSA units represented exclusively by the AFGE, its Waukegan District unit, and a pending unit consolidation (UC) petition, filed by the AFGE to consolidate the SSA district office units it represented exclusively, which UC petition the Respondent opposed.

In agreement with the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's conduct herein was violative of Section 19(a)(1) and (6) of the Order. In this regard, he agreed with the Administrative Law Judge's holding that the pendency of a DR petition in the AFGE's Waukegan SSA District unit did not warrant the Respondent's refusal to meet and confer concerning a negotiated agreement covering the SSA Cook County district office unit. Moreover, the Assistant Secretary agreed with the Administrative Law Judge's holding that the Respondent was obligated to honor the AFGE's request to negotiate for an agreement concerning its Cook County district office unit during the pendency of the UC petition filed by the AFGE. In this regard, he noted that Section IV of the Report and Recommendations of the Federal Labor Relations Council (1975), which accompanied the issuance of Executive Order 11838, indicated that a UC petition does not itself raise a question concerning representation and, therefore, does not warrant a refusal to negotiate an agreement for a unit included in the UC petition during the pendency of that type of petition. The Assistant Secretary concluded that it would not effectuate the purposes of the Order to deny an exclusive representative the right to negotiate an agreement in an individual unit during the pendency of a UC petition which includes that unit, absent the raising of a valid question concerning representation in such unit. In this regard, he noted that a contrary finding would not only possibly deprive employees in that unit of new contractual benefits during the pendency period, but, inasmuch as a UC petition does not itself foreclose the filing of a petition raising a question concerning representation, might also deny the incumbent exclusive representative the opportunity of insulating itself against rival claims by negotiating a new agreement.

However, contrary to the holding of the Administrative Law Judge, the Assistant Secretary found that the parties' obligation to negotiate an agreement with respect to an individual unit encompassed by a UC petition ceases upon the issuance of a certification of the consolidated unit. Thus, once a certification on consolidation of units is issued, a new bargaining obligation in a new unit is created between the activity or activities involved and the labor organization or labor organizations representing the consolidated unit, replacing the individual bargaining obligation which the activity or activities involved had previously with respect to each of the pre-consolidation units.

Accordingly, the Assistant Secretary issued an appropriate remedial order.

A/SLMR No. 832

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE, SOCIAL SECURITY
ADMINISTRATION, BUREAU OF FIELD
OPERATIONS, REGION V-A,
CHICAGO, ILLINOIS

Respondent

and

Case No. 50-13144(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1395

Complainant

DECISION AND ORDER

On February 10, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions with respect to the Administrative Law Judge's Recommended Decision and Order. 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 Recommended Decision and Order and the entire record in the subject case, 2/ including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

The Administrative Law Judge concluded that the Respondent had violated Section 19(a)(1) and (6) of the Order by refusing to meet and confer with the Complainant for the purpose of developing ground rules for the negotiation of a collective bargaining agreement covering the Complainant's Cook County district office unit, one of the Social Security Administration (SSA) units in Illinois represented exclusively by the Complainant. In this regard, the Respondent contended that it was not obligated to negotiate with the Complainant concerning the Cook County district office unit because of a pending decertification (DR) petition in one of the other SSA units represented exclusively by the Complainant, its Waukegan District unit, and a pending unit consolidation (UC) petition filed by the Complainant to consolidate the SSA district office units represented exclusively by the Complainant, which UC petition the Respondent opposed. The Administrative Law Judge found that the pending DR petition in the Complainant's Waukegan District unit was irrelevant to the Respondent's obligation to negotiate with the Complainant for an agreement covering the Cook County district office unit, as any agreement so consummated for the latter unit would apply only to that unit, whether or not the Complainant was decertified in the Waukegan unit. 3/ In addition, the Administrative Law Judge held that the pending UC petition was equally irrelevant to the Respondent's obligation to bargain with respect to the Cook County district office unit. In this regard, he noted that a labor organization does not risk its status as the exclusive representative in its existing units when it files a UC petition and that Section 202.2(h)(8) of the Assistant Secretary's Regulations provides that, "Upon the issuance of a certification on consolidation of units, the terms and conditions of existing agreements covering those units embodied in the consolidation shall remain in effect, except as mutually agreed by the parties, until a new agreement covering the consolidated unit becomes effective." On this basis, the Administrative

1/ The Respondent filed an untimely request for an extension of time to file exceptions in the instant case, which request was denied. Therefore, its subsequently filed exceptions have not been considered in reaching the disposition herein.

2/ The formal documents and the parties' joint exhibit in the instant case were not formally introduced into the record by the Administrative Law Judge. However, he indicated that such formal documents (Continued)

2/ and joint exhibit, while not formally introduced, would be considered part of the record. In these circumstances, and as the record in the instant case transferred to the Assistant Secretary included the formal documents and the parties' joint exhibit, they are deemed to be properly included in the record within the meaning of Section 203.23(b) of the Assistant Secretary's Regulations. Cf. Charleston Naval Shipyard, A/SLMR No. 1.

3/ After the filing of the complaint in this case, but before the hearing in this matter, the Complainant was decertified as the representative of the Waukegan District unit in Case No. 50-13058(DR), and its unit consolidation petition in Case No. 50-13073(UC), which is currently pending before the Assistant Secretary, was amended to exclude that unit.

Law Judge concluded that any agreement consummated for the Cook County district office unit would apply only to that unit whether or not a certification on consolidation of units was ultimately issued and, if issued, whether or not such agreement was consummated before or after the issuance of such certification.

I agree with the conclusion of the Administrative Law Judge that the Respondent, by refusing to negotiate ground rules for an agreement covering the Complainant's SSA Cook County district office unit because of the pending DR petition in the Waukegan unit and because of the pending UC petition, violated Section 19(a)(1) and (6) of the Order. Thus, I agree that the pendency of a DR petition in the Complainant's Waukegan SSA District unit did not warrant the Respondent's refusal to meet and confer concerning a negotiated agreement covering the SSA Cook County district office unit. Moreover, I agree with the Administrative Law Judge's holding that the Respondent was obligated to comply with the Complainant's request to negotiate for an agreement covering its Cook County district office unit during the pendency of the UC petition filed by the Complainant. Thus, in my view, and contrary to the position of the Respondent, a UC petition does not raise a question concerning representation in the units for which the consolidation is sought, and thus does not warrant a refusal to negotiate an agreement during the pendency of that type of petition. In this regard, it was noted that Section IV of the Report and Recommendations of the Federal Labor Relations Council, (1975), which accompanied the issuance of Executive Order 11838, states that "[t] he procedure for consolidating a labor organization's existing exclusively recognized units should have application only to situations where there is no question concerning the representation desires of the employees who would be included in a proposed consolidation." Nor does the UC procedure cause an incumbent labor organization to risk its existing certifications or recognitions in the units for which the consolidation is sought as it is clear that the filing of a UC petition does not raise a question concerning representation. Moreover, as noted by the Administrative Law Judge, there is no question as to the applicability of any agreement which might be consummated for the Cook County district office unit during the pendency of the unit consolidation petition. Thus, if the UC petition ultimately is dismissed, any such agreement would continue to apply only to the Cook County district office unit. If, on the other hand, a consolidated unit ultimately should be certified, the terms and conditions of any negotiated agreement consummated for the Cook County district office unit prior to such certification would apply only to the Cook County district office portion of the consolidated unit pursuant to Section 202.2(h)(8) of the Assistant Secretary's Regulations, and would remain in effect, except as mutually agreed by the parties, until a new agreement

covering the consolidated unit becomes effective. 4/ Under these circumstances, I find that it would not effectuate the purposes of the Order to deny an exclusive representative the right to negotiate an agreement in an individual unit during the pendency of a UC petition which includes that unit, absent the raising of a valid question concerning representation in that unit. 5/ In my view, a contrary result would not only possibly deprive employees in that unit of new contractual benefits during the pendency period, but, inasmuch as a UC petition does not, in of itself, foreclose the filing of a petition raising a question concerning representation, might also deny the incumbent exclusive representative the opportunity of insulating itself against rival claims for that unit, if the proposed consolidation fails, by negotiating a new agreement.

However, contrary to the Administrative Law Judge, I find that the parties' obligation to negotiate an agreement with respect to an individual unit encompassed by a UC petition ceases upon the issuance of a certification for the consolidated unit. Thus, in my view, once a certification on consolidation of units is issued, a new bargaining obligation in a new unit is created between the activity or activities involved and the labor organization or labor organizations representing the consolidated unit, replacing the individual bargaining obligation which the activity or activities involved had previously with respect to each of

4/ It was noted that a negotiated agreement, consummated prior to the certification of a consolidated unit, covering one of the pre-existing units would not constitute a bar to a subsequent election in the consolidated unit regardless of such agreement's duration. In this regard, Section 202.3(g) of the Assistant Secretary's Regulations provides, in essence, that the exclusive representative of a newly consolidated unit shall have 12 months after the certification on consolidation of units is issued to consummate a negotiated agreement for the consolidated unit free from rival claim.

5/ If, prior to such negotiations or while such negotiations are in progress, a rival labor organization, a unit employee, or the activity itself files a petition raising a valid question concerning representation, i.e. questioning the majority status of the exclusive representative of the individual unit or the continued appropriateness of the existing individual unit, the obligation of the activity to continue negotiations in the existing unit would cease until resolution of the question concerning representation. See Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, FLRC No. 72A-30; Department of the Air Force, Headquarters, 31st Combat Support Group, Homestead Air Force Base, Homestead, Florida, A/SLMR No. 574, FLRC No. 75A-112; and Report on a Ruling of the Assistant Secretary, No. 55.

the pre-consolidation units. 6/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, Chicago, Illinois, shall:

1. Cease and desist from:

(a) Refusing to meet and confer with representatives of the American Federation of Government Employees, AFL-CIO, Local 1395, for the purpose of negotiating a collective bargaining agreement for the unit of Social Security Administration district office employees in Cook County, Illinois, represented exclusively by the aforementioned labor organization, during the pendency of a petition to consolidate exclusively recognized units which includes said unit.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, AFL-CIO, Local 1395, that, upon request, it will meet and confer with representatives of that labor organization for the purpose of negotiating a collective bargaining agreement for the unit of Social Security Administration district office employees in Cook County, Illinois, represented exclusively by the aforementioned labor organization, during the pendency of a petition to consolidate exclusively recognized units which includes said unit.

(b) Post at all of the facilities within the unit of the Social Security Administration district office employees in Cook County, Illinois, represented exclusively by the American Federation of Government Employees, AFL-CIO, Local 1395, copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Management Relations. 7/ Upon receipt of such forms, they shall be signed by the Regional Representative, or other appropriate official in charge of the Bureau of Field Operations, Region V-A Office, and they 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 Regional Representative, or other appropriate official in charge of the Bureau of Field Operations, Region V-A Office, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
April 27, 1977

F. X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

6/ In this regard, I view Section 202.2(h)(8) of the Assistant Secretary's Regulations as providing a method of stablizing the parties' relationship during the period between the issuance of the certification on consolidation of units and the negotiation of a new agreement covering the newly consolidated unit. A requirement that the parties bargain with respect to a portion of a consolidated unit after a unit consolidation certification has been issued, as suggested by the Administrative Law Judge, would, in my view, have quite the contrary affect.

7/ Contrary to the recommendation of the Administrative Law Judge, I shall require the Respondent to post a notice consistent with my remedial order herein. In my view, such a notice is necessary to inform and assure employees that the rights guaranteed to them and their exclusive representative by the Order will be protected.

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 with representatives of the American Federation of Government Employees, AFL-CIO, Local 1395, for the purpose of negotiating a collective bargaining agreement for the unit of Social Security Administration district office employees in Cook County, Illinois, represented exclusively by the aforementioned labor organization, during the pendency of a petition to consolidate exclusively recognized units which includes said unit.

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 American Federation of Government Employees, AFL-CIO, Local 1395, that, upon request, we will meet and confer with representatives of that labor organization for the purpose of negotiating a collective bargaining agreement for the unit of Social Security Administration district office employees in Cook County, Illinois, represented exclusively by the aforementioned labor organization, during the pendency of a petition to consolidate exclusively recognized units which includes said 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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is Room 1060, Federal Office Building, 230 South Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

. . . . . .
In the Matter of

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION BUREAU OF FIELD OPERATIONS REGION V-A, CHICAGO, ILLINOIS
Respondent

and

LOCAL 1395, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
Complainant

Case No. 50-13144(CA)

. . . . . .

Mark A. Zaltman
Vice-President, Local 1395
AFGE (AFL-CIO)
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For the Complainant

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Paul Arca, Acting Director
Labor-Management Relations Staff
Office of Management
Office of Program Operations
Social Security Administration
6401 Security Boulevard
Baltimore, Maryland 21235
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint filed April 15, 1976 alleging a violation of Sections 19(a)(1), (5), and (6) of the Executive Order. On June 15, 1976 the complaint was amended to delete the allegation that Section 19(a)(5) had been violated. As amended, the complaint alleged that the Respondent refused to negotiate for an agreement with the Complainant, a recognized exclusive representative of a unit of its employees.

On September 7, 1976 the Regional Administrator issued a Notice of Hearing to be held on October 14, 1976 in Chicago, Illinois. Hearings were held that day in that City. The Complainant was represented by its Vice-President, and the Respondent was also represented. Neither party presented any witnesses. They presented a written stipulation, entered into additional oral stipulations, and submitted extensive joint exhibits which were received in evidence. The Complainant made a closing argument and the Respondent waived closing argument. Both parties filed timely briefs.

FACTS

The Complainant has been recognized by the Respondent as the exclusive representative of a defined unit of Respondent's employees in Cook County, Illinois (basically Chicago) since December 30, 1969. On September 9, 1971 it was certified as the exclusive representative for a unit of Respondent's employees in Champaign, Illinois and in June 1974 it was certified for a unit of Respondent's employees in Waukegan, Illinois. At none of the three locations has there been a written comprehensive collective bargaining agreement although from time to time agreements on specific matters were entered into. On January 21, 1971 the parties negotiated ground rules for negotiating a comprehensive agreement for the Cook County unit but substantive negotiations pursuant to those ground rules were not pursued. Relations between the parties were amicable throughout; monthly consultations were held, and the only disagreement between them that they could not resolve themselves is the one that gave rise to this case.

On February 4, 1976 the Complainant submitted to the Respondent a request to negotiate proposed ground rules for negotiating a comprehensive agreement for the Cook County unit. Prior thereto, on July 10, 1975, a decertification

petition was filed to decertify the Complainant as the representative of the Waukegan unit. On August 29, 1975 the Complainant had filed a petition to consolidate the three units it represented in Cook County, Champaign, and Waukegan. 1/ Both those petitions were pending when the February 4, 1976 request to bargain ground rules to negotiate an agreement was served. 2/ On February 19, 1976 the Respondent replied to the Complainant's proposal to establish ground rules for negotiations by stating it was unable to enter into such negotiations at that time because of the pendency of the consolidation and decertification petitions.

The amendments to Executive Order 11491 by Executive Order 11838 on February 6, 1976, especially the amendments to Section 10, and their implementing regulations, facilitated the consolidation of units. The Report and Recommendations of the Federal Labor Relations Council, makes this clear. It says, in part:

> "IV. CONSOLIDATION OF EXISTING UNITS.
>
> "Federal sector labor-management relations policy should facilitate the consolidation of existing bargaining units.
>
> * * * *
>
> "Where there is no bilateral agreement on a proposed consolidation, either party should be permitted to petition the Assistant Secretary to hold an election on the consolidation issue.
>
> * * * *
>
> "A labor organization seeking an election on a proposed consolidation of existing units should not lose its status as the exclusive representative in the existing unit should the employees reject the consolidation.

1/ The Respondent did not join in the petition to consolidate.

2/ After the filing of the complaint in this case, and before the hearing, the Complainant was decertified as the representative at Waukegan on July 6, 1976 and the petition to consolidate was amended to exclude the Waukegan unit.

> * * * *
>
> "Election bars, certification bars, and agreement bars should not apply . . . when a labor organization . . . petitions the Assistant Secretary for an election on a proposed consolidation among units represented by a particular labor organization."

The Regulations provide (Section 202.2(h)) that when a petition for consolidation of units is filed:

> "(8) Upon the issuance of a certification on consolidation of units, the terms and conditions of existing agreements covering those units embodied in the consolidation shall remain in effect, except as mutually agreed by the parties, until a new agreement covering the consolidated unit becomes effective."

DISCUSSION

By refusing to negotiate ground rules because of the pending decertification and consolidation petitions the Respondent violated Sections 19(a)(1) and (6) of the Executive Order.

The pending petition to decertify the Complainant as the representative of the Waukegan unit is irrelevant to the question of the Respondent's obligation to negotiate concerning an agreement for its Chicago unit. The Respondent argues that so long as the decertification and consolidation petitions were pending the situation would be uncertain and confusing with respect to whom the new agreement, if one should eventuate, would apply.

It would not be at all uncertain to whom it would apply. If the decertification petition should result in decertifying the Complainant with respect to the Waukegan unit, obviously any new agreement would not apply to that unit. If it should not result in decertification, the new agreement still would not apply to the Waukegan unit; the proposal was to negotiate only for the Chicago unit, and the Complainant's continued representation of the Waukegan unit would not expand the applicability of the Chicago agreement (assuming one should eventuate) beyond its terms which was proposed only for the Chicago unit. This is so regardless of whether the new agreement should be consummated before or after the recertification of the Waukegan Unit. The new agreement was proposed only for

the Chicago unit, and there is no obligation imposed by the Executive Order or elsewhere that a representative negotiate at the same time for all the separate units it represents.

Similar reasoning makes the consolidation petition equally irrelevant to the Respondent's obligation to bargain with respect to the Chicago unit. If the consolidation petition should be dismissed, obviously the new agreement would apply only to the Chicago unit for which it was proposed. If the consolidation petition should result in a consolidation of the units, the new agreement would still apply only to the Chicago segment of the unit. This is so regardless of whether the agreement should be consummated before or after the consolidation. If consummated before the consolidation, it would apply only to the Chicago unit because that was the only unit for which it was negotiated and there would have been no consolidation. If a consolidation should later be certified it would remain applicable only to the Chicago unit until a new agreement covering the consolidated unit should become effective; this is so not only logically but also because Section 202.2(h)(8) of the Regulations, quoted above, expressly so provides. And if consummated after the consolidation, it would still be applicable only to the Chicago segment of the consolidated unit; it was proposed only for that unit and there is no obligation imposed by the Executive Order or elsewhere that a representative negotiate for all segments of the unit in all negotiations no matter how the segments may be differentiated, geographically or otherwise. 3/

It follows that in refusing to negotiate "at this time" (while there were pending the concurent consolidation-of-units petition and the partially overlapping-in-scope decertification petition), the Respondent violated Section 19(a)(6) of the Executive Order and, at least derivatively, Section 19(a)(1) of the Order.

The Respondent argues that Section 11(a) of the Executive Order requires it to "meet at reasonable times and confer", and that a proposal to be negotiated while the consolidation and decertification petitions were pending with the attendant uncertainties they created after the Complainant had apparently been satisfied without a comprehensive agreement for than six years, was not a proposal made at a reasonable time.

3/ I take administrative notice that Waukegan is about 40 miles north of Chicago and Champaign about 125 miles south of Chicago.

It is always proper for either party to propose negotiations on permissible matters, "so far as may be appropriate under applicable laws and regulations". I construe the phrase "at reasonable times" in Section 11(a) to refer to the time of day or day of the week or day of the month or time when there is no overriding necessity to engage exclusively in other activities. The fact that Respondent, because of the particular and unusual circumstances of the pending petitions, was uncertain of its obligation under Section 11(a), did not make it an unreasonable time. The Respondent's uncertainty did not arise from doubt whether the proposal was made at a "reasonable time" but from whether it was "appropriate under applicable laws and regulations". Such an uncertainty does not render a proposal, otherwise legitimate, made at an unreasonable time. This argument of Respondent must be rejected; it confuses "at reasonable times" with "so far as may be appropriate under applicable laws and regulations".

THE REMEDY

The Respondent argued, throughout the hearing and in its brief, that no remedial order should be issued nor a notice posted. It argues that an order would be superfluous and a posting might impinge adversely on the heretofore harmonious labor relations the parties have enjoyed. It argues that it acted in good faith, that it had a good-faith doubt that it would be proper under the Order to negotiate while the consolidation and decertification petitions were pending, that it had always in the past negotiated on request, and that even in this only instance of refusal stood and stands willing and ready to negotiate as soon as some competent authority advises it the Executive Order and its Regulations do not prohibit it, i.e., that it is appropriate under applicable laws and regulations.

I have no doubt of the Respondent's good faith and sincerity. But the utmost good faith and sincerity do not change the fact that it violated Section 19(a)(6) when it declined to negotiate while bemused by the pending petitions. Its expression of willingness, which I believe is sincere, to bargain when the decision in this case becomes final, should it sustain the Complainant's position, is not enough to remedy the default. An appropriate order to bargain, while not fully remedial (I can think of no reasonable action of the Assistant Secretary that would be fully remedial, - the year that has elapsed since the request to negotiate is irretrievably gone), is appropriate. A recommended order is attached hereto as "Appendix A".

However, I do not perceive that a requirement of posting would "effectuate the policies of [the] Order." 4/ There is no indication that anyone believed, or reasonably could have believed, that the Respondent's conduct was motivated by anything other than a good faith doubt that it was required to act otherwise than it did under the particular and unusual circumstances. A public announcement that it has done wrong and would not do it again would effectuate no policy of the Order this is perceptible in these circumstances.

MILTON KRAMER
Administrative Law Judge

Dated: February 10, 1977
Washington, D.C.

4/ See E.O. 11491, Section 6(b); Regulations, Section 203.26(b).

APPENDIX A

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations orders that the Bureau of Field Operations, Region V-A, Social Security Administration, Department of Health, Education, and Welfare, Chicago, Illinois, shall:

(a) Cease and desist from refusing to negotiate with Local 1395, American Federation of Government Employees (AFL-CIO) on its proposal of February 4, 1976 to establish ground rules for negotiating a written agreement between the parties.

(b) In any like or related manner refusing to consult, confer, or negotiate with a labor organization that has been accorded exclusive recognition concerning personnel policies and practices and matters affecting working conditions so far as may be appropriate under applicable laws and regulations.

(c) Notify Local 1395, American Federation of Labor (AFL-CIO) promptly that it will meet and confer with it at reasonable times concerning its proposal of February 4, 1976.

Assistant Secretary of Labor
for Labor-Management Relations

May 5, 1977

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
TREASURY, INTERNAL REVENUE SERVICE
A/SLMR No. 833

This case arose as a result of an unfair labor practice complaint filed by National Treasury Employees Union, Chapter 81, Western Region (NTEU) alleging, essentially, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to allow a union representative to be present at an investigatory interview of a unit employee.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1), applying the Supreme Court's decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). Also, citing the Supreme Court's holding in Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, for the proposition that Section 1 of the Executive Order and Section 7 of the National Labor Relations Act are essentially similar, the Administrative Law Judge concluded that an employee's right to representation at an investigatory interview inheres in the rights afforded employees in Section 1 of the Order and found that the Respondent's refusal to permit the Complainant to be present at the investigatory interview involved herein was a violation of Section 19(a)(1) of the Order. In reaching his decision, the Administrative Law Judge found that the interview of May 13, 1975, which was the gravamen of the instant complaint, did not constitute a "formal discussion" within the meaning of Section 10(e) of the Order as, in his view, Section 10(e) was plainly intended to safeguard the bargaining obligations of the collective bargaining agent and was not addressed to the individual rights of the represented employees.

The Assistant Secretary deferred his decision in the subject case pending the Federal Labor Relations Council's Statement on Major Policy Issue concerning the representation rights of employees under the Order. The Council's statement was issued on December 2, 1976.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the interviews conducted on May 12 and 13, 1975, were not formal discussions within the meaning of Section 10(e) of the Order as the events which were the subject of the interviews occurred during a period of time in which the employee was an acting supervisor, and thereby excluded from the recognized unit. Thus, in the Assistant Secretary's view, the interviews involved did not come within the purview of Section 10(e) of the Order as, in effect, they involved agency management seeking to gather information from one of its managers. As a result, the Assistant Secretary found that the Respondent did not violate Section 19(a)(1) and (6) of the Order when it failed to afford the Complainant an opportunity to be represented at the May 12 and 13, 1975, interviews. The Assistant Secretary also found pursuant to the Council's Major Policy Statement, that in the absence of evidence that the right of an individual employee to assistance or representation at a non-formal investigative meeting had been established by negotiations between the Respondent and the Complainant, the Respondent did not violate Section 19(a)(1) of the Order when it refused to allow the employee to be represented at the interview involved herein. Accordingly, he ordered that the complaint be dismissed in its entirety.

A/SLMR No.833

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE

Respondent

and Case No. 70-5010(CA)

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 81, WESTERN REGION

Complainant

DECISION AND ORDER

On April 27, 1976, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Complainant filed exceptions and a supporting brief, the Respondent filed exceptions and a supporting brief, and the Complainant filed cross-exceptions with respect to the Administrative Law Judge's Recommended Decision and Order.

On October 18, 1976, the Assistant Secretary informed the Complainant and the Respondent that it would effectuate the purposes and policies of the Order to defer his decision in the subject case pending the Federal Labor Relations Council's resolution of a major policy issue which has general application to the Federal labor-management relations program:

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

On December 2, 1976, the Council issued its Statement On Major Policy Issue, FLRC No. 75P-2, Report No. 116, finding, in pertinent part, that:

1. An employee in a unit of exclusive recognition has a protected right under the last sentence of Section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of the employees in the unit; and,

2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a non-formal investigation meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with Section 11(a) 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. 1/ Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, including the exceptions and cross exceptions filed by the parties, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The instant complaint alleges, in essence, that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to allow a union representative to be present at an investigatory interview of a unit employee. In finding a violation of Section 19(a)(1), the Administrative Law Judge applied the Supreme Court's decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), to the instant case. Also, citing the Supreme Court's holding in Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, for the proposition that Section 1 of the Executive Order and Section 7 of the National Labor Relations Act are essentially similar, the Administrative Law Judge concluded that an employee's right to representation at an investigatory interview inheres in the rights afforded employees in Section 1 of the Order. Consequently, he found that the Respondent's refusal to permit the Complainant to be present at the investigatory interview involved herein was violative of Section 19(a)(1) of the

---

1/ In his Recommended Decision and Order, the Administrative Law Judge corrected page 82 of the official transcript by striking the words "kind of a standard random thing" and replacing it with the words "kind of a standard Miranda thing." In its exceptions, the Respondent contended that he had no authority to amend and change the transcript without affording the parties the opportunity to comment upon the change. I disagree. Thus, Section 203.16(m) of the Assistant Secretary's Regulations states, in pertinent part, that ". . . Upon assignment to him and before transfer of the case to the Assistant Secretary, the Administrative Law Judge shall have the authority to: -- Correct or approve proposed corrections of the official transcript when deemed necessary." Under these circumstances, I hereby affirm the Administrative Law Judge's correction of the official transcript.

Order. In reaching his decision, the Administrative Law Judge found that the interview of May 13, 1975, which is the gravamen of the instant complaint, did not constitute a "formal discussion" within the meaning of Section 10(e) of the Order as, in his view, Section 10(e) "is plainly intended to safeguard the bargaining obligations of the collective bargaining agent and is not addressed to the individual rights of the represented employees."

In its exceptions, the Respondent contended, among other things: (1) that the May 13, 1975, interview concerned only the employee's activities while acting as a supervisor and, thus, he was precluded from any rights accorded bargaining unit employees; (2) that the May 13, 1975, interview was investigatory in nature, and the employee had no right to union representation; (3) that the May 13, 1975, interview was not a formal discussion within the meaning of Section 10(e) of the Order and the Complainant had no right to be present; and (4) that the Administrative Law Judge erred in applying the Weingarten rationale to this case. In its exceptions and cross-exceptions, the Complainant contended, among other things: (1) that the Administrative Law Judge correctly applied the Weingarten rationale to this case, and (2) that the Administrative Law Judge erred in finding that the May 13, 1975, interview was not a "formal discussion" within the meaning of Section 10(e) of the Order.

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

On September 16, 1974, an employee submitted a request for reimbursement for expenses incurred in taking a night school course to the Acting Assistant Branch Chief, Donald L. Feurzig. Feurzig approved the application. Thereafter, on September 20, 1974, the Branch Chief disapproved the application. The submitting employee then grieved the disapproval, and the Complainant requested binding arbitration under the terms of the parties' negotiated agreement. In order to prepare for the arbitration, the Respondent assigned the matter to its attorney, Michael Sussman, for the purpose of conducting an investigation.

On May 12, 1975, Sussman, Robert Wilson, Staff Assistant to the Regional Counsel, Western Region, and Feurzig met. During the short interview, it was determined that Sussman and Feurzig would meet on the following day in order to permit Sussman to learn Feurzig's version of the background of the grievance to be arbitrated. At that time, Feurzig requested that he be allowed union representation at the interview with Sussman. This request was denied.

On May 13, 1975, Feurzig again met with Sussman, and during the course of the interview was asked to explain the basis for his approval of the employee's reimbursement request. 2/ During the course of the

2/ At the hearing, the parties agreed that at the time of the May 12 and May 13 interviews, Feurzig was not a supervisor of the Activity, but was a member of the unit for which the Complainant is the exclusive bargaining representative.

ensuing discussion, Sussman learned that Feurzig taught the course in question, and Sussman began to question Feurzig about whether he had authority to teach such a course. Feurzig questioned the relevancy of this line of questioning, as well as certain other questions. At the end of the interview, Sussman read a "kind of a standard Miranda thing" to Feurzig, asking Feurzig to keep confidential the subject matter of their interview.

In agreement with the Administrative Law Judge, I find that the interviews conducted on May 12 and 13, 1975, were not formal discussions within the meaning of Section 10(e) of the Order. Thus, the record reveals, and the parties agree, that the events which were the subject of the interviews occurred during a period of time in which Feurzig was an acting supervisor and thereby excluded from the exclusively recognized unit. 3/ Further, the evidence establishes that the Respondent was concerned only with the actions and decisions of Feurzig made while he was serving in an acting supervisory capacity as such actions had a direct bearing on the Respondent's position in the pending arbitration case. In this context, I do not view the interviews involved to come within the purview of Section 10(e) of the Order, as, in effect, they involved agency management seeking to gather information from one of its own managers. 4/ Accordingly, I find that the Respondent did not violate Section 19(a)(1) and (6) of the Order when it failed to afford the Complainant an opportunity to be represented during the interviews of Feurzig on May 12 and 13, 1975, concerning his actions and decisions while an acting supervisor.

However, contrary to the Administrative law Judge, I do not find that Feurzig, as an individual, was entitled under the Order to representation at the interviews in question. Thus, as indicated above, the Council, in its Major Policy Statement, found that an individual employee is entitled to personal representation under only two circumstances: (1) When the employee is summoned to a formal discussion with management within the meaning of Section 10(e); and (2) when the employee is summoned by management to a non-formal investigation meeting or interview and the right to assistance or representation has been established through negotiations conducted by the exclusive representative and the agency in accordance with Section 11(a) of the Order. Noting the finding above that the interviews herein were not formal discussions within the meaning of Section 10(e) of the Order, and the absence of evidence that the right of an individual employee to assistance or representation at a non-formal investigative meeting had been established by negotiations between the Respondent and the Complainant,

3/ See, U.S. Department of Agriculture, U.S. Forest Service Angeles National Forest, Pasadena, California, A/SLMR No. 339.

4/ Compare United States Air Force, McClellan Air Force Base, California, A/SLMR No. 830.

I find that the Respondent did not violate Section 19(a)(1) of the Order when it refused to allow Feurzig to be represented at the interviews involved herein. 5/ Accordingly, I shall dismiss the instant complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-5010(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 5, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

5/ In view of the disposition herein, I find it unnecessary to determine whether Feurzig, under the particular circumstances of this case, would be entitled to assistance or representation in the event that such rights had been negotiated by the parties.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:

UNITED STATES DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE
Respondent

and

NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 81, WESTERN REGION
Complainant

CASE NO. 70-5010

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For the Respondent

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For the Complainant

Before: PETER McC. GIESEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a proceeding brought under the terms of Executive Order 11491, as amended, (hereafter "the Order") by National Treasury Employees Union, Chapter 81, Western Region (hereafter, "the Union") against United States Department of the Treasury, Internal Revenue Service (hereafter, "IRS"). The Union asserts that IRS violated Section 19(a)(1) and (6) of the Executive Order by refusing to allow a Union representative to be present

at a management interview of a unit employee. The Interview in question was associated with the processing of a grievance filed by a unit employee based upon a reversal of his acting supervisor's approval of his request for reimbursement for the costs of a private course of study undertaken during non-working hours. The person whose interview is the subject of the asserted unfair labor practices was the acting supervisor who initially approved the grieving employee's request.

A hearing was held on January 29, 1976, in San Francisco, California. All facts are undisputed unless otherwise noted. Briefly, the record shows the following circumstances.

On September 16, 1974, an employee submitted a request for reimbursement for expenses incurred in taking a night school course to the Acting Assistant Branch Chief, Mr. Donald L. Feurzig. Feurzig approved the application.

On September 20, 1974, the Branch Chief disapproved the application. The submitting employee grieved the disapproval and the Union requested binding arbitration under the terms of the collective bargaining agreement.

Management assigned the case to Michael Sussman, a lawyer in the office of the IRS Chief Counsel. As counsel for IRS, Mr. Sussman conducted an investigation preparatory to the arbitration.

On May 12, 1975, Mr. Sussman, Robert Wilson, Staff Assistant to the Regional Counsel, Western Region, and Mr. Feurzig met. 1/ During the short (15 minutes) interview, it was determined that Sussman and Feurzig would meet on the following day in order to permit Sussman to learn Feurzig's version of the background of the grievance to be arbitrated. Feurzig requested that he be allowed"union representation" at the interview with Sussman. The parties stipulated that "that request was denied by IRS management." The parties agree that Feurzig was not an acting supervisor at this time and was a member of the bargaining unit for which the Union is the collective bargaining agent.

1/ Feurzig testified that a Mr. Sheean of the Union was also present at the meeting. Sussman and Wilson testified that only Sussman, Wilson and Feurzig attended the meeting.

On the following day, Feurzig met with Sussman and was interviewed. Feurzig was asked to explain the bases for his approval of the employee's reimbursement request. The substance of the course was discussed. Because Feurzig taught the course in his off duty time, he had detailed knowledge of its substance and informed opinions concerning its relevancy and value to the employee. During the interview, Feurzig was asked whether the grievant was "a good friend." He was also asked whether he had obtained agency authorization to engage in the "outside" occupation of teaching. Feurzig questioned the relevancy of this question at which he was "incensed." Sussman's reply was regarded by Feurzig as a "token explanation, maybe a question as to whether I was qualified to teach it."

At the conclusion of the interview, Sussman read "kind of a standard [Miranda 2/] thing " to Feurzig.

The statement, according to Sussman was as follows:

> I consider these matters confidential and request that you not discuss the questions and answers . . . or nature of the questions . . . and answers that I asked with any union personnel. If the union attorney or representative who prepares this case wants to talk to you, it is a voluntary matter and you do not need any management official or attorney present. My presence or Robert Wilsons is not necessary. You do not need permission, to notify us or to ask our permission, (and I believe that I added something to the effect that these specific questions and answers were the items that I felt were confidential and that any facts that came out during that he was free to discuss but not to bring up specific questions that I had asked him).

Parenthesis supplied.

2/ The transcript, at p.82, reads "a standard random thing." In part, because Mr. Sussman was answering my question at the time, I remember his use of "Miranda" which was apparently misunderstood by the reporter. The transcript is amended to reflect the correct testimony.

Feurzig asked Sussman by what authority he had thus been cautioned. Sussman replied that "as far as I knew there was authority" and that he would "attempt to find points and authorities to back this statement up." Sussman testified that "the matter did slip my mind."

Findings of Fact and Conclusions of Law

All witnesses were credible. Predictably, the memories of some were more precise than others. In all important respects, they were in agreement and the events concerning which they testified occurred as set forth, supra. I so find.

Respondent argues in a thoughtful and well researched brief that Feurzig was being interviewed only in connection with his duties as an acting supervisor, and was therefore shorn of any rights under the Order which he might have asserted as a member of the bargaining unit. He cites authority for the exclusion of acting supervisors from bargaining units.

The short answer to this argument is that, while the exclusion of an acting supervisor from the bargaining unit is a sound and proper application of precedent, there is no precedent in law or logic for the exclusion of a former acting supervisor. As more fully discussed, infra, the facts of this case present persuasive reasons for denying management the right unilaterally to determine in what circumstances it will or will not recognize the rank and file status of an employee who has in the past acted in a supervisory capacity. The parties have stipulated that Feurzig was a member of the unit at the time of the "interview," as such, he was entitled to all of the protections and rights afforded members of the unit by the Order.

Respondent argues that the Order afforded Feurzig no right to the presence of a representative in any case because the "interview" was not a formal discussion within the meaning of Section 10(e) of the Order. 3/

3/ In pertinent part;

* * *

The labor organization shall be given the opportunity to be represented at formal discussions . . . concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

I agree. If this employee had the right under the Order to representation at the "interview," it does not derive from Section 10(e) which is plainly intended to safeguard the bargaining obligations of the collective bargaining agent and is not addressed to the individual rights of the represented employees.

Finally, respondent asserts that the "administrative law judge. . . must adopt the rationale of the decisions previously decided by the Assistant Secretary." Counsel has also cited an impressive line of decisions supporting the proposition that an employee being interviewed in circumstances such as those demonstrated on this record is not entitled by the Order to representation and that the denial of such representation is not an unfair labor practice. 4/

If I agreed with counsel's first proposition, I would follow the precedent established by the cited authorities. However, in federal labor relations matters, an administrative law judge is not charged - as under most circumstances in which he acts - with the responsibility for formulation of a reviewable decision. Rather, he is obligated to render a recommendation to the Assistant Secretary. Such recommendations are subject to de novo determinations. In my opinion, the circumstances of the instant dispute militate to persuade that it is one of the rare instances in which the administrative law judge should recommend that the Assistant Secretary give hospitable consideration to the application of a principle articulated in a decision involving the private sector more than twenty years ago; 5/

4/ E.g., H.E.W., S.S.A., Great Lakes Program Center, A/SLMR 419 and cases cited therein; F.A.A., Cleveland ARTC Center, Oberlin Ohio, A/SLMR 430; F.A.A., National Aviation Facilities, Experimental Center, Atlantic City, New Jersey, A/SLMR 438. See also, N.A.S.A., Washington D.C., A/SLMR 457, remanded, FLRC No. 74A-95, dismissed A/SLMR 566.

5/ N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344 (1953).

> 'Cumulative experience' begets understanding and insight by which judgements. . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.

Id. at p. 349

Thus, in the interim between the Assistant Secretary's decisions in the cases exemplified by those cited at n. 4, the Supreme Court has had opportunity to consider the Labor Board's judgment in similar circumstances based upon "cumulative experience" of nearly forty years. In light of the Assistant Secretary's notation of the impending decision of the Court in N.L.R.B. v. J. Weingarten Inc., in his decision in F.A.A., Cleveland ARTC Center, Oberlin, Ohio A/SLMR 430, viz., "perhaps we shall soon have more definitive enlightenment on this line of cases," it appears appropriate that the Court's decision be considered here..

Preliminarily, the decision in N.L.R.B. v. J. Weingarten Inc., 420 U.S. 251 (1975) constitutes an examination of the decision of the Board, the historical development of that decision qua policy, and an explication of the rationale. Accordingly, I dismiss all argument that the Court "merely" determined that the decision was within the Board's authority. The Court examined the entire matter critically and at length, setting forth, inter alia, five criteria for determination of entitlement to representation during an investigatory interview.

> First, the right inheres in §7's guarantee to act in concert for mutual aid and protection.
>
> * * *
>
> Second, the right arises only in situations where the employee requests representation. * * *
>
> Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.

> * * *
>
> Fourth, exercise of the right may not interfere with legitimate employer prerogatives. * * *
>
> * * *
>
> Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. ***

95 S. Ct. at 963-964, citations and n. omitted.

Counsel for Respondent points out that Section 7 of the National Labor Relations Act, as amended, "has no counterpart" in the Order. While this is literally correct, I am persuaded by the Court's discussion of Section 7 of the Act, that the decision is addressed to that portion of concerted activity for the purpose of mutual aid or protection which is also subsumed in Sections 1 and 7 of the Order as an adjunct and protection of the right to bargain and to have a collective bargaining agent empowered meaningfully to act to "safeguard . . . not only the particular employee's interest, but also the interests of the entire bargaining unit . . . ." Weingarten at p. 925; see also the Court's discussion at pp. 963-964; cf., the Court's discussion of this matter in its opinion in Old Dominion Br. No. 496, Nat., Assn. Letter Car. v. Austin, 418 U.S. 264, 94 S.Ct. 2770 (1974);

> In this case, of course, the relevant federal law is Executive Order 11491 rather than the NLRA.
>
> * * *
>
> The basic provisions of the Executive Order establish a labor-management relations system for federal employment which is remarkably similar to the scheme of the National Labor Relations Act. Although several significant adjustments have been made to reflect the different structure and responsibilities of the governmental employer, it is apparent that the Order adopted in large part the provisions and policies of the NLRA as its model.

Id. at pp. 2775-2776, n.'s omitted. Moreover, at n.6, p. 2776 the Court observed, in part;

> Section 1 of the Order grants Federal employees the 'right freely and without fear of penalty or reprisal, to form join, and assist a labor organization' ... and provides that 'each employee shall be protected in the exercise of this right,' much as employees in the private sector are protected by §7 of the NLRA....

See also, the Court's discussion of distinctions between Section 7 of the NLRA and Section 1 of the Order at p. 2778, n. 13.

In light of the above, I am persuaded that an employee's right to representation in an investigatory interview inheres in Section 1 of the Order's guarantee that employee's may join together for mutual aid and protection.

Second, it is undisputed that Mr. Feurzig requested representation.

Third, Mr. Feurzig had bases for a reasonable belief that the investigation might result in disciplinary action. Thus, Sussman admits questioning Feurzig concerning his having obtained official permission to engage in "outside" employment (teaching a tax course). I found Mr. Sussman's explanation of the reason for this inquiry to be lame (Tr. 104). Perhaps Mr. Sussman was unaware of the effect of the question. However that may be, the record demonstrates its intimidating nature and the threat contained in the suggestion that personnel rules had been breached by the interviewee. Moreover, the statement with which Sussman closed the interview, in Sussman's words, a "Miranda thing," is plainly intimidating. Feurzig was told in an imprecise manner the kinds of information he was to withhold from his representative - and left to speculate concerning the consequences of disobedience. Had Feurzig no previous basis for believing that the interview might result in displinary action, the "Miranda thing" provided not a warning, but a threat.

Fourth, I find no substantial evidence or representation that the presence of the representative requested by Mr. Feurzig would have tended to interfere with any legitimate management prerogatives. Mr. Sussman's explanation for his "Miranda thing" (Tr. 107), that he wished to "keep within his file" his theory of the case until the arbitration hearing, impressed me as a less-than-precise endorsement of surprise as as a desirable trial strategy. Inappropriate in any litigation save that conducted on commercial television, it is particularly inappropriate to arbitration proceedings.

Last, I would point out that, in accordance with the criteria set fourth in Weingarten, supra, management is under no obligation to treat with the Union representative present during an investigatory interview. He is present at the behest of the member of the bargaining unit to advise him and act as his representative. Thus, no occasion for interference with legitimate management prerogatives is presented.

Recommended Order

It is recommended that the Assistant Secretary issue an order in the following form;

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of the Treasury, Internal Revenue Service, San Francisco Regional Office, shall:

1. Cease and disist from:

(a) Interfering with, restraining or coercing its employees by refusing to permit a representative of the collective bargaining agent to be present at investigatory interviews of memebers of the bargaining unit who request such representation and who reasonably believe that the investigation will result in disciplinary action.

(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 actions to effectuate the purpose of this Order.

(a) Post at its San Francisco Regional Office copies of the attached notice marked "Appendix" on forms furnished by the Assistant Secretary of Labor for Labor-Management Relations. Upon receipt of such forms, they shall be signed by a responsible management official 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. Care shall be taken that such notices are not altered, defaced or covered by any other material.

(b) Notify the Assistant Secretary of the steps taken in compliance with this order in writing, within 30 days of the date of this order.

Peter McC. Giesey
Administrative Law Judge

Dated: April 27, 1976
Washington, D.C.

A P P E N D I X

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 purposes 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 our employees by refusing to allow a representative of National Treasury Employees Union, Chapter 81, Western Region to attend investigatory interviews of members of the bargaining unit when requested by an employee who reasonably believes that the investigation will result in disciplinary action.

We will not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights under 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.

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May 5, 1977

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

63rd AIR BASE GROUP, U.S. AIR FORCE
NORTON AIR FORCE BASE, CALIFORNIA
A/SLMR No. 834

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 687 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order when it refused to negotiate with the Complainant on a matter which had been determined by the Department of Defense to be negotiable.

In recommending that the complaint be dismissed in its entirety, the Administrative Law Judge found that in determining that the matter was negotiable, the Department of Defense also determined that the matter was a non-mandatory subject of bargaining under the provisions of Section 11(b) of the Order. Therefore, in the Administrative Law Judge's view, until the negotiability determination was set aside or modified by the procedure provided by Section 11(c)(4) of the Order, the agency determination constituted the guidelines for future negotiations. Thus, the Administrative Law Judge concluded that the Respondent was free to bargain or not to bargain, and to agree or not to agree, on the subject matter in question.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed. In this regard, the Assistant Secretary noted that a subject which is non-mandatory at the outset of negotiations does not become mandatory merely because both parties considered it during their negotiations.

A/SLMR No. 834

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

63rd AIR BASE GROUP, U.S. AIR FORCE
NORTON AIR FORCE BASE, CALIFORNIA

Respondent

and

Case No. 72-6398(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 687

Complainant

DECISION AND ORDER

On February 4, 1977, Administrative Law Judge James L. Butler issued his Recommended Decision and Order 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 with respect to the Administrative Law Judge's Recommended Decision and Order.

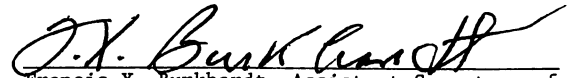
The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject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

Under the particular circumstances herein, I agree with the Administrative Law Judge that the Respondent did not violate Section 19(a)(1) and (6) of the Order by its refusal to consider further proposals pertaining to the assignment of custodial and janitorial duties to unit employees on the grounds that such matter was a non-mandatory or permissive subject under Section 11(b) of the Order. In my view, a subject which is non-mandatory at the outset of negotiations does not become mandatory merely because both parties consider it during their negotiations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-6398(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 5, 1977



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of	)	
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 687 Complainant	)	CASE NO. 72-6398
and	)	
DEPARTMENT OF AIR FORCE NORTON AIR FORCE BASE Respondent	)	

Maj. Timothy J. Dakin, USAF
Office of the Military Staff Judge Advocate
Headquarters, Military Airlife Command
Scott Air Force Base, Illinois 62225
For the Complainant

John V. O'Reilly, Esquire
3685 La Hacienda Drive
San Bernardino, California 92404
For the Respondent

Before: JAMES J. BUTLER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended. It was initiated by a complaint dated July 14, 1976, filed July 15, 1976. The complaint alleged a violation of Section 19(a)(6) of the Executive Order on the basis of Respondent's refusal to negotiate with the Complainant on a "matter" which, according to the complaint, "had been determined by proper authority to be negotiable." Details of the complaint were set forth in an instrument identified in the complaint as "Attachment 1" and documents pertinent to that instrument were included and identified in the complaint as "Attachments 2 through 12." Five issues appear. They are: (1) whether the Assistant Secretary has the delegated authority to review negotiability determinations made by an agency head; (2) whether the subject upon which Respondent refused to bargain was a non-mandatory subject of collective bargaining under the provisions of Section 11(b) of the Executive Order; (3) whether a subject which was non-mandatory at the outset of bargaining may become mandatory merely because a party exercises this freedom by not rejecting the proposal at once or sufficiently early; (4) whether Respondent's refusal to bargain as charged was consistent with its obligations in this regard outlined in the negotiability determination issued by the Department of Defense, the agency head; and ultimately, (5) whether Complainant has carried its burden of proving the allegations of the complaint by a preponderance of the evidence.

The Facts

It appears from the complaint and the attachments thereto that the current collective bargaining agreement between the parties hereto was negotiated during the months of January through March of 1975. The parties were unable to reach agreement on only one provision during that period. That proposal provided for the assignment of custodial and janitorial duties to employees of the unit. Following an exchange of proposals and counterproposals related to the unresolved provision of the agreement, Respondent declined to negotiate further, contending that the matter was not a mandatory subject of bargaining under Section 11(b) of the Executive Order. The overall agreement was then concluded with the disputed

provision omitted. On the same day the parties concluded a subsidiary agreement providing that Complainant would submit the matter to a higher agency pursuant to Section 11(c) of the Executive Order for determination of negotiability and, further, that upon receipt of such a determination, the parties would thereupon meet to further negotiate the provision under the terms of the determination sought.

The Complainant then sought, and after some correspondence, obtained a negotiability determination from the Department of Defense on November 28, 1975. Among other things, the negotiability determination clearly indicated that the matter of the assignment of custodial and janitorial duties to employees of the unit involved was a subject which fell within the provisions of Section 11(b) of the Executive Order which 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. 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."

The determination further indicated that while Respondent was permitted to negotiate over the subject matter in question, it was not obligated to do so. The decision letter succinctly outlined Respondent's obligation to negotiate over a permissive or non-mandatory subject of bargaining as follows:

> "... Furthermore, having entered into negotiations on an 11(b) matter, management is not bound to continue to the point of agreement or impasse but may decide at any time to exercise its option not to bargain on the

> matter. However, management cannot advance its own proposal on an 11(b) matter while at the same time declining to negotiate on a union proposal covering substantially the same subject."

On January 21, 1976, the Complainant requested that the parties resume negotiations in the light of the negotiability determination of the Department of Defense. The Respondent replied on February 9, 1976, indicating that it was willing to resume negotiations as requested.

Consequently, Complainant tendered a new proposal on the controversial provision which incorporated some modifications to its last proposal submitted prior to the determination request. Respondent in turn submitted its counterproposal dated February 19, 1976, which deleted any and all reference to the theretofore heated subject of the assignment of custodial and janitorial duties to employees of the unit. Thereafter, at a meeting of the parties on February 20, 1976, the two proposals were discussed. It was on this occasion that Respondent stated that while it would continue to negotiate on other unresolved provisions of the contract, it would exercise its 11(b) option and no longer bargain on the matter of the assignment of custodial and janitorial duties and it then withdrew all of its prior proposals which addressed themselves in any respect to that particular subject matter. Subsequently, Complainant charged Respondent with a violation of Section 19(a)(6) of the Executive Order and, as grounds therefor, cited its refusal to bargain on the matter which was the subject of the negotiability determination.

Discussion, Preliminary Findings and Conclusions

There was no oral evidence presented in this case by either party. A consideration of the whole record developed, as it was, solely by the introduction of documentary material, readily discloses the fact that the pivotal question underlying the controversy at hand was plainly one of negotiability and as such was exclusively within the jurisdiction of the Federal Labor Relations Council under the explicit terms of Section 11(c)(4) of the Executive Order which provides that:

> "A labor organization may appeal to the Council for a decision when--

"(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

"(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation or appropriate authority outside the agency, or this Order, or are not otherwise applicable to bar negotiations under paragraph (a) of this section."

It is only when there is an alleged "unilateral change in, or addition to, personal policies and practices or matters affecting working conditions" and the acting party is charged with a refusal to consult, confer or negotiate, that the jurisdiction of the Assistant Secretary may be initially brought into play in order to make determinations of negotiability necessary to resolve the merits of such a complaint.

In the instant and in like situations, however, any open questions of negotiability involving a contest by a union of an agency's determination and designation of a topic as being either a mandatory or permissive subject of collective bargaining must first be resolved after timely appeal by the union to the Council before that union may properly attempt to invoke the jurisdiction of the Assistant Secretary in an unfair labor practice proceeding under Section 19(a)(6) of the Executive Order.

The complaint filed in this matter charges that Respondent refused to negotiate "on a matter which had been determined by proper authority to be negotiable." That is all very true. But what the union either fails to perceive or refuses to accept is the fact that the "matter" on which Respondent admittedly refuses to negotiate is a topic which the same "authority" determined to be a non-mandatory subject of collective bargaining under the provisions of Section 11(b) of the Executive Order. Stated more specifically, the matter of the assignment of custodial and janitorial duties to employees of the unit involved here has been determined by the Department of Defense to be a permissive subject of bargaining. Accordingly, while this determination stands, the right of the union to urge this non-mandatory subject of bargaining ceases short of ultimate insistence. As to non-mandatory matters "each party is free to bargain or

not to bargain, and to agree or not to agree." N.L.R.B. v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 349, 78 S.Ct. 718, 722, 2 L.Ed. 2d 823 (1958).

Even Complainant in its oral argument in support of its complaint, was forced for a moment to acknowledge the permissive character of the matter in question when it advanced what one court has termed "the ingenious contention" that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom by not rejecting a proposal at once, or sufficiently early. The opinion in the case, N.L.R.B. v. Davidson, 318 F.2d 550 (4th Cir. 1963) undermined this position so effectually that there has been little attempt since to occupy the weakened ground. Beginning with the last paragraph in the outside column of page 557 of the report the court ruled as follows:

"Arlington advances the ingenious contention that even if the indemnity proposal was not initially a mandatory subject of bargaining, it became one by reason of the lengthy consideration that it was accorded. A determination that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matters. Parties might feel compelled to reject non-mandatory proposals out of hand to avoid risking waiver of the right to reject."

Quite obviously, so long as the original negotiability determination stood unchallenged, the union involved here had no valid quarrel with Respondent's actions or, if you will, inaction in the instant matter. Instead, the union's quarrel is with the agency determination which allowed the Respondent to refuse to bargain further on the subject of the assignment of custodial and janitorial duties after it refrained from further advancing its own proposals on that topic and withdrew all of its past proposals related to the matter. The union, if it believed that the negotiability determination of the Department of Defense was contrary to applicable law, should have turned its guns on that agency, not the Respondent. The union should not now be allowed to collaterally attack the negotiability determination

by means of a Section 19(a)(6) proceeding after, for some unknown reason, failing to avail itself of the prescribed appellate procedure allowed it under the Executive Order.

The Respondent in this case, no matter how arbitrary its actions may have appeared to the union, was nevertheless in strict compliance with the very letter of the negotiability determination furnished at the union's request. Unless and until a negotiability determination by a higher agency is set aside or modified by the exclusive procedure provided by Section 11(c)(4) of the Executive Order, the agency determination constitutes the applicable guidelines by which the parties contemplated must fix the course of their future negotiations. Of course, had the union offered any evidence whatsoever that Respondent's refusal to negotiate was in conflict in any manner with the negotiability directive of the higher agency, we would be confronted here with an entirely different matter and one over which the Assistant Secretary enjoys jurisdiction under the provisions of Section 19(a)(6) of the Executive Order. The fact that Complainant, although provided the opportunity to do so, chose not to even attempt to offer any evidence in this regard is in itself indicative of the fact that no such violation took place. To the contrary, it is manifestly clear that the refusal of Respondent to negotiate as charged was expressly permissible and even invited under the terms and conditions of the negotiability determination then in force.

Thus, it is seen that the topic of the assignment of custodial and janitorial duties to employees of the unit involved is, at least for the purpose of this inquiry, a non-mandatory or permissive subject of collective bargaining simply because it was so designated by the unchallenged negotiability determination issued by the Department of Defense. The Assistant Secretary has no authority to disturb the agency head's interpretation in this respect even if he should be so inclined.

There is also some insistence by Complainant, but no evidence in the record to support the contention, that Respondent did not comply with the terms and conditions of the negotiability determination before it refused to negotiate further on the subject contemplated. In the absence of any showing to the contrary, however, it must be concluded that Respondent's refusal to negotiate was

validly made in full accordance with the determination. So long as Respondent acted within the scope of the guidelines set down in the determination, it is all but impossible to conceive any supportable basis for the complaint. Indeed, it is difficult to imagine how the management of an agency can, at one and the same time, be both in full compliance with a negotiability determination and guilty of an unfair labor practice.

Finally, it now must be vividly clear that the real quarrel in this whole affair necessarily has to be between the union and the negotiability determination of the Department of Defense which allowed management to escape bargaining to an impasse on what is a seemingly crucial subject from the viewpoint of the union. As pointed out before, the only forum before whom this confrontation could have taken place is the Federal Labor Relations Council as provided in Section 11(c)(4) of the Executive Order. (The rules of the Council provide that an appeal of a negotiability issue must be submitted within 30 days after the agency head's determination was served on the labor organization. 5 C.F.R. § 2411.24(a)) The propriety of this inflexible jurisdictional rule is aptly demonstrated here where the Assistant Secretary, if he had been delegated the questionable authority to do so, could very well find himself in the wholly untenable position of having to overturn a negotiability determination made by the head of another executive department in order to arrive at a decision on the merits of a Section 19(a)(6) matter.

Ultimate Findings and Conclusions

Upon the basis of the entire record and for the reasons hereinabove set forth, I make the following ultimate findings of fact and conclusions of law, not one of which is exclusively one and not the other:

1. That the negotiability determination of the Department of Defense stipulated, in effect, that the cessation by Respondent of the advancement of all proposals on the matter of the assignment of custodial duties to employees of the unit in question was required as a negative condition subsequent to the continuing designation of that topic as a non-mandatory or permissive subject of collective bargaining under the terms of Section 11(b) of the Executive Order;

2. That in the absence of any evidence to the contrary, it is conclusively presumed that Respondent honored this restrictive condition as averred in its written response to the complaint;

3. That the Complainant did not appeal the negotiability determination of the Department of Defense to the Federal Labor Relations Council and, accordingly, the same was in full force and effect and binding on the parties at issue at all times under consideration here; and,

4. That the Complainant has failed to sustain its burden of proving the allegations of the complaint by a preponderance of the evidence (29 C.F.R. § 203.15).

Recommendation

For the above assigned reasons, findings and conclusions, it is recommended that the complaint be dismissed.

Ancillary Order

The suggested recommendations together with supportive rationale requested of the parties at the conclusion of the hearing should be withheld.

JAMES J. BUTLER
Administrative Law Judge

Dated: February 4, 1977
San Francisco, California

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 JERSEY DEPARTMENT OF DEFENSE,
NEW JERSEY AIR NATIONAL GUARD,
177TH FIGHTER INTERCEPTOR GROUP
A/SLMR No. 835

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3486, AFL-CIO (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral change of the minimum military re-enlistment term for New Jersey Air National Guard members from one year to three years, which military enlistment is a mandatory condition of employment for civilian technicians of the Guard.

The Administrative Law Judge found, and the Assistant Secretary concurred, that the Respondent was not obligated to afford the Complainant an opportunity to meet and confer on the decision to change the minimum term for military re-enlistments in the Guard, as such decision was outside the scope of the bargaining requirements of the Order. However, the Assistant Secretary did not adopt the Administrative Law Judge's finding that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to afford the Complainant an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized to effectuate the decision and on the impact of the decision on adversely affected employees. In this regard, the Assistant Secretary noted that the record indicated that military membership in the Air National Guard is, by statute, a prerequisite for civilian employment as an Air National Guard Technician. In the Assistant Secretary's view, the Respondent's decision to change the minimum term for military re-enlistments did not change a working condition which was bargainable in any respect under the Order, but, rather, changed a precondition for civilian technician employment which is outside the purview of the Order and is solely governed by statute. Under these circumstances, the Assistant Secretary found that there were no procedures or impact over which the Respondent had an obligation to bargain.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 835

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NEW JERSEY DEPARTMENT OF DEFENSE,
NEW JERSEY AIR NATIONAL GUARD,
177TH FIGHTER INTERCEPTOR GROUP

Respondent

and

Case No. 32-4381(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3486, AFL-CIO

Complainant

DECISION AND ORDER

On December 10, 1976, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order 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 recommendations, only to the extent consistent herewith.

The instant complaint alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral change of the minimum military re-enlistment term for New Jersey Air National Guard members from one year to three years, which military enlistment is a mandatory condition of employment for civilian technicians of the Guard.

The Administrative Law Judge concluded that the Respondent was not obligated to afford the Complainant an opportunity to meet and confer on the decision to change the minimum term for military re-enlistments. However, he found that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to afford the Complainant an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be utilized to effectuate the decision and on the impact of the decision on adversely affected employees. He also concluded that although the Respondent apparently afforded the Complainant the opportunity to meet and confer concerning the implementation and impact of its decision some three months after the change became effective, this could not absolve the Respondent of its unfair labor practice.

I concur with the Administrative Law Judge's determination that the Respondent was not obligated to afford the Complainant an opportunity to meet and confer on its decision to change the minimum term for military re-enlistments as such decision was outside the scope of the bargaining requirements of the Order. However, contrary to the Administrative Law Judge, I find also that, under the particular circumstances herein, the Respondent was not obligated under the Order to afford the Complainant an opportunity to meet and confer on the procedures to be utilized in effectuating the implementation of its decision and on the impact of its decision on adversely affected employees.

The record shows that military membership in the Air National Guard is, by statute, a prerequisite for civilian employment as an Air National Guard Technician. However, while certain of the terms and conditions of civilian employment as an Air National Guard Technician are subject to the bargaining requirements of the Order, military membership in the Air National Guard is a wholly separate enlistment contract which is mandated by statute and controlled by the regulations which implement that statute. 1/ In this connection, I note that the June 20, 1975, directive, issued under the authority of the Chief of Staff, New Jersey Department of Defense, did not address terms and conditions of employment for civilian technicians, but, rather, established a new policy for all military units of the New Jersey Air National Guard, including the Respondent, with respect to military re-enlistment procedures. Thus, the directive increased the minimum term for military re-enlistment for prior service personnel from one year to three years effective July 1, 1975.

In my view, the change in military re-enlistment procedures did not change a working condition which was bargainable in any respect under the Order, but, rather, changed a precondition for civilian technician employment which is outside the purview of the Order and is solely

1/ See Association of Civilian Technicians, Inc. and State of New York National Guard, FLRC No. 72A-47. See also Tennessee et al v. Dunlap, 426 U.S. 312 (1976).

governed by statute. 2/ Under these circumstances, I find that there were no procedures or impact over which the Respondent had an obligation to bargain. Accordingly, I shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 32-4381(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 5, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

2/ See Association of Civilian Technicians, Inc. and State of New York National Guard, cited above.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
NEW JERSEY DEPARTMENT OF DEFENSE, NEW JERSEY AIR NATIONAL GUARD, 177th FIGHTER INTERCEPTOR GROUP	:	
Respondent	:	
and	:	Case No. 32-4381 (CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, Local 3486	:	
Complainant	:	

Homer R. Zink, Esquire
1 Palmer Square
Princeton, New Jersey 08540

For the Respondent

Joseph F. Girlando
National Representative
American Federation of Government Employees
300 Main Street
Orange, New Jersey 07050

For the Complainant

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on December 31, 1975, under Executive Order 11491, as amended, by the American Federation of Government Employees (AFGE), AFL-CIO, Local 3486 (hereinafter called the Complainant or Union) against the New Jersey Department of Defense, New Jersey Air National Guard, 177th Fighter Interceptor Group (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Regional Administrator for the New York Region.

The complaint alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by unilaterally changing and establishing the minimum military reenlistment term for New Jersey Air National Guard members from one year to three years, which military enlistment is a mandatory condition of employment for civilian technicians of the Guard.

A hearing was held in this matter before the undersigned in Pomona, New Jersey. The Respondent moved at the outset of the hearing to dismiss the complaint. Decision on the motion was reserved. Both parties were afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter, the parties submitted briefs.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

In June 1975 the Complainant was, and it continues to be, the exclusive representative of a unit of federal employees, called technicians, employed by the Respondent, the 177th Fighter Interceptor Group, New Jersey Air National Guard.

Pursuant to the National Guard Technicians Act of 1968, these technicians must, as a prerequisite to their civilian employment with the Guard, become members of the Guard in a military capacity and hold the military grades required for their positions. Civilian employment is terminated where the concurrent military status ceases to exist. 32 U.S.C. §709(b), (e)(1). The concept of the technician program is that the technicians will serve concurrently in three different ways: (a) perform full-time civilian work in their units; (b) participate in scheduled military training periods, such as weekend drills and fifteen days summer camp during each year; and (c) be available to enter full-time military service in their military grades at any time their units are called to active duty.

Enlistment policies of the New Jersey Air National Guard are established by the Chief of Staff, New Jersey Department of Defense, pursuant to guidelines of the National Guard Bureau in Washington, D.C. The Chief of Staff is the New Jersey equivalent of the "Adjutant General," sometimes referred to in the applicable statutes and regulations.

During the period March 14, 1972 to November 1, 1975, Air National Guard Manual 39-09(C1) authorized the states to allow military members of the Air National Guard to voluntarily extend their enlistments for a minimum term of one year. (Joint Exhibit 6).

On June 20, 1975, Major General Joseph P. Zink, New Jersey Air National Guard, under authority of the Chief of Staff, New Jersey Department of Defense, issued a directive to all units of the New Jersey Air National Guard, including the Respondent, which established a new policy with respect to enlistment/reenlistment procedures. The directive increased the minimum term for reenlistment for prior service personnel to three years effective July 1, 1975. (Joint Exhibit 1). Such action was taken by General Zink, after conversations with National Guard Bureau officials, because of concern that, due to the one year enlistment option, and the operation of Department of Defense Directive 1235-10,

which provides that individuals with only six months or less remaining on their enlistment are exempt from mobilization, large numbers of Guardsmen would not be available for active duty in the event their units were mobilized in a national emergency. This potential personnel loss reduced the mobilization readiness posture of the New Jersey Air National Guard. The new directive was designed to correct this situation.

The Respondent Activity was made aware of the directive by at least June 25, 1975. (Joint Exhibit 1). There was never an attempt to discuss the matter with the Union, nor to inform the Union representatives of the change in enlistment policy prior to its implementation on July 1, 1975.

The Union learned of the change in policy in July 1975. A number of technicians were due for re-enlistment in the Air National Guard and were immediately confronted with the change. The Union authorized Richard L. Apothaker to speak to the Respondent to discuss the impact of the change. Members of the Union were concerned about such matters as (1) whether, if they reenlisted for the new minimum term of three years as a condition of employment, and subsequently terminated their civilian technician employment, they could be discharged from their military status; (2) the adequacy of the 30 day time span between required reenlistment or termination of civilian employment, in view of the change in the minimum enlistment period and the need to make immediate personal decisions as to career, geographic location, etc., and (3) whether transfer to the Army National Guard, which had only one year enlistments at the time, would be possible.

Mr. Apothaker requested to meet with Col. Welsey Hannon, Respondent's base detachment commander, concerning the impact of the reenlistment change, but was advised by Col. Hannon that the change was a military matter which did not concern the Union, and, in any event, it was not his policy and the Union should address General Zink. The Union also attempted to raise the matter with the Respondent during negotiation meetings concerning a collective bargaining

agreement, but the Respondent stated that the change in enlistment policy was a military matter and would have to be resolved through different channels. Similarly, General Zink, when contacted by Mr. Apothaker, stated that he would discuss the military policy through military channels, or on personal man-to-man basis, but could not do so in a labor management capacity.

Between July 1, 1975 and October 3, 1975 civilian technicians Apothaker, Lewis, and Devers each attempted to re-enlist in the Air National Guard for a period of one year. Respondent refused each of them this option and offered each a minimum of a three year enlistment consistent with the new policy. When these individuals did not re-enlist in the Air National Guard, they were each provided thirty days notice pursuant to 32 U.S.C. §709(e)(6), and their employment as civilian technicians was terminated.

On October 3, 1975, the National Guard Bureau discontinued, as of November 1, 1975, the authority granted to the fifty states, Puerto Rico, and District of Columbia for optional one year extensions of military enlistments, and imposed, on a national basis, a three year minimum for extensions and reenlistments as of that date. (Joint Exhibit 6). The concern which prompted this change was the same as that which prompted General Zink to make the change in the New Jersey Air National Guard some four months earlier: One year reenlistments resulted in large numbers of military personnel being unavailable for recall to active duty, due to the provisions of the Department of Defense directive, which was detrimental to the readiness and capability of the Air National Guard to fight in the event of mobilization in a national emergency.

On October 7, 1975 representatives of the Union and Respondent met to discuss the July 1, 1975 change in reenlistment policy in the New Jersey Air National Guard. Subsequently, on December 17, 1975, the New Jersey Department of Defense issued a Memorandum of Understanding to the American Federation of Government Employees which provided, in part:

"2. New Jersey Air National Guard Technicians separated from their technician positions prior to their Expiration of Term of Service may request and be granted termination of their military enlistment, provided there is no remaining service obligation. The provisions of this memorandum will not be applicable in the event of any Air National Guard mobilization."

The issuance of this "Memorandum of Understanding," concerning termination of military enlistment in the New Jersey Air National Guard by separated technicians, was within the discretionary authority of the New Jersey Department of Defense, as provided by Air National Guard Regulation 39-10. Prior to the issuance of the "Memorandum of Understanding," the policy and practice of the New Jersey Air National Guard was the same as stated in the memorandum. However, until December 17, 1975, the specific policy was not in writing, and this lack of a formal policy in writing caused the civilian technicians to have some uncertainty as to whether termination of their military enlistment would follow, upon request, after separation from technician status, except in the event of mobilization.

The December 17, 1975 "Memorandum of Understanding" satisfied the primary concern which the Union had when it learned of the change in re-enlistment policy in July 1975. Two individuals, Richard L. Apothaker and Fred Lewis, who were separated from their technician positions when their requests to reenlist for one year terms were refused and they did not reenlist for the minimum term of three years, testified that they would have reenlisted for the minimum term of three years had the "Memorandum of Understanding" been in existence at that time.

Discussion, Conclusions, and Recommendations

The decision of the Chief of Staff, New Jersey Air National Guard, to change the minimum term for reenlistment is the New Jersey Air National Guard from one to three years was a decision by Agency Headquarters, applicable uniformly to more than one subordinate activity, and was not

subject to negotiation at the local level. Cf. Alabama National Guard, A/SLMR No. 660 (1976); United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, FLRC 71A-15. There is no evidence that a collective bargaining agreement existed at the time, thus the new policy did not attempt to unilaterally supersede or modify the terms of an existing negotiated agreement. See Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi, A/SLMR No. 390.

Moreover, the Federal Labor Relations Council has held that although military membership in the National Guard is a prerequisite for civilian employment as a National Guard technician, that precondition is outside the scope of bargaining under Section 11(a) of the Order, and "is a wholly separate enlistment contract which is mandated by statute and controlled by the regulations which implement that statute." Association of Civilian Technicians, Inc. and State of New York National Guard, FLRC No. 72A-47 (Dec. 27, 1973). See also State of Tennessee et al. v. Dunlop, ___U.S.___, 96 S. Ct. 2099 (1976).

Accordingly, I conclude that the Agency was not obliged to afford Complainant the opportunity to meet and confer on the decision to effectuate a change in the minimum term for reenlistment from one to three years as accomplished by the June 20, 1975 directive.

Notwithstanding the fact that a particular management decision is non-negotiable, agency or activity management is required under the Order to afford the exclusive representative timely notice of its decision and, upon request, 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. New Mexico Air National Guard, A/SLMR No. 362; Pennsylvania Army National Guard, A/SLMR No. 475.

The enlistment contract in the Air National Guard is for military service to be fulfilled by all members of the Guard, regardless of the nature of their civilian employment. However, the June 20, 1975 change in the required minimum period for enlistment had an effect peculiar to civilian technicians of the Guard and materially changed the terms and conditions of employment of certain of the unit employees. In order for

certain unit employees to retain their civilian jobs by remaining members of the National Guard, pursuant to the National Guard Technicians Act, they were required, by the June 20, 1975 change, to make a new commitment, upon the expiration of their current enlistment, for three additional years of military service instead of one additional year as before.

The evidence establishes that certain of the unit employees had grave concerns about the implementation and impact of the change. The evidence also establishes that the Respondent did not previously notify the Complainant of the June 20, 1975 change in policy and that the Complainant did not have actual knowledge of the change until after it had been implemented on July 1, 1975. There is no evidence that there was any overriding exigency which precluded Respondent from providing Complainant with the change in policy in sufficient time to permit it to review the change and to request bargaining as to its implementation and impact before it was implemented or had any impact. Although Respondent apparently afforded Complainant the opportunity to meet and confer concerning implementation and impact some three months after the change became effective, this cannot absolve Respondent of its unfair labor practice. Cf. Small Business Administration, Richmond, Virginia, District Office, A/SLMR No. 674; Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656, at footnote 6.

In my view, Respondent violated Section 19(a)(6) of the Order by failing to inform the Complainant of the change in policy prior to its effectuation and, thereby, failed to 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 higher level decision of June 25, 1975 changing the reenlistment policy, and on the impact of the decision on adversely affected employees. Further, such refusal to meet and confer with the bargaining representative necessarily tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order and, therefore, also is violative of Section 19(a)(1) of the Order.

The remedy herein should be consistent with the scope of the violation found. In view of the admission by Union representatives that the December 17, 1975 "Memorandum of Understanding" satisfied the primary concern which the Union had concerning the implementation and impact of the change in re-enlistment policy, an appropriate remedy, in my judgement, would be to require Respondent to re-evaluate all separations from technician employment by reason of failure to reenlist in the Air National Guard that occurred between July 1, 1975 and December 17, 1975, and afford each individual the opportunity to reenlist subject to the provisions of higher command directives and the provisions of the December 17, 1975 "Memorandum of Understanding," and, if such reenlistment is accomplished, reinstate such employee to the position he held and make him whole for any loss of back pay consistent with laws, regulations, and decisions of the Comptroller General. Respondent should also be required to cease and desist from engaging in such unfair labor practices in the future.

Recommendations

Upon the basis of the aforementioned findings, conclusions, and the entire record, I recommend that the Assistant Secretary:

1. Deny Respondent's motion to dismiss;

2. Dismiss the alleged violation by Respondent of Section 19(a)(1) and (6) of the Order by virtue of having issued the June 20, 1975 change in reenlistment policy without meeting and conferring with the Complainant Union;

3. Adopt the following order designed to effectuate the purposes of Executive Order 11491, as amended, in view of the conclusion that Respondent violated Section 19(a)(1) and (6) of the Order by failing to afford the Complainant an opportunity to meet and confer with regard to the procedures to be utilized to effectuate the implementation of the June 25, 1975 change in reenlistment policy and with regard to the impact of such change on adversely affected employees.

Recommended Order

Pursuant to Section 6(b) of the Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the New Jersey Department of Defense, New Jersey Air National Guard, 177th Fighter Interceptor Group, shall:

1. Cease and desist from:

(a) In the absence of an overriding exigency, failing to notify Local 3486, American Federation of Government Employees, AFL-CIO, or any other exclusive representative, of any directive or instruction received from a higher command changing the minimum term for reenlistment in the Air National Guard, or any other term or condition of employment, and, upon request, affording such representative the opportunity to meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the higher level decision and on the impact such decision will have on the employees adversely affected by such action.

(b) In any like or related matter, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) In the absence of an overriding exigency, notify Local 3486, American Federation of Government Employees,

AFL-CIO, or any other exclusive representative, of any directive or instruction received from a higher command changing the minimum term for reenlistment in the Air National Guard, or any other term or condition of employment, and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the higher level decision and on the impact such decision will have on the employees adversely affected by such action.

(b) Reevaluate all separations from technician employment by reason of failure to reenlist in the Air National Guard that occurred between July 1, 1975 and December 17, 1975, and subject to the provisions of higher command directives and the provisions of the December 17, 1975 "Memorandum of Understanding," afford each individual the opportunity to reenlist and, if such reenlistment is accomplished, reinstate such employee to the position he held and make him whole for any loss of back pay consistent with laws, regulations, and decisions of the Comptroller General.

(c) Post at the facilities of the New Jersey Department of Defense, New Jersey Air National Guard, 177th Fighter Interceptor Group, 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 sixty (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 herein.

Garvin Lee Oliver
GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 10, 1976
Washington, D.C.

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 interfere with, restrain, or coerce our employees in the exercise of their rights assured by Executive Order 11491, as amended.

WE WILL, in the absence of an overriding exigency, notify Local 3486, American Federation of Government Employees, AFL-CIO, or any other exclusive representative, of any directive or instruction received from a higher command changing the minimum term for reenlistment in the Air National Guard, or any other term or condition of employment, and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the procedures to be utilized in effectuating the higher level decision and on the impact such decision will have on the employees adversely affected by such action.

WE WILL reevaluate all separations from technician employment by reason of failure to reenlist in the Air National Guard that occurred between July 1, 1975 and December 17, 1975, and, subject to the provisions of higher command directives and the provisions of the December 17, 1975 "Memorandum of Understanding," afford each individual the opportunity to reenlist and, if such reenlistment is accomplished, reinstate such employee to the position he held and make him whole for any loss of back pay consistent with laws, regulations, and decisions of the Comptroller General.

_____
(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: 26 Federal Plaza, Room 1751, New York, New York 10007.

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 THE AIR FORCE,
HEADQUARTERS, 317TH COMBAT SUPPORT GROUP,
POPE AIR FORCE BASE, NORTH CAROLINA
A/SLMR No. 836

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, Local 2364, AFL-CIO (Petitioner) seeking to include the classification of Supervisory Firefighter, GS-081-06 (GS-6) and GS-081-07 (GS-7), in its exclusively recognized unit. In this regard, the Activity contended that the employees in these classifications are supervisors within the meaning of Section 2(c) of the Order. Contrary to the Activity, the Petitioner, the incumbent exclusive representative contended that the classifications in question are not supervisory within the meaning of the Order in that the duties they perform are routine in nature and do not require the use of independent judgment.

The Assistant Secretary found that Supervisory Firefighters, GS-6, who act as Station Captains at Station No. 2 for 6 to 9 months a year, were not supervisors within the meaning of Section 2(c) of the Order and should be included in the exclusively recognized unit.

With respect to the classification of Supervisory Firefighter, GS-7, the Assistant Secretary found that the employee in that classification was a supervisor within the meaning of Section 2(c) of the Order in that he responsibly directs employees in connection with the firefighting and rescue procedure operations at the Activity's remote landing zones and responsibly makes and adjusts leave schedules of all the firefighters on the Activity's yearly leave break rosters.

Accordingly, the Assistant Secretary clarified the exclusively recognized unit by including in such unit the Supervisory Firefighters, GS-6, and excluding from such unit the Supervisory Firefighter, GS-7.

A/SLMR No. 836

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
HEADQUARTERS, 317th COMBAT SUPPORT GROUP,
POPE AIR FORCE BASE, NORTH CAROLINA

Activity

and

Case No. 40-7582(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2364, AFL-CIO

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 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 submitted by the parties, the Assistant Secretary finds:

The American Federation of Government Employees, Local 2364, AFL-CIO, herein called AFGE, filed a petition for clarification of unit (CU) seeking to clarify its currently recognized unit at Pope Air Force Base 1/, herein called the Activity, by including in the unit the classifications of Supervisory Firefighter, GS-081-06 and GS-081-07. In this regard, the Activity contends that the employees in these classifications are supervisors within the meaning of Section 2(c) of the Order. 2/ Conversely, the AFGE contends that the employees in the classifications in question are not supervisors within the meaning of the Order in that the duties they perform are routine in nature and do not require the use of independent judgment.

The Fire Department (or Fire Protection Branch) at the Activity is responsible for structural and aircraft fire prevention and protection. It has 91 employees of whom 41 are civilian. The civilian work force consists of the Chief (GS-11); three Assistant Chiefs (GS-9); a clerk typist (GS-3); five inspectors in the fire inspection branch (GS-5 through GS-8); and an operations branch composed of one Supervisory Firefighter (Airfield) (GS-7); four Supervisory Firefighters (Airfield) (GS-6); 11 Firefighter/Driver Operators (GS-5); and 15 Firefighters (GS-5). The military complement consists of a United States Air Force Master Sergeant assigned as Deputy Chief, two Technical Sergeants (equivalent to GS-7); two Staff Sergeants (equivalent to GS-6); and 45 military personnel who are firefighters and equivalent to GS-3 through 5.

There are two fire stations operating within the Fire Department, Stations Nos. 1 and 2, which are on the base and separated by a distance of about one-half mile. The Chief and Assistant Chief on duty are located at the main fire station, Station No. 1. Their offices and sleeping facilities are in the main station. Station No. 2 is principally a structural fire fighter station with the responsibility of being the first "run pumper" (truck) that is dispatched in the event of a structural fire on the base.

The classifications in dispute herein are the four civilian GS-6 and the one GS-7 Supervisory Firefighters (Airfield). The record reveals that the four GS-6 employees in this classification are assigned as the Station Captains of Station No. 2 for periods of 6-9 months a year. During this time, they are physically located at Station No. 2 during their entire tour of duty, 24 hours per day, 3 times per week. Additionally, they are called upon to act as the Station Captains at Station No. 1 between 2 and 3 times per month (for 24 hours each time) during the remaining part of the year that they are physically located at the main fire station. At all other times, they function as crew chiefs.

The GS-7 Supervisory Firefighter is principally concerned with directing firefighting and rescue activities at locations termed "landing zones". These zones are used for the landing of aircraft picking up and unloading troops and equipment and are located at remote sites located anywhere from 20 to 30 miles from the main fire station. At all other times, the GS-7 Supervisory Firefighter is located in Station No. 1. In the past, the employee in the GS-7 classification has been used to fill the position of Station Captain.

1/ The AFGE was granted exclusive recognition pursuant to Executive Order 10988 on July 17, 1964. Its currently recognized unit includes all General and Wage Schedule employees of the Pope Air Force Base.

2/ There are four Supervisory Firefighters, GS-081-06 and one Supervisory Firefighter, GS-081-07, whose positions are in dispute.

Supervisory Firefighters GS-6

The record indicates that when the Supervisory Firefighters GS-6 act as Station Captains at Station No. 2, they are in charge of the station, its four or five personnel and its fire equipment. 3/ In the day-to-day operations of Station No. 2, the evidence establishes that the equipment and "in-house" details performed by the firefighters are routine and require little or no follow-up supervision. Thus, the Station Captains follow a work schedule prepared by the base fire chief outlining building, grounds, and vehicle maintenance which will be performed each day of the week, i.e., grass cutting, window washing, and waxing of the floors and vehicles. Further, the Station Captains who are not required to perform these tasks assign the tasks outlined in the work schedule to the crew members. The record reveals that crew members know, as a routine matter, what tasks they will perform. 4/ Furthermore, the Department of the Air Force's Operating Instructions (OI's) dictate the particular responsibilities and duties of the Station Captains (DEF-OI 92-10) and the Crew Chiefs (DEF-OI 92-11).

The record indicates that in case of a structural fire, the Station Captains, if they are first at the scene, take charge of the situation, including ordering more equipment to the scene if necessary, until such time as someone senior to them (the Assistant Chief or Chief) arrives and takes over their duties and responsibilities. However, the record reflects that the Station Captain is seldom first on the scene and seldom in charge of the operation. Moreover, once the fire crew arrives at a fire and sets up the fire equipment their duties are usually routine in nature.

The record reveals that Station Captains wear white shirts with their dress uniform as do the Chief and Assistant Chief, while the remaining personnel wear blue shirts. Also, at a fire the Station Captain wears a distinguishing red fire hat. The record indicates that Station Captains have no authority to hire, lay-off, recall or discharge employees. They do attend "supervisory" meetings (attended by GS-7's, GS-9's, the military line Station Captains, the Deputy Fire Chief and the training Non-Commissioned Officer) with the Fire Chief approximately once a month for the primary purpose of receiving information. Station Captains have counseled employees on being late for work and have entered these matters on the employee's records maintained in the

3/ The record reveals there is a mix of civilian and military employees at both fire stations.

4/ The general rules for all firefighters are described, in detail, by "Fire Department Operations (DEF-OI 92-7) and General Orders (DEF-OI 92-8)".

Fire Department, which are personal records kept by the Fire Department and not the official personnel record of the Activity. Also, Station Captains forward leave requests by their crew to the Assistant Chief who has the final authority to approve leave. They have not, in fact, suspended any crew members (although the record indicated they may relieve crew members of their duties if they were to see one drinking or drunk on the job). 5/ Also, Station Captains may ask the Station Captain at Station No. 1 (usually a Technical Sergeant) or the Assistant Chief that an employee on his crew be transferred to Station No. 1 because of conflicts with other crew members or himself, but the Assistant Chief is responsible for approving such a move.

Training is accomplished at Station No. 2 by the Station Captain based on a training program established by the base fire chief following Air Force Regulation 92-1 on firefighting training. Futhermore, the record indicates that Station Captains may handle routine disagreements or gripes involving working conditions and that, if a disagreement occurs that is more than routine and is considered a grievance, it would be referred to the Assistant Fire Chief as the first step of the grievance procedure. 6/ The record reflects also that, normally, the Assistant Chief checks on Station No. 2 twice on a 24 hour shift to ascertain if everything is in operation.

As indicated above, the GS-6 employees serve as regular crew members at Station No. 1 from three to six months a year, although when at Station No. 1 they intermittently act as a Station Captain twice a month, when the regular Station No. 1 Captains (usually Air Force Technical Sergeants) are on their break days.

Based on the foregoing, I find that Supervisory Firefighters, GS-6 are not supervisors within the meaning of Section 2(c) of the Executive Order when serving as Station Captains. 7/ Thus, as indicated above, Supervisory Firefighters, GS-6, serving in this capacity have no authority

5/ The evidence establishes that Station Captains have effectively recommended promotion actions in the past when they were classified as GS-7's, but, ever since they were downgraded to the GS-6 level (the record does not reveal the date of such action), there is no evidence that they have recommended promotion actions.

6/ The Fire Chief testified that, "If it was some minor thing about working conditions...or some minor thing, I would tell him to go back and see the Station Captain" and also that, "Some routine disagreement about working conditions...or something of this nature, I would refer him back down." (Tr. pp. 65 and 92)

7/ There is no contention that for the substantial periods of time when these employees serve as regular crew members, they act in a supervisory capacity.

to hire, lay-off, recall, promote or discharge employees, or to adjust grievances, or to effectively recommend such action. Regarding their ability to make job assignments when acting as Station Captains, the record discloses that the daily equipment and in-house details are pre-determined by the Fire Chief and that the Station Captains have no part in their selection. Moreover, when unusual situations arise, the Station Captains call the Assistant Chief or Technical Sergeant at Station No. 1 for direction. Further, the nature of any instructions which a Station Captain may give in this respect relates to tasks which are so routine as to not require actual supervision and, in effect, require no exercise of independent judgment. Although the record indicates that Station Captains may forward annual leave requests by crew members, there is no evidence that the forwarding of such requests are other than routine in nature. While the evidence establishes that Station Captains have counseled employees for tardiness, the evidence does not reflect that this is other than routine in nature or within well prescribed requirements. Nor is there evidence that any such actions have led to discipline. Finally, the Station Captains' ability to resolve disagreements at the local level involve no more than routine matters regarding working conditions and do not require the use of independent judgment. Grievances are resolved at a higher level. Under these circumstances, I find that the Station Captains, GS-6, are not supervisors within the meaning of Section 2(c) of the Order and should be included in the exclusively recognized unit.

Supervisory Firefighter GS-7

As noted above, the record discloses that the Supervisory Firefighter, GS-7, is stationed at Station No. 1 and is currently in charge of the landing zone operations which involve the direction of one or more crew chiefs, firefighters and equipment in firefighting and rescue procedures at remote sites some 20-30 miles from the base where planes deliver equipment and troops. About 65 to 70 percent of the GS-7's duty time is occupied by landing zone operations. Due to the distance of the zones from the base, the Supervisory Firefighter, GS-7, is the Acting Fire Chief at these landing zones at all times unless there is an emergency and, even in the latter situation, due to the remoteness of the sites and the times involved for the Fire Chief or Assistant Chief to come to the site, he is the Acting Fire Chief most of the time. In this latter regard, he is responsible for the operations at the landing sites and for making all the necessary decisions in preparation of the sites and in any emergency situation. Furthermore, the record reveals that the GS-7 is responsible for preparing the annual break (leave) roster for all the firefighters. In this connection, he has each firefighter mark his forecasted leave for the year and then makes discrepancy corrections for who gets leave when and forwards the break roster he has prepared to the Fire Chief who usually approves the schedule.

Based on the foregoing, I find that the Supervisory Firefighter, GS-7, is a supervisor within the meaning of Section 2(c) of the Order inasmuch as the evidence establishes that he responsibly directs employees in connection with the firefighting and rescue procedures and controls operations at the Activity's remote landing zones and responsibly makes and adjusts leave schedules of the firefighters on the yearly break rosters. Accordingly, I find that the position of Supervisory Firefighter, GS-7, should be excluded from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 2364, AFL-CIO, was recognized on July 17, 1964, be, and hereby is, clarified by including in such unit Supervisory Firefighters, GS-6, and excluding from such unit the Supervisory Firefighter, GS-7.

Dated, Washington, D. C.
May 6, 1977

Francis X. Burkhardt, Assistant Secretary
of Labor for Labor-Management Relations

May 6, 1977

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,
ABERDEEN PROVING GROUND COMMAND,
MARYLAND
A/SLMR No. 837

This case involved an unfair labor practice complaint filed by the International Association of Machinists and Aerospace Workers, Local 2424, AFL-CIO (IAM) alleging, in effect, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to notify the IAM of a meeting conducted on October 22, 1975, between two bargaining unit employees and certain management officials, and, by refusing to allow the IAM representation at the aforementioned meeting.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. In this regard, he concluded that it was unnecessary for him to determine whether, as asserted by the IAM, the meeting involved a formal discussion within the meaning of Section 10(e) of the Order as the IAM was made aware of and had sufficient notice of the October 22, 1975, meeting and the President and Vice President of the IAM, in fact, came to the meeting and actively participated in the discussion. Moreover, with respect to the right of the individual employees to representation, he concluded that the two employees involved did not specifically request the attendance of union officials and, in any event, the union representatives came to the meeting and participated in behalf of the employee whose conduct was being questioned. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, and ordered that the complaint be dismissed.

A/SLMR No. 837

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF THE ARMY,
ABERDEEN PROVING GROUND COMMAND,
MARYLAND

Respondent

and Case No. 22-6627(CA)

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LOCAL 2424, AFL-CIO

Complainant

DECISION AND ORDER

On January 12, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6627(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 6, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

U.S. DEPARTMENT OF THE ARMY, ABERDEEN PROVING GROUND COMMAND, MARYLAND 1/ :
Respondent

and Case No. 22-6627

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Local 2424 :
Complainant

Captain James F. Hicks, Jr., Esq.
Assistant Staff Judge Advocate
Aberdeen Proving Ground
Aberdeen, Maryland 21005
For the Respondent

Louis P. Poulton, Esq.
Associate General Counsel
International Association of Machinists & Aerospace Workers, AFL-CIO
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on June 11, 1976 by the Acting Regional Administrator for Labor-Management Services of the U.S. Department of Labor, Philadelphia,

1/ The name of the Employer appears as corrected at the hearing.

Region, a hearing in this case was held before the undersigned on July 27, 1976 at Aberdeen, Maryland.

The proceeding herein is brought under Executive Order 11491, as amended (herein called the Order). A complaint was filed on January 19, 1976 by International Association of Machinists and Aerospace Workers, AFL-CIO, Local 2424 (herein called the Complainant) against U.S. Department of the Army, Aberdeen Proving Ground Command, Maryland (herein called the Respondent). The said complaint alleged a violation of Section 19(a)(1) and (5) of the Order based on a refusal by Respondent to allow union officials to be present at a meeting held in the office of James L. Lockhart, manager of the commissary, on October 22, 1975. It alleged, further, that certain statements made by Lockhart at the said meeting to two employees constituted interference and coercion under the Order. 2/

All 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 Complainant filed a brief which has been duly considered.

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 of fact, conclusions and recommendations:

Findings of Fact

At all times since July 29, 1970 Complainant has been, and still is, the certified collective bargaining representative for (a) all wage grade employees assigned to the boiler plants branch, facilities management directorate, Aberdeen Proving Ground, Aberdeen, Maryland, (b) all wage rate employees assigned to the Proving Ground Command at Aberdeen, Maryland.

2/ At the hearing the undersigned granted Complainant's motion to amend the complaint to allege a violation of 19(a)(6) in lieu of 19(a)(5). Moreover, Complainant conceded that the issues to be litigated - as expressed in the June 11, 1976 letter to the parties by the Acting Regional Administrator - were the following: (1) whether Respondent was obligated to notify the union of the meeting conducted on October 22, 1975; (2) whether Manager Lockhart refused union representation at the meeting on October 22, 1975, and, if so, was the refusal a violation of 19(a)(1) and (6) of the Order.

Collective bargaining agreements were entered into between Complainant and Respondent covering both units. The most recent contract became effective on January 23, 1975 and continued, by its terms, for a period of two years.

Article IX, Section 7, of the aforesaid 1975 agreement provides for certain procedures to be followed by the Chairman and Assistant Chairman of the Shop Committee, and Stewards and Chief Stewards, when those officials desire to leave their work area during duty hours to perform representational duties. It requires, inter alia, that such official must notify his immediate supervisor and inform the latter of his destination, building number, work location, phone number and type of representation duty to be performed. Certain additional procedures are detailed in the event the union representative should also visit other areas, including notification to a supervisor in charge of another work area. Personnel are also required to report to their supervisors directly after the completion of their representational duties.

At all times material herein Charles Duff has been, and still is, a meat cutter employed in the Respondent's meat department at the commissary as well as a shop steward of Complainant in said department. In the performance of his duties Duff has been supervised by William Gulden, commissary meat market manager.

Prior to October 22, 1975 Duff notified Gulden of his dissatisfaction with the alternate work schedule whereby he would work one day late and another day early. Since Duff insisted upon speaking with James L. Lockhart, Manager of the commissary, regarding this matter, Gulden set up a meeting for October 22, 1975 at 12:30 P.M. in Lockhart's office. The meeting was to be attended by Duff, Gulden and Lockhart. In arranging the meeting Gulden also asked Lockhart to persuade Duff to follow Article 9, Section 7 of the collective bargaining agreement dealing with the steward's obligation to notify his supervisor when leaving the job to attend the union business.

A meeting was held at 2:00 P.M. on October 22, 1975 in Lockhart's office. 3/ It was attended initially by Lockhart,

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3/ The meeting was originally scheduled for 12:30 on that date but duff failed to appear at that hour.

Duff and Gulden. They discussed and resolved the work schedule problem. Whereupon Lockhart asked Duff to read Article 9, Section 7 of the bargaining contract, stating that he should try to follow the provisions therein; that Duff was not following proper protocol and informing his supervisor where he was going when leaving the job for union representation, how long he would be there, and what was the nature of the representation to be performed; that Lockhart had to be informed 4/ of these details when the steward was on union time. Duff disagreed with Lockhart's interpretation of the aforesaid contract provision, stating he did not have to contact Lockhart - that under the agreement his only obligation was to notify his immediate supervisor. Lockhart stated that if Duff did not comply, disciplinary action would be taken against him. Whereupon Duff remarked that "I'm going to need some union representation here".

Upon returning from her lunch break on October 22, 1975, Sharon Mayberry, sales store worker and recording secretary of Complainant, was informed by the head cashier that she was wanted in Lockhart's office. 5/ Mayberry reported to the office at about 3:00 P.M. When she entered the room Duff asked her to make a phone call saying "that he needed union representation." Mayberry asked Lockhart if she could use the telephone, and the latter replied he would prefer if she didn't leave and he felt they could first settle the matter. She then stated it was necessary to visit the ladies' room, and Lockhart reluctantly excused her to do so. Upon leaving the office, Mayberry asked employee Florence Clark to call the union head, stating they need union representation.

4/ There is some controversy over whether Lockhart said that the steward must notify him as well as the immediate supervisor under Article 9, Section 7 in order to follow proper protocol. The record supports the finding that Lockhart at least implied that under certain circumstances the steward was expected to advise him when leaving the work area re the details of the union representation as set forth under the contract. Further, Duff so understood Lockhart and objected to being required to report to the manager.

5/ When Duff failed to appear at 12:30, Lockhart sent for Mayberry to discuss a proposed dismissal of employee Franklin.

When Mayberry returned to the meeting, Gulden was no longer present and the other two participants were discussing Article 9, Section 7 of the contract. She remarked that she was following the contract, and Lockhart continued to state there would be disciplinary action if they did not follow proper protocol. The manager also referred to the fact that he was an ex-union man but never got a promotion until he left the union.

About 20 minutes after Mayberry returned from the ladies' room the vice-president of Complainant, Spencer Dowell, and the president of Complainant, Carlton Talbot, arrived on the scene. They appeared in response to the call made at the instance of Mayberry when she left the meeting. When Dowell asked what was the problem, Lockhart replied that the shop steward was not following proper protocol under Article 9, Section 7 of the contract - that Mayberry and Duff had not been reporting to him as outlined in the contract. Dowell remarked they did not have to do so under the particular clause in question; that it didn't apply to Lockhart but just to a first line supervisor and a rare occasion when the Manager was "in the picture". 6/

Conclusions

In asserting a violation of Section 19(a)(6) of the Order herein, Complainant makes two principle contentions: (1) Under Section 10(e) of the Order the Respondent was obliged, but failed, to notify the union of the meeting held in Lockhart's office on October 22, 1975 regarding the alleged refusal by the shop steward to follow Article 9, Section 7 of the contract; (2) Respondent denied union representation to its employees during their discussion with Management at the aforesaid meeting regarding their alleged refusal to abide by the said contract provision.

(1) It is specifically provided under Section 10(e) of the Order that an exclusive representative must be given the opportunity to be represented at formal discussion between management and employees or their representatives regarding grievances, personnel policies and practices, or other matters affecting general working conditions of unit employees. This section has been construed to require an

6/ The record contains different versions of what transpired at the October 22 meeting in Lockhart's office. The version adopted by the undersigned represents the testimony credited in respect to the material and relevant facts herein.

employer to notify and inform an exclusive representative of meetings with grievants relating to the processing of grievances filed with an Agency under an Agency grievance procedure. Internal Revenue Service, Southeast Service Center, Chamblee, Georgia, A/SLMR No. 448. See also Federal Aviation Administration, National Aviation Facilities, Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438.

Complainant herein considers that the discussions at the October 22, meeting regarding the interpretation of Article 9, Section 7 of the contract was of such a nature as to require notification be given by Respondent to it. While the obligation of an employer to give notification under Section 10(e) is bottomed on the type of discussions occurring at the meeting, i.e., formal or informal, I do not deem it necessary to determine whether the meeting on October 22 involved a formal discussion under said Section of the Order. The meeting on that date was originally scheduled at the request of shop steward Duff to discuss his particular work schedule. At that stage the discussion did not pertain to conditions of employment affecting unit employees in general so as to require the presence of the collective bargaining representative, nor was any attempt made by the employee to obtain the union. When the parties discussed the failure of the shop steward to follow the contract and report as required therein, accompanied by threatened disciplinary action, notification to the union may have been in order so as to afford the bargaining agent an opportunity to represent the stewards in the discussion with management. However, Complainant was, in fact, made aware of the meeting and discussion on October 22 re Article 9, Section 7 of the contract. President Talbot and Vice-President Dowell of the union were in fact notified of the meeting, albeit not by management at the initial instance. They both attended the meeting and participated in the discussions concerning the failure to follow the contractual provision dealing with leaving work to attend to union business.

Under these circumstances I am persuaded that Complainant had sufficient notice of the meeting and became aware of the issue which was under discussion. See Southeast Exchange Region, Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656. Although the union did not receive formal notification, the record demonstrates that Complainant had actual knowledge of the October 22 meeting. Accordingly, I find no merit to the allegation that Respondent's failure to send a formal notice to Complainant was a violation of Section 19(a)(1) or (6) of the Order.

(2) Complainant lays particular stress upon NLRB v. Weingarten, 420 U.S. 251 (1975) in asserting that employees Duff and Mayberry were denied union representation at the October 22 meeting in violation of the Order. The cited case involved the right of an employee in the private sector to union representation during an interview conducted with supervisory personnel. The Supreme Court acknowledged this right in certain instances where the employee requests such representation when an investigation is likely to result in disciplinary action. Subsequent to the Weingarten decision, the Federal Labor Relations Council in FLRC No. 75P-2, December 7, 1976, issued a policy statement regarding the right of an employee in an exclusive recognition unit to be assisted by the bargaining representative when summoned to a meeting or interview with agency management. In sum, it stated that, under Section 10(e) of the Order, when such an employee is summoned to a formal, decision with management concerning grievances, personnel policies - practices, or other matters affecting general working conditions of employees in the unit, he is entitled to such assistance or representation. 7/

While it is clear that Duff and Mayberry would have been entitled to union representation if the October 22 meeting be deemed a formal discussion, 8/ I am persuaded, upon receiving the record herein, that there was no denial of union assistance by Respondent.

The statement by Duff to Lockhart that he would need union representation, although ignored by the manager, was not, in my opinion, a specific request to Respondent for the attendance of union officials. Moreover, Mayberry's request to make a phone call, without specifying that she intended to contact the union and seek representation, was not sufficiently clear and specific so as to constitute a request for such aid.

7/ The Council also declared that the Weingarten case did not compel a contrary conclusion, emphasizing the fact that the provisions and purposes of the Order are dissimilar from thos of the Labor Management Relations Act. Further, it noted that since the Council rather than the National Labor Relations Board, is responsible for administering the Order, there is no obligation to defer to the NLRB ruling in Weingarten.

8/ In view of my conclusion that these employees were not denied representation, I do not pass upon whether the discussion re the failure to follow the contract by these individuals was a formal one under 10(e) of the Order.

Apart from the question of whether Duff and Mayberry did, in fact, ask the manager to have union representation, the record reflects that the president and vice-president of Complainant came to the meeting on October 22. Moreover, vice-president Dowell discussed the controversial issue with Lockhart, and the union official interceded on behalf of the employees whose conduct was being questioned. Under such circumstances, and especially since there was complete participation by Complainant at this meeting - with no attempt by the activity to bar or exclude the union agents therefrom - I am convinced that Respondent did not deny Duff and Mayberry union representation at the October 22, 1975 meeting. Accordingly, I conclude Respondent did not violate Sections 19(a)(1) and (6) of the Order.

RECOMMENDATION

Having found that Respondent did not violate Sections 19 (a)(1) and (6) of the Order as alleged, I recommend that the complaint herein be dismissed in its entirety.

WILLIAM NAIMARK
Administrative Law Judge

Dated: January 12, 1977
Washington, D.C.

May 11, 1977

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,
ST. LOUIS, MISSOURI,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1715
A/SLMR No. 838

This case involved unfair labor practice complaints filed by an individual against the Veterans Administration Hospital, St. Louis, Missouri (Activity) and the American Federation of Government Employees, AFL-CIO, Local 1715 (AFGE). Essentially, the Complainant alleged that the Activity violated Section 19(a)(1), (2) and (3) of the Order and the AFGE violated Section 19(b)(1) of the Order by interfering with the Complainant's right to file a grievance, and, further, that the Activity harassed the Complainant following the filing of her grievance.

The Administrative Law Judge found that there was insufficient evidence to establish that the Activity failed to process the Complainant's grievance properly. The record revealed that in July 1975, the Complainant filed an informal grievance but failed to specify whether it was being filed under the agency or the negotiated grievance procedure. When the Activity subsequently learned that the Complainant desired to have her grievance processed under the negotiated procedure, the Activity complied without prejudice to the Complainant and processed it accordingly. Similarly, the Administrative Law Judge found that there was insufficient evidence that the AFGE had acted arbitrarily or in bad faith with respect to the handling of the grievance. In this regard, the record indicated that throughout the filing and processing of the grievance, the Complainant was assisted by an AFGE steward. Finally, the Administrative Law Judge found there was insufficient evidence to support the allegations of harassment and recommended that the complaints be dismissed in their entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaints be dismissed.

A/SLMR No. 838

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION HOSPITAL,
ST. LOUIS, MISSOURI

Respondent

and Case No. 62-4752(CA)

ALICE A. FREALY

Complainant

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1715

Respondent

and Case No. 62-4751(CO)

ALICE A. FREALY

Complainant

DECISION AND ORDER

On February 4, 1977, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceedings, finding that the Respondents 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 with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order, and the entire record in these cases, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaints in Case No. 62-4752(CA) and Case No. 62-4751(CO) be, and they hereby are, dismissed.

Dated, Washington, D. C.
May 11, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ On pages 5 and 7 of his Recommended Decision and Order, the Administrative Law Judge made reference to events occurring in 1976 rather than 1975. This inadvertence is hereby corrected.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
Veterans Administration, Veterans Administration Hospital, St. Louis, Missouri Respondent		
and Alice A. Frealy Complainant		Case No. 62-4752(CA)
American Federation of Government Employees, AFL-CIO, Local Union 1715 Respondent		
and Alice A. Frealy Complainant		Case No. 62-4751(CO)

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Rose R. Wuellner
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Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter referred to as the Assistant Secretary), the captioned cases were consolidated for hearing and a notice of hearing on the complaints issued on September 3, 1976 with reference to alleged violations of 19(a)(1)(2)(3) and 19(b)(1) of the Order. The complaints, filed by Alice A. Frealy, an individual (hereinafter sometimes referred to as Complainant), alleged in substance that the Veterans Administration, Veterans Administration Hospital, St. Louis, Missouri (hereinafter sometimes referred to as the Activity) and American Federation of Government Employees, AFL-CIO, Local Union 1715 (hereinafter sometimes referred to as the Union) violated the Order by their failure to properly process a grievance filed by Complainant as well as harassing Complainant because she filed the grievance.

At the hearing held on October 19, 1976 in St. Louis, Missouri all parties appeared and were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.

Upon the entire record in this matter and from my evaluation of the evidence and observation of the witnesses and their demeanor, I make the following:

Findings of Fact

At all times relevant hereto Respondent Local Union 1715 and American Federation of Government Employees, Local Union 2139 represented various of the Activity's employees who worked at the Veteran Administration's John Cochran Division and Jefferson Barracks Division. The two hospitals are in the St. Louis, Missouri area approximately twenty miles apart.

Alice Frealy was employed at Jefferson Barracks as a medical technician until transferring to Cochran in April 1973. Local Union 1715 serviced employees at Jefferson Barracks and Local Union 2139 serviced Cochran employees. While working at Jefferson Barracks, Frealy was a member of Local Union 1715 and when she transferred to Cochran she retained her membership in that organization.

The Grievance

In early July 1975 Alice Frealy returned from a vacation to discover she was being reassigned to another job at Cochran. While on vacation Frealy's job in the serology section was redesignated, posted as a vacancy and filled by another employee. Upon returning to work, Dr. Eugenia Parker, Acting Chief of Laboratory Services, informed Frealy that she was reassigned to the hospital's hematology section. Frealy protested the action and on July 7, 1975 telephoned Personnel Officer James Crews and requested a meeting on the matter. Frealy told Crews that she wanted a union steward to be present "in case this is a union thing." She also advised Crews she would be accompanied by Mrs. Rose Wuellner. 1/ Thereafter, Frealy called Local 1715 and asked to be assigned a steward for the meeting. Local 1715 provided Frealy with steward Harold Drake and on that same day Frealy, Wuellner and Drake met with Crews.

At the meeting held in Crews' office on July 7, 1975 the parties discussed in considerable detail the circumstances relative to Ms. Frealy's reassignment. During the discussion Frealy complained of her job being posted as a vacancy. Crews explained that Frealy's job description was that of a rotating technician and the position in the serology laboratory which was posted as a vacancy was actually newly created. Frealy responded that she thought the Activity's actions were unfair and she intended to file a grievance on the matter. Union steward Drake commented that he thought that Frealy was the object of a "personal vendetta" and he would stand by her if she wished to file a grievance. Crews questioned Drake's participation in the matter and told Drake he could put him out of the office. Frealy stated that she did not want Drake to leave and Wuellner added

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1/ Rose Wuellner is a personal friend of Frealy and an employee of another government agency.

that Crews could not eject Drake since Frealy was entitled to whomever she wished to represent her. Crews announced that the discussion was getting nowhere and told Frealy to file a grievance if she so desired. Frealy replied she thought that might be the best course of action and the meeting ended.

On July 11, 1975 Frealy presented Acting Chief of Laboratory Services Eugenia Parker with a memorandum dated July 9 captioned "Notice of Informal Grievance Due to Change in Duty Assignment." 2/ The memorandum did not indicate whether Frealy was invoking the grievance procedure set forth in the negotiated agreement in effect at the time or the agency's administrative grievance procedure. Therefore on July 16, 1975 in response to the "Notice of Informal Grievance", Acting Chief Parker met with Frealy in Parker's office. 3/ Also present were Administrative Officer John Shalhoob, Lois Pillars, supervisor of the hematology section and Rose Wuellner who was invited by Frealy to accompany her. No union representative was present nor did Frealy state that she desired to have a union steward or representative to assist her. 4/ Although the reassignment was discussed,the matter was not resolved to Frealy's satisfaction. By letter from Parker to Frealy dated July 24, 1975, Parker summerized what had occurred at the meeting, 5/ and concluded by stating that Frealy, if not satisfied with the Activity's decision, had the right to present her grievance under the "formal grievance procedure" as set forth in "VA Employees Letter 00-75-3 dated April 28, 1975." 6/

2/ Copies of the memorandum were sent to Crews, John Shalhoob, Administrative Officer, Jeanne Maddern, Microbiology Supervisor (Frealy's immediate supervisor in the serology section prior to Frealy's reassignment) and "Harold Drake, AFGE Local 1715". Upon receiving a copy of this document Maddern informed Frealy that there was nothing she (Maddern) could do about it.

3/ I assume that the meeting was called by Parker.

4/ Frealy testified that it was her belief that it was the Activity's responsibility to notify the Union of the meeting.

5/ Parker's letter indicated that although Frealy was on vacation during the posting period set forth in the vacancy announcement, her name was nevertheless submitted as an eligible candidate for the position.

6/ The cited letter reflects the agency's administrative grievance procedure.

Upon receipt of the Activity's response dated July 24, Ms. Frealy contacted Union steward Drake and met with him at her home in the presence of Mrs. Wuellner. At Frealy's request Drake provided Frealy with American Federation of Government Employees, (AFGE) grievance forms. The forms provided, inter alia, spaces for the following information: date incident occurred; date presented to supervisor; name of immediate supervisor; statement of grievance by employee; sections of the contract or agency regulations or CSC, law, or Executive Order which apply; other related incidents etc; and what adjustment was expected. After Drake informed Frealy that he had no prior experience assisting in the preparation of a grievance form, 7/ he and Frealy went through the negotiated agreement including the grievance procedure section, and picked out what sections of the agreement they thought were applicable. Drake signed some forms and told Frealy to type the grievance and he would later pick it up and have the grievance reviewed for proper preparation,which he subsequently did.

On July 30, 1976, Ms. Frealy mailed the grievance to Dr. Parker with copies to Crews, Prentice Davis, President of Local 1715 and AFGE National Represenative William Martin. On August 5 Frealy left a copy of the grievance at the office of Dr. Ralph Biddy, Hospital Chief of Staff, and on August 14 mailed a copy of the grievance to Dr. Joseph Mackney, the Hospital Director. There is no evidence that Frealy had any contact with either the Activity or the Union concerning the grievance between July 30 and August 14. However, by letter dated August 8 the Activity, following procedures outlined under its administrative grievance procedure, forwarded Frealy's grievance to VA Central Office, Washington, D.C. for a determination on the merit. 8/

7/ While Drake was representing Frealy in this matter Drake had the impression that Frealy was not satisfied with his competency. Accordingly,on numerous occasions Drake informed Frealy that, if she desired, she could have another union representative if she felt he was inadequate or not satisfactorily acting on her behalf. Frealy at all times declined the offer.

8/ Personnel Officer Crews testified that although he observed that the grievance was submitted on an AFGE grievance form and should have contacted Frealy to inquire whether there was some mistake in the matter, he nevertheless did not contact Frealy and felt "compelled" to route the grievance through the administrative grievance procedure. Crews could give no better explanation of his actions in this matter.

On August 15, 1975 Ms. Frealy called Union steward Drake and inquired about the status of her grievance. Apparently Drake had been in contact with Crews and accordingly told Frealy that Crews told him he was going to send the grievance "to Washington". Frealy commented that the negotiated grievance procedure did not provide for such action and asked Drake why Crews was sending the grievance to Washington. Drake answered he did not know and Frealy asked him to "find out". Drake indicated he couldn't discover the reason.

Ms. Frealy then called Local 1715 President Davis and asked him why management was sending the grievance to Washington. Davis indicated that all he was able to ascertain was that the grievance was being sent to Central Office Washington "for investigation". Frealy stated she did not want to have her grievance sent to Central Office and asked Davis to stop management from following that course of action. Davis replied that the grievance had already been sent.

According to Personnel Officer Crews,around this period of time he became aware of Ms. Frealy's strong desire to have her grievance processed through the negotiated procedure. Crews asked Union steward Drake to contact Frealy to confirm his understanding of Frealy's wishes in the matter. Crews asked Drake to obtain a signed statement from Frealy regarding her desires.

On August 25, 1975 Drake called Frealy, related to her of his conversation with Crews and told her Crews felt that under the negotiated grievance procedure Frealy would surely lose her grievance. Drake asked if he could stop by Frealy's house to have her sign a statement changing her grievance to an administrative grievance. Frealy told Drake that she had no confidence in Crews' "good faith" and preferred taking her chances under the negotiated grievance procedure. Thereafter, on that same day Drake reported his conversation with Frealy to Crews and Crews telephoned Frealy to confirm that she did not wish her grievance processed through the administrative grievance procedure. Frealy insisted she wished to keep her grievance under the negotiated procedure and Crews informed her that the grievance had already been sent to Washington Central Office. Frealy asked "why" since that step was not part of the negotiated

procedure and Crews merely replied that was the way the Activity was processing the grievance. 9/

In this same period of time Frealy called AFGE National Representative William Martin and complained to him that she felt management had frightened Drake and he was no longer giving her proper assistance in the matter.

On or about August 26 or 27, 1975 Crews, at his request, met with National Representative Martin, Local 2039 President William Johnson, Local 1715 President Davis and Local 1715 steward Drake. At the meeting Martin indicated that it was not union policy to discuss the merits of a grievance outside the presence of the grievant. However Martin asserted that the Activity had no right or authority to send Frealy's grievance to VA Central Office under the administrative grievance procedure and requested its return to the facility for processing under the negotiated procedures. Crews replied that the Activity was in the process of having Frealy's grievance returned and raised the question as to which local union was Frealy's exclusive representative. It was agreed by all that it would be appropriate for Local Union 1715 to represent Frealy. Crews left the union representatives alone for awhile and upon returning was informed by the Union that as they saw the question, the negotiated grievance procedure was not applicable to Frealy's grievance since that procedure was only applicable to matters of interpretation and application of the agreement and not to such a matter raised in Frealy's grievance.

By letter dated August 27, 1975 the Activity requested that VA Central Office return Frealy's grievance to the Activity for processing under the negotiated procedure. There were no further actions taken in this matter until October 2, 1975 when Ms. Frealy filed against the Activity and the Union the unfair labor practice charges which gave rise to these proceedings. Thereafter the grievance file was returned from D.C. Central Office on October 3, 1976 10/ and on October 8 the Activity issued it's third step decision under the negotiated grievance procedure denying Frealy's grievance. That decision stated, inter alia:

9/ Frealy testified that at this point she began to suspect that her grievance was not being processed under the negotiated procedures or that the agency personnel office was merely "letting it lie".

10/ No reason was given for the delay in return of the grievance from D.C. Central Office.

"2. We are now at step 3 of the negotiated grievance procedure, Article XVI of our Agreement, which provides that the negotiated procedure will be the sole procedure for processing grievances over the interpretation or application of the Negotiate Agreement and may not be used for any other matters.

3. It is my decision that your grievance over rotation in your work assignment must be denied as not being in violation of Article XIII, Section 1, Article XV, Sections 1,2 and 4 and Article XVI, A, Step 2, as cited by you." 11/

Thereafter, Frealy made no timely effort to notify the Union of the decision, request the Union to proceed to arbitration on the grievance 12/ or pursue the matter further. However, by letter dated December 5, 1975 Frealy, through her personal attorney, requested the Union proceed to arbitration. Local 1715 President Davis called Frealy's attorney and told him that he had not previously heard from Frealy on the subject, that he was without authority to pass on the request and a decision to arbitrate a grievance must be approved by the members of the Union. The attorney indicated he would talk to Ms. Frealy but Davis had no further communication from him.

11/ Article XIII, Section 1 refers to the rights and procedures involved in the Union President leaving his work area to attend neetings and consultations.

Article XV (Supervisors Employee Relations), Sections 1, 2 and 4 concern Section Chiefs' and supervisors' obligations relative to compliance with the negotiated agreement and discussions and communications with employees.

Article XVI (Grievance Procedure), A, Step 2 is set forth, infra.

12/ Under the negotiated agreement only the Union or the Activity may invoke arbitration.

Relevant Negotiated and Administrative Grievance Provisions

The negotiated agreement provides a four step grievance procedure culminating in arbitration. Under the negotiated procedure an employee may pursue a grievance without representation but the Union "should" be given an opportunity to be present at each step. The pre-arbitration steps of the procedure state as follows:

"Step 1 In the event an employee has a grievance, he shall have the right to present the grievance to his immediate supervisor orally or in writing within fifteen (15) calendar days of the date the employee has knowledge of the action or first learned (sic) by the employee. The grievance will be discussed informally with the Supervisor. The Supervisor will make every effort to resolve the grievance immediately but must provide an answer within ten (10) calendar days. This answer will be oral unless the employee has presented the grievance in writing.

"Step 2 - If the grievance is not satisfactorily resolved it may be presented to the Service Chief in writing within ten (10) calendar days of the supervisor's decision. The grievance must state the section or sections of the agreement the party feels have been violated, the nature of of the violation and the corrective action desired. The Service Chief shall answer, in writing, within ten (10) calendar days.

"Step 3 - If the grievance is not satisfactorily resolved at Step 2, it may be presented to the Hospital Director in writing within seven (7) calendar days of the decision of the Service Chief. The Hospital Director will issue a decision within ten (10) calendar days."

The agreement also provides:

"C. Compliance with Time Limitations. Failure of the Supervisor or the Service Chief to answer grievance within the time limits will permit the grievance to be referred to the next succeeding step of the procedure. Failure of the employee or the Union to take action within the procedure time for each step gives the Employer the right to cancel the grievance. Extensions of time limitations may be granted by mutual consent for good cause provided the request is made within the initial time limitations."

The Activity's administrative grievance machinery is divided into an informal and a formal procedure. The informal procedure provides for the oral or written presentation of the grievance to the grievant's immediate supervisor or any of various other management representatives so selected by the employee with fifteen calendar days after the incident occurred or was first learned. If the matter is beyond the supervisor's control, the supervisor will refer it to the proper authority and an answer "should" be provided by that official within ten days from the day the grievance was presented. If the grievance is denied under the informal procedure, the employee is to be advised of his right to present the grievance under the formal grievance procedure.

The formal grievance procedure requires the filing of a written grievance within ten days after notification of the answer under the informal procedure. The formal grievance, "normally" submitted through the employees immediate supervisor, is required to contain sufficient detail to identify and clarify the basis for the grievance, the personal relief requested, information relative to the action being grieved, pertinent dates, reasons supporting the position taken and the specific policy, written agreement, or provision violated and the corrective action sought. If the grievance is not informally resolved the grievance is to be referred to V.A. Central Office for inquiry by an examiner within ten days from the date the employee filed the formal grievance with the immediate supervisor.

The Alleged Harassment

Ms. Frealy contends that because she filed the grievance described above, the Activity engaged in various acts of harassment which included: 1) protecting an employee who threatened her life; 2) the manner in which various of her personal belongings left in the serology lab when she was transferred were subsequently brought to her and; 3) receipt by Ms. Frealy from an undisclosed sender on August 20, 1975, copies of two memoranda Frealy sent to various of the Activity's supervisory or management personnel in February and March 1975 complaining of possible illegal conduct in the serology lab. 13/

13/ I find the record contains insufficient evidence to support the allegation that the matters set forth in items 2 and 3 constituted violations of the Order. Accordingly, said conduct will not be treated further in this decision.

With regard to the threat incident, in the afternoon of August 5, 1975 a male employee in the hemotology section at Cochran Hospital threatened to take violent action against Ms. Frealy if she was not removed from the section. The section supervisor, Lois Pillars immediately took the employee to Administrative Officer John Shalhoob and reported the incident. Shalhoob informed Pillars that he would take the matter up with the Chief of Laboratory Services. Frealy was quite apprehensive over the incident and, upon her request, also met with Shalhoob. During their meeting Shalhoob asked Frealy if she had any suggestions as to how to deal with the situation. Frealy suggested that she be transferred. At this point it was late in the day and Shalhoob told Frealy to report to him in the morning and he would settle the matter.

Ms. Frealy did not report for work on the following day. Instead, she telephoned Union steward Drake explained the situation and asked him to intervene on her behalf to get the matter "straightened out". Drake then called Shalhoob, informed him that Frealy was in fear of her life and requested a meeting. A meeting was arranged for later that day and Drake told Shalhoob that he would act as Frealy's representative at the meeting.

In the meantime Ms. Frealy and her brother met with Shalhoob and discussed the matter. Frealy's brother wanted some assurance that no harm would come to his sister and the matter would be satisfactorily settled. Shalhoob explained that he was going to consult with the Chief of Laboratory Services and that a meeting had been arranged at Drake's request. He also conveyed that something definite would be done to resolve the situation and the Activity would, to the best of their ability, see to it that no harm came to Ms. Frealy while on duty.

Thereafter, Frealy called Prentice Davis, President of Local 1715 concerning the threat on her life. Frealy indicated that she and her brother desired to attend the scheduled meeting. Davis replied that while Frealy could probably attend, it was questionable whether management would permit her brother to be present at the meeting. Frealy replied that since the individual who threatened her would be present at the meeting, she would not like to attend without her brother. Davis informed Frealy that it would be to her own best interest to be at this meeting but didn't feel that management would permit her brother's presence. Frealy again

explained that she couldn't go to the meeting unless she had her brother with her.

That same day Shalhoob met with the Chief of Laboratory Services and together they decided that the individual who threated Frealy should immediately be transferred from Cochran Hospital to Jefferson Barracks. Shalhoob then met with Drake, Davis, the employee who made the threat and a supervisor. Davis questioned why Frealy was not present and Shalhoob answered he thought it was in Frealy's best interest not to be present when the employee who threatened her was there. In any event, after the parties reviewed the facts of the incident the Union urged some immediate action be taken due to the serious nature of the situation. Shalhoob informed those in attendance that the employee who made the threat would immediately be transferred to Jefferson Barracks.

After the meeting Drake phoned Frealy and informed her of how the matter was resolved. Frealy gave no indication that she was dissatisfied with the ultimate disposition but did convey to Drake her displeasure with the meeting having occurred without her being present. 14/

Discussion and Conclusions

Essentially, Ms. Frealy contends that the Activity violated the Order by its failure to properly process her grievance and the Union violated the Order by failing to give her fair and full representation in the matter. According to Frealy, the alleged harassment would not have occurred but for her filing the grievance. The allegations are denied and I conclude the evidence is insufficient to establish a violation of the Order.

Prior to Frealy filing her grievance on the AFGE form, it was reasonable for the Activity to assume from the attendant circumstances that Frealy wished to have her grievance processed through the administrative grievance procedure. Thus, the negotiated and administrative grievance procedures are quite similar in the early steps. Frealy was accompanied by Rose Wuellner during both the July 7 and July 16 grievance discussions with the Activity, indeed without any union representative present during the July 16 meeting. Since under the administrative procedure a grievant may be accompanied by a personal representative during such discussions and absent a specific oral or written designation

14/ Unknown to either the Union or Frealy, within a few days after the meeting described above the Activity gave the individual who threatened Frealy a letter of admonishment relative to his improper conduct.

by Frealy that she was using the negotiated procedure, it is understandable that the Activity might have concluded that Frealy wished to invoke the administrative grievance procedure. This is especially true since the Activity was of the opinion that the matter Frealy was seeking to grieve was not cognizable as a grievance under the negotiated procedure, a conclusion in which the Union later concurred. Indeed, the Activity's July 24, 1975 answer to Frealy's informal grievance reflects the belief that up to that point in time, the Activity assumed the matter was being pursued under the administrative procedure.

However, I am at a loss to understand why Crews, after receiving Frealy's grievance on the AFGE grievance form continued in the belief that Frealy wished to pursue the matter through the administrative grievance procedure. Crews never adequately explained his behavior on this subject. Perhaps the strength of his conviction that the agreement did not apply to the matter being grieved clouded his judgment. In any event, when the Union pressed the issue and Crews clearly ascertained that Frealy strongly wished to have her grievance considered under the negotiated procedure, the error was corrected with no prejudice to the grievant. The grievance was then withdrawn from the administrative channel and considered under the negotiated procedure, which was what the grievant desired.

While interference with the processing of a grievance under a negotiated grievance procedure has been found to be violative of the Order, 15/ the Assistant Secretary has stated that a test of reasonableness would be applied on a case by case basis in assessing conduct with regard thereto. 16/ Accordingly, absent evidence that the Activity harbored hostility against Frealy because she filed the grievance or engaged in other Activity protected by the Order and in all the circumstances herein, 17/ I conclude that insufficient evidence exists to support the allegation that the Activity's conduct in processing Ms. Frealy's grievance violated the Order. Further, I find no evidence that the Activity was in

15/ Long Beach Naval Shipyard, A/SLMR No. 154; Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

16/ Veterans Administration Hospital, cited above.

17/ Cf. Vanderberg Air Force Base, 4392d Aerospace Support Group, Vanderberg Air Force Base, California, FLRC No. 74A-77 (August 8, 1975) Report No. 79; U.S. Army Natick Laboratories, Natick, Massachusetts, A/SLMR No. 381.

any manner responsible for the threat made to Ms. Frealy by another employee at the facility. Nor do I find that the Activity's conduct with regard to resolving that matter was in any manner violative of the Order.

Turning now to the complaint against the Union, it is well established in the private sector that an exclusive collective bargaining representative has, as a correlative to its right to represent the employees in a bargaining unit, an obligation or duty of fair representation to those employees. This duty of fair representation includes the obligation to serve the interests of all members without hostility or discrimination, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct. 18/ However, since the phrase is a legal term of art incapable of precise definition, it is necessary to examine the facts of each case to determine whether the duty of fair representation has been breached. 19/ Further, although a union may not arbitrarily ignore a grievance or handle it in a perfunctory manner, 20/ a union is given a wide range of latitude and substantial discretion in fulfilling its responsibilities as collective bargaining representative. 21/ Thus, it has been held that a union does not breach its duty of fair representation by merely refusing to take a grievance to arbitration 22/ and is given the discretion of which grievances it will pursue to justify the expense and time involved. 23/ Further, it has been held that the test in determining whether a union breached its duty of fair representation in processing a grievance is not whether a particular union representative was unwise in his judgment or negligent and therefore represented an employee inadequately, but rather, whether the representative acted in bad faith or in an arbitrary manner. 24/

18/ Vaca v. Sipes, 386 U.S. 171 (1967).

19/ Griffin v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, 469 F. 2d 181 (4 Cir. 1972).

20/ Vaca v. Sipes, cited above.

21/ Id.; Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)

22/ Vaca v. Sipes, cited above.

23/ Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5 Cir. 1971)

24/ Bagarte v. United Transportation Union, 429F. 2d 868, 872 (3 Cir. 1970).

In the Federal sector as in the private sector, recognition of a union as exclusive collective bargaining representative carries with it the obligation to represent all employees in the appropriate unit. 25/ It follows therefore that under the Order unions have a duty of fair representation similar to that in the private sector. 26/

Evaluating Respondent Union's conduct by the criteria set forth above, and in all the circumstances herein, I find insufficient evidence of Union hostility or discrimination against Frealy, arbitrariness or lack of good faith in pursuing her grievance, or handling it in a perfunctory fashion. Up to and including the preparation of the grievance on the AFGE grievance form, the Union provided Ms. Frealy with whatever assistance or representation she sought. 27/ As to the grievance form, although the sections of the agreement noted thereon do not appear to be particularly applicable to the transfer Frealy was grieving, there is no showing that any other sections of agreement were more applicable to Frealy's situation. Indeed, the Union agreed with management that the negotiated agreement would be an inappropriate vehicle to support Frealy's protest of the transfer.

Drake was not familiar with the steps in the negotiated or administrative grievance procedure. Therefore, his confused actions with regard to the Activity's sending Frealy's grievance "to Washington" and the implications of that step are understandable. Frealy was informed of Drake's lack of familiarity with grievance handling and was specifically invited to replace Drake as her representative if she was displeased with him. This she refused to do. In any event, when Frealy's desires became clear to the Union it acted to have the grievance processed in compliance with Frealy's wishes. Moreover, no prejudice was visited upon Frealy due to the Union's actions or inactions.

25/ See Section 10(a) and (e) of the Order.

26/ Cf. American Federation of Government Employees, Local 2028, (Veteran's Administration Hospital, Pittsburgh, Pennsylvania), A/SLMR No. 431.

27/ I find insufficient evidence exists to support Ms. Frealy's contention that the Union failed to respond to telephone calls allegedly made to various Union representatives.

RECOMMENDATION

I recommend the complaints herein be dismissed in their entirety.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: February 4, 1977
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 TRANSPORTATION,
ST. LAWRENCE SEAWAY DEVELOPMENT CORPORATION
A/SLMR No. 839

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, Local 1968, AFL-CIO (AFGE) seeking clarification with respect to the status of various employee classifications in the AFGE's exclusively recognized unit at the Activity.

With respect to all but one of the job classifications covered by the CU petition, the Assistant Secretary noted that during the course of the hearing the parties stipulated as to their status. In these circumstances, he concluded that the agreement of the parties constituted, in effect, a withdrawal request of the petition insofar as it sought clarification with respect to the agreed upon classifications. With the exception of two alleged supervisory positions in which the evidence was insufficient to make a finding as to their supervisory status, and in the absence of any evidence that the remainder of the parties' agreement was improper, the Assistant Secretary approved the withdrawal request. As to the remaining job classification--that of Vessel Traffic Controller--the Assistant Secretary found that the employees in the job classification were not supervisors within the meaning of the Order and should be included in the exclusively recognized unit.

Accordingly, the Assistant Secretary clarified the unit consistent with his findings.

A/SLMR No. 839

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF TRANSPORTATION,
ST. LAWRENCE SEAWAY DEVELOPMENT CORPORATION

Activity

and

Case No. 35-3870(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1968, AFL-CIO

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 Nuchereno. 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, American Federation of Government Employees, Local 1968, AFL-CIO, herein called AFGE, filed a petition seeking to clarify the status of certain employee positions at the Activity where it is the exclusive representative. The unit description, as set forth in the parties' negotiated agreement, consists of all employees of the Activity, "excluding managerial officials, supervisors, those employees designated by the Activity as professional employees, employees who assist and act in confidential capacities to persons who formulate and effectuate management policies in the field of labor relations, and employees engaged in Federal personnel work in other than a purely clerical capacity." 1/

The St. Lawrence Seaway Development Corporation, a wholly owned, self-sustaining government enterprise, was established in 1954 and is presently an operating administration of the Department of Transportation.

1/ The record reflects that the AFGE was recognized as the exclusive bargaining representative for all eligible employees of the Activity on August 9, 1962.

It is responsible for the development, operation and maintenance of that part of the Seaway between Montreal and Lake Erie within the territorial limits of the United States. The record reveals that the Activity is represented in Washington, D.C., by an Administrator and his personal staff while most of its approximately 185 employees are centered at its operating headquarters at Massena, New York, which is directed by the Associate Administrator/Resident Manager. The Massena office is organizationally divided into seven component offices, the Office of Administration; the Office of Procurement/Supply; the Public Information Office; the Office of Engineering; the Office of Marine Services; the Office of Maintenance; and the Office of Lock Operations, all of which report directly to the Resident Manager.

At the hearing, the parties stipulated as to the status of all but one of the petitioned for employee positions. 2/

The evidence indicates that the sole disputed position--Vessel Traffic Controllers--are the senior members in each of the four three-man teams which operate in eight-hour shifts, twenty-four hours a day. In this regard, the Vessel Traffic Controller, who is directly responsible to the Operations Superintendant, oversees the activities of the Vessel Traffic Control Center and acts as a senior employee with respect to two subordinates, the Vessel Traffic Controller (Lakes) and Vessel Traffic Assistant, in directing the transit of vessels and cargoes along 140 miles of river and 15 river ports. However, the evidence establishes that, in general, his subordinates work within well-established procedures and are able to perform their duties, for the most part, without the direction of the Vessel Traffic Controller. The record indicates also that the incumbent controllers devote only up to approximately 25 percent of their work time directing their subordinates. It is contended that

2/ The parties stipulated that employees in certain classifications included in the petition, and separately listed in the attached Appendix A, were supervisory or confidential employees, or employees engaged in Federal personnel work and, therefore, were excluded from the unit. They stipulated also that certain other employee classifications should not be excluded from the unit. There is no record evidence that the stipulations with respect to the employee classifications listed in Appendix A were improper. It should be noted that such stipulations, in the context of a unit clarification petition, are viewed as a motion to amend the petition to delete and, in effect, withdraw such stipulated classifications. Under these circumstances, I grant the motion to amend and, therefore, find it unnecessary to clarify the status of those stipulated classifications listed in Appendix A. Cf. New Jersey Department of Defense, A/SLMR No. 121.

(Continued)

the incumbent controllers have prepared performance evaluations for their subordinates, have effectively participated in hiring and promotion decisions, have approved annual and sick leave, and, under the Activity's interpretation of the parties' negotiated agreement, can adjust grievances as a first-line supervisor. However, the evidence establishes that they participate in hiring and promotion decisions as panel members only, that such leave as they approve is done with the concurrence of their supervisor, and that up to the present time they have not resolved any grievances under the parties' negotiated agreement, nor have they been requested to do so.

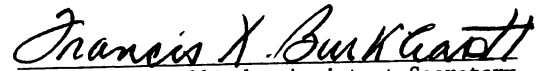
Under the circumstances outlined above, I find that the Vessel Traffic Controller has a senior-to-junior employee relationship with respect to his subordinates and that his duties are essentially routine in nature, performed within well-established guidelines, and do not require the use of independent judgment. Consequently, I conclude that an employee in the classification of Vessel Traffic Controller is not a supervisor within the meaning of the Order and should be included in the exclusively recognized unit.

2/ With respect to the job classifications of Relief Lockage Supervisor (the name of this classification appears as amended at the hearing), and Tugboat Mate, the parties stipulated that the employees in those positions served as supervisors only in the absence of the Lockage Supervisor and Tugboat Master respectively. The Assistant Secretary has indicated that with respect to employees who perform supervisory functions on an intermittent basis, the facts of each case shall determine their supervisory status. See Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, A/SLMR No. 212, at footnote 8. In the instant proceeding, the evidence is insufficient to establish the periods for which the Relief Lockage Supervisor may exercise any supervisory authority and it appears that such authority is exercised only on an infrequent and intermittent basis. In connection with the Tugboat Mate, there is no record evidence to indicate how often an employee in this classification acts in a supervisory status. Thus, the record does not clearly establish the extent to which the Relief Lockage Supervisor and the Tugboat Mate exercise supervisory authority. Accordingly, I shall make no finding as to their supervisory status. Cf. Department of Transportation, United States Coast Guard Support Center, Third District, Governors Island, New York, A/SLMR No. 785, and Army and Air Force Exchange Service, Richards-Gebaur Consolidated Exchange, Richards-Gebaur Air Force Base, Missouri, A/SLMR No. 219.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 1968, AFL-CIO, was recognized on August 9, 1962, be, and hereby is, clarified by including in said unit employees assigned to the position classified as Vessel Traffic Controller.

Dated, Washington, D.C.
May 11, 1977



Francis X. Burkhardt, Assistant Secretary
of Labor for Labor-Management Relations

APPENDIX A

The parties stipulated that the employee classifications set forth in Group A are confidential employees and should be excluded from the unit; that the employee classifications set forth in Group B are supervisors within the meaning of the Order and should be excluded from the unit; that the employee in the employee classification set forth in Group C is an employee engaged in Federal personnel work in other than a purely clerical capacity and should be excluded from the unit; and that the employee classifications set forth in Group D are not supervisors, confidential employees, or employees engaged in Federal personnel work and are thus included in the unit.

GROUP A

Secretary to Special Assistant to Administrator #522
Secretary to Chief, Office of Maintenance #309
Clerk-Stenographer to the Director of Procurement & Supply #481
Clerk-Stenographer #542

GROUP B

Lockage Supervisor #570
Marine Engineer #138
Safety and Security Specialist #461 3/
Accounting Technician #560

GROUP C

Personnel Clerk #539

GROUP D

Secretary to the Comptroller #563
Assistant Marine Engineer #109
Lead Lines Man #133
Management Assistant #531

3/ The name of this classification appears as amended at the hearing.

May 12, 1977

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 DEFENSE
DEPENDENTS SCHOOLS, EUROPE,
[BRINDISI SCHOOL]
A/SLMR No. 840

This case involved a petition for clarification of unit (CU) filed by the Overseas Education Association, National Education Association (OEA), and a representation petition (RO) filed by the Overseas Federation of Teachers, American Federation of Teachers, AFL-CIO (OFT). Essentially, the OEA sought to clarify its existing exclusively recognized bargaining unit to include the nonsupervisory professional school personnel hired as a result of the addition of grade 12 to the Brindisi School. The OFT, on the other hand, sought an election in a unit consisting of all nonsupervisory professional school personnel employed at the Brindisi High School. The OFT argued that the addition of the 12th grade created a new and separate high school which constituted an appropriate unit for the purpose of exclusive recognition. The Activity took a neutral position with respect to both petitions.

The Assistant Secretary found that the addition of grade 12 to the Brindisi School did not result in substantial or material changes in the scope or character of the existing exclusively recognized bargaining unit. In this regard, it was particularly noted that the one professional employee hired as a result of the addition of grade 12 worked in the same physical location as other unit employees, had teaching responsibilities similar to other employees within the unit, was subject to the same overall supervision and shared common personnel policies, practices and essentially the same working conditions. Accordingly, he ordered that the existing exclusively recognized bargaining unit represented by the OEA be clarified to include the employee hired as a result of the addition to the Brindisi School.

With regard to the OFT's representation petition, the Assistant Secretary found that the petition was untimely filed inasmuch as it was not filed during the valid challenge period as provided for in the Assistant Secretary's Regulations. In this connection, the record revealed that the OEA and the Activity were parties to a negotiated agreement which became effective on September 27, 1973, for a two year period and was extended by the parties to September 27, 1976, and that the petition herein was filed on August 17, 1976. Accordingly, the Assistant Secretary ordered that the OFT's petition be dismissed.

A/SLMR No. 840

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE DEPENDENTS
SCHOOLS, EUROPE
[BRINDISI SCHOOL]

Activity

and Case No. 22-7337(CU)

OVERSEAS EDUCATION ASSOCIATION,
NATIONAL EDUCATION ASSOCIATION

Petitioner

DEPARTMENT OF DEFENSE DEPENDENTS
SCHOOLS, EUROPE [BRINDISI HIGH SCHOOL] 1/

Activity

and Case No. 22-7428(RO)

OVERSEAS FEDERATION OF TEACHERS,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

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 Carol M. Rollins. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

1/ The name of the Activity in Case No. 22-7428(RO) appears essentially as amended at the hearing.

Upon the entire record in these cases, including a brief filed by the Overseas Federation of Teachers (OFT), the Assistant Secretary finds:

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

2. In Case No. 22-7337(CU), the Overseas Education Association (OEA) seeks to clarify its existing exclusively recognized bargaining unit which currently consists of all nonsupervisory professional school personnel of the Brindisi School in grades kindergarten through 11 to include the personnel hired as a result of the addition of grade 12 to the school. In Case No. 22-7428(RO), the OFT seeks an election in a unit of all nonsupervisory professional school personnel who are employed in the Brindisi High School. Essentially, the OFT argues that the addition of the 12th grade at the Brindisi School resulted in the creation of a new and separate high school which constitutes an appropriate unit for the purpose of exclusive recognition. The Activity took a neutral position with respect to the subject petitions.

In July 1967, the OEA was granted exclusive recognition by the United States Dependents Schools, European Area, for a unit of all nonsupervisory professional school personnel at a number of its overseas dependents schools, including the Brindisi School in Italy. Thereafter, the parties executed a two year negotiated agreement which became effective on September 27, 1973. By mutual assent, the parties extended their agreement to September 27, 1976.

The record indicates that during the school year 1974-75, the Brindisi School consisted of grades kindergarten through 10. Grade 11 was added the following year and, in school year 1976-77, a 12th grade was added. Separate facilities located some 250 yards apart house the elementary and high schools although a new facility currently under construction will house the elementary school, a high school addition, a gymnasium and a cafeteria which will serve all students.

General supervision of the Brindisi School rests with the principal who has delegated the supervision of the elementary school to the deputy principal. The deputy principal can approve leave requests, adjust grievances and complete performance evaluations for those employees under his supervision although the principal retains final authority in these matters.

For the most part, there is a different teaching staff for the elementary and high school portions of the school, although some teachers, notably those for art and music, teach in all grades. Additionally, the Brindisi School employs specialists who do not have classroom teaching responsibilities but, like the school counselor, have responsibilities in all grades. Staffing in the high school for the school year 1976-77 consisted of 12 positions as well as the host nation, art and music

teachers. One of these positions was added as a result of the addition of the 12th grade. An orientation week held prior to the current school year was conducted for teachers in all grades and the teachers' handbook encompasses teachers in all grades. The elementary and high school payrolls are submitted jointly to the Activity's Finance and Accounting Office although separate monthly statistical reports are submitted to higher agency management. Separate official bulletin boards are maintained for the elementary and high school teachers, separate faculty meetings are generally held, and, commencing in school year 1976-77, the elementary and high school teachers have been on a different work schedule with the elementary teachers terminating their official work day one hour earlier than the high school teachers. The addition of grade 11 in school year 1975-76 and the subsequent addition of grade 12 the following school year resulted in the addition and expansion of several programs, including a special testing program for high school students, participation in interscholastic sports competition, changes in the physical education program and a wider variety of course offerings in grades 7 through 12.

Based on the foregoing, I find that the addition of grade 12 to the Brindisi School did not result in substantial or material changes in the scope or character of the existing exclusively recognized bargaining unit. It was particularly noted that the one professional employee hired as a result of the addition of grade 12 to the Brindisi School works in the same general location as all other employees, has teaching responsibilities similar to other employees within the unit, is subject to the same general supervision and shares common personnel policies, practices and working conditions with the other employees. Under these circumstances, I find that the newly hired professional employee shares the same community of interest with the other employees in the existing exclusively recognized bargaining unit. Furthermore, in view of the fact that all of the professional employees at the Brindisi School share the same personnel policies and practices and essentially the same conditions of employment, I find that the inclusion of grade 12 into the present unit will promote effective dealings and efficiency of agency operations and prevent unit fragmentation. 2/ Accordingly, I shall order that the existing exclusively recognized bargaining unit represented by the OEA be clarified to include the nonsupervisory professional school personnel hired as a result of the addition of grade 12 to the Brindisi School. 3/

With respect to the OFT's petition in Case No. 22-7428(RO) seeking an election among the nonsupervisory professional school personnel at the Brindisi High School, I find that further processing is barred by the negotiated agreement between the Activity and the OEA which was in

2/ Cf. United States Dependents Schools, European Area, Upper Heyford High School, A/SLMR No. 770, and Department of Defense Dependents Schools, Europe, [Sigonella School], A/SLMR No. 825.

3/ In view of the fact that the unit inclusions of the OEA's existing exclusively recognized bargaining unit adequately encompass the above-noted clarification, I find it unnecessary to specify the OEA's clarified unit in terms of the school's grade struoture.

effect at the time the instant petition was filed on August 17, 1976, and which, as found above, covered the claimed employees. As noted previously, the OEA and the Activity entered into a negotiated agreement which became effective on September 27, 1973, for a period of two years and was extended by the parties to September 27, 1976. In order to be considered timely, a representation petition must be filed within the valid challenge period as provided for in Section 202.3(c) of the Assistant Secretary's Regulations. 4/ As the instant petition was not filed within the valid challenge period, I shall order that the OFT's petition be dismissed.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified by the petition in Case No. 22-7337(CU) be, and it hereby is, clarified to include in said unit the nonsupervisory professional school personnel hired as a result of the addition of grade 12 to the Brindisi School.

IT IS FURTHER ORDERED that the petition in Case No. 22-7428(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 12, 1977

F. X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

4/ Section 202.3(c) states, in pertinent part: "When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition or other election petition will be considered timely when filed...[n]ot 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 and dated by the activity and the incumbent exclusive representative;...."

May 16, 1977

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,
INTERNAL REVENUE SERVICE,
MANHATTAN DISTRICT
A/SLMR No. 841

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union, and its Chapter 47 (NTEU) alleging that the Respondent had violated Section 19(a)(1) and (6) of the Order by its refusal to negotiate with the NTEU concerning the impact and implementation of the decision by the Respondent to change the method of filling out the "Daily Location Record" by the revenue agents in the Audit Division.

The Assistant Secretary adopted the Administrative Law Judge's findings, based on his credibility resolutions, that on Friday, June 27, 1975, the Respondent advised the NTEU's president that a change in the method of filling out the "Daily Location Record" was going to become effective on July 1, 1975; that following this, the NTEU requested negotiations on the impact and implementation of the Respondent's decision; and that on July 18, 1975, a meeting was held between representatives of the NTEU and the Respondent at which the representatives of the Respondent stated that they were not obliged to negotiate, but would only "discuss" the matter with the NTEU. The meeting concluded when the representatives of the NTEU walked out. The Administrative Law Judge concluded that the Respondent had failed to give the NTEU adequate notice of the change to permit time for the NTEU to consider the change and request bargaining on the implementation and impact of the change, and further that, on July 18, 1975, the Respondent failed in its obligation to bargain about the impact and implementation of the decision to change the method for filling out the "Daily Location Record", thereby violating Section 19(a)(1) and (6) of the Order.

The Administrative Law Judge's recommended remedy included a rescission of the change in the method of filling out the "Daily Location Record" which, in effect, was a return to the status quo ante. Contrary to the Administrative Law Judge's recommendation, the Assistant Secretary concluded that such an order would not be warranted in this case, which involved conduct occurring in 1975, as such a rescission would not prohibit the Respondent from again changing the method of filling out the "Daily Location Record", after appropriate notification and bargaining with the exclusive representative only with respect to implementation and impact. In his opinion, a remedial order requiring the Respondent to bargain over implementation and impact after an appropriate request by the NTEU, and prohibiting a change in the method of filling out the "Daily Location Record" in the future without appropriate notification and bargaining constituted a satisfactory resolution of the unfair labor practice, and he so ordered.

A/SLMR No. 841

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
MANHATTAN DISTRICT

Respondent

and

Case No. 30-6638(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER 47

Complainant

DECISION AND ORDER

On December 1, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief to the Respondent'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 Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent and the Complainant's answering brief to the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations, as modified herein.

1/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180, the Assistant Secretary held that as a matter of policy he would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a careful review of the record in this case, I find no basis for reversing the Administrative Law Judge's credibility findings.

The Administrative Law Judge found, and I concur, that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to bargain with the Complainant concerning the implementation and impact of the Respondent's decision to change the method of filling out the "Daily Location Record" by the revenue agents in its Audit Division.

In his proposed remedy, the Administrative Law Judge recommended, in effect, a return to the status quo ante by rescinding the change in the method of filling out the "Daily Location Record" which became effective July 1, 1975. In my view, such a remedial order is not warranted under the particular circumstances of this case, including the nature of the violation found. Thus, a rescission of the change at this time would not prohibit the Respondent from again changing the method of filling out the "Daily Location Record" after appropriate notification and bargaining only with respect to implementation and impact. In my opinion, a remedial order requiring the Respondent, after an appropriate request by the Complainant, to bargain over the procedures for implementation and the impact on adversely affected employees of the change of July 1, 1975, and prohibiting a change in the method of filling out the "Daily Location Record" in the future without appropriate notification and bargaining, constitutes a satisfactory resolution of the unfair labor practice involved herein, and I shall so order. 2/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Manhattan District shall:

1. Cease and desist from:

(a) Instituting a change in the method of filling out the "Daily Location Record" with respect to employees represented exclusively by the National Treasury Employees Union, Chapter 47, without notifying the National Treasury Employees Union, Chapter 47, 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 implementing such change, and on the impact the change will have on the employees adversely affected by such action.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

2/ Cf. Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486, FLRC No. 75A-59.

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

(a) Upon request by the National Treasury Employees Union, Chapter 47, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing the change in the method of filling out the "Daily Location Record" which became effective July 1, 1975, and on the impact of the change on adversely affected employees.

(b) Post at all Department of Treasury, Internal Revenue Service, Manhattan District facilities and installations 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 Manhattan District 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 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
May 16, 1977

F X Burkhardt

Francis X. Burkhardt, 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 institute a change in the method of filling out the "Daily Location Record" with respect to employees represented exclusively by the National Treasury Employees Union, Chapter 47, without notifying the National Treasury Employees Union, Chapter 47, 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 implementing such change, and on the impact the change will have on the employees adversely affected by such action.

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

WE WILL, upon request by the National Treasury Employees Union, Chapter 47, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in implementing the change in the method of filling out the "Daily Location Record" which became effective July 1, 1975, and on the impact of the change on adversely affected employees.

_____
(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 Regional Administrator, 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

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
	:	
DEPARTMENT OF THE TREASURY,	:	
INTERNAL REVENUE AND SERVICE	:	
MANHATTAN DISTRICT	:	
	:	
Respondent	:	
	:	
and	:	Case No. 30-6638 (CA)
	:	
NATIONAL TREASURY EMPLOYEES UNION	:	
AND NTEU CHAPTER 47	:	
	:	
Complainant	:	

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Internal Revenue Service
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New York, New York 10008

For Respondent

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 5, 1975 and an amended complaint filed on May 10, 1976 under Executive Order 11491, as amended, (hereinafter called the Order) by National Treasury Employees Union and NTEU, Chapter 47, (hereinafter called NTEU and NTEU Chapter 47 respectively and the Complainants, collectively)against the Department of the Treasury, Internal Revenue Service, Manhattan District (hereinafter called the Activity or the Respondent) a Notice of Hearing on Complaint was issued by the Regional Administrator for the New York, New York Region on May 13, 1976.

A hearing was held before the undersigned in New York, New York. Both parties were represented and afforded full opportunity to be heard, to introduce evidence and to examine and cross-examine witnesses. Both parties had an opportunity to argue orally and to file briefs. The briefs have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusion of law and recommendations:

Findings of Fact

1. NTEU Chapter 47 holds and has held at all times relevant hereto exclusive recognition for a unit of all professional and non-professional employees of the Activity, including Internal Revenue Agents, employed in the Activity's Audit Division.

2. Internal Revenue Agents' duties include the conducting of field examinations of income tax returns and other audit investigations.

3. At all times material, prior to July 1, 1975 Internal Revenue Agents employed in the Activity's Audit Division utilized the "Daily Location Record," NAR Form 3-139. Prior to July 1, 1975 the form was filled out on a daily basis. It was maintained for each group for each day of the month. There was one or more page for each day and

each employee had his own line on each such page. The individual Internal Revenue Agent would enter on his line on the form for the day in question, where he would be working that workday and where he could be reached. The Internal Revenue Agent filled out the form on the day in question or a day or two in advance. Thus for each day of the month there was a composite "Daily Location Record" reflecting the requested information for each Agent within the work group.

4. In late May or early June of 1975 Mr. Joseph Slipowitz, then Chief of the Activity's Audit Division, tentatively decided to revise the manner in which the "Daily Location Record" was completed and maintained. Under the new system each Agent was to fill out his own "Daily Location Record" on a monthly basis setting forth for the next month, on a separate line or two for each date during the month, where he planned to be and the specific matter he would be working on, 1/ including his plans for when he was working in the office. With respect to the latter matter the Agent must set forth the precise nature of the work he intend to do in the office. These entries were to be made by the Agent, at the beginning of the month, for the entire month, and then as changes occurred in the appointments, etc., changes were to be promptly made on the record. This new system was to be done on an experimental basis in the Audit Dvision for six months.

5. On June 27 Mr. Slipowitz met with NTEU Chapter 47 President and Chief Steward Sol Katz and advised him of the impending change in filling in the Daily Location Record and advised him that the change was going to be effective on July 1, 1975. Mr. Katz indicated he had some reservations and asked Mr. Slipowitz to delay the effective date of the change till Mr. Katz could consult other union officials.

In this regard I credit Mr. Katz' version of this

1/ Under this new system each Agent in the Audit Division would have a one or two sheet Daily Location Record which would have his name at the top and a line or two for each date. Under the old system each page was for a specific date and each Agent entered his work for that date on his own line on the page; a large number of Agents' plans for that date would appear on the same page.

June 27, 1975 meeting and I discredit Mr. Slipowitz contention that he advised Mr. Katz of the proposed change on June 16, 1975 and that there was no such June 27, 1975 meeting. Mr. Katz, as described below, immediately after the June 27 meeting advised Mr. Morris Goldstein, an NTEU Chapter 47 Vice-President, what had just occurred at the meeting and Mr. Goldstein corroborates Mr. Katz' testimony. Further Mr. Katz recalls it because the date was his last day before going on annual leave. Mr. Slipowitz, however, did not advise anyone about the alleged June 16 meeting until about July 2, 1975 and even then, the alleged corroboration from Mr. Russo, Chief of the Activity's Personnel Branch, is not too supportive of Mr. Slipowitz' contention. Although Mr. Russo testified that he was advised by Mr. Slipowitz on July 2 that the meeting had occurred two weeks before, in an affidavit and elsewhere in his testimony he seemed to indicate the meeting occurred during the latter part of June. Further the relationship of the subject change, to a problem concerning the reassignment of two Agents, which Mr. Slipowitz contends was also discussed on the June 16, meeting is too tenuous and not sufficient to persuade me to credit Mr. Slipowitz' version. Further it is concluded that Mr. Katz' version of the June 27 meeting is not inconsistent with the Activity's witnesses versions of the July 18, 1975 meeting described below.

In light of all of the foregoing and the events that did subsequently occur, Mr. Katz' testimony concerning the June 27 meeting is credited. 2/

6. After leaving Mr. Slipowitz' office on June 27, 1975, Mr. Katz went to and advised Mr. Goldstein about the conversation he had just had and about the proposed change in filling out of the Daily Location Record. He advised Mr. Goldstein that he, Mr. Katz, was going on annual leave and he asked Mr. Goldstein to handle the matter.

7. The proposed change in the method filling out the Daily Location Record was set forth in a June 27, 1975 memorandum from Mr. Slipowitz.

2/ It should be noted that in Mr. Slipowitz' own version of the alleged June 16, 1975 meeting he testified that he did not tell Mr. Katz that the Daily Location Record would have to be filled out in advance for the entire month.

8. On Monday, June 30, 1975 Mr. Goldstein attended a group meeting of Agents at which the new change in the method of filling out the Daily Location Record was explained and discussed. The Agents were told that the new system of filing out the Daily Location Record would become effective on July 1, 1975.

9. Upon advise from NTEU National of Field Representative Lipton on July 2, 1975 NTEU Chapter 47 sent a letter to the Activity stating "We are requesting full consultation on the impact of the implementation of the new locator sheets for the Audit Division."

10. The parties met on July 18, 1975; NTEU Chapter 47 was represented by Mr. Katz, Mr. Lipton, Mr. Goldstein and a Mr. Esmirne and the Activity was represented by Mr. Russo, Mr. Slipowitz, Assistant Chief of Audit Division Murray Navarro, and Labor Relations Section Chief Amy Adler Chassid. 3/

11. There is apparently some confusion as to what exactly was said at the July 18 meeting. I conclude that Mr. Slipowitz apparently opened the meeting by stating they were willing to discuss this matter. Mr. Lipton stated that the Union wanted to negotiate about the impact and implementation of the new Daily Location Record. Mr. Russo at that point asserted that this was a change in "work technology" and that, under the Order, they were not obligated to bargain about it. The parties then got into a discussion of the definition of work technology. Mr. Slipowitz reminded Mr. Katz that when he first advised him of the change Mr. Katz had no objection. Mr. Katz replied that he had not then realized the impact of the changes. NTEU Chapter 47 representatives demanded to bargain about the impact and implementation of the change with respect to the Daily Location Record. The Activity representatives stated they were not obliged to negotiate, but would discuss the matter with the Union. The NTEU Chapter 47 representatives then walked out of the meeting.

3/ Prior to the July 18 meeting the Activity representatives met and agreed upon a "fall back" position. Mr. Slipowitz was willing to delete the requirement that Agents enter on the location form when they are working in the office, what precisely they would be doing in the office and what precise cases they would be working on. They did not have to enter this information under the method of filling in the Daily Location Record prior to July 1, 1975.

Conclusions of Law

The issue presented in this case, simply put, is whether the Activity violated Section 19(a)(1) and (6) of the Order by failing to bargain and negotiate concerning the impact and implementation of the change in filling out the Daily Location Record.

The Activity contends that the change in the method of filling out the form constituted a change in "work technology" within the meaning of Section 11(b) of the Order and that therefore the Activity was not obligated to negotiate concerning its decision to institute this change in the method for filling out the Daily Location Record. Without conceding that the change in filling out the Daily Location Record involved "work Technology" or that the Activity was privileged to make the change without bargaining about its decision, N.T.E.U. Chapter 47 does not allege that the Activity failed or refused to bargain about the basic decision to change the method for filling out the Daily Location Record. Rather, it alleges that the Activity failed and refused to bargain about the impact and implementation of this change. The Activity specifically does not contend that the impact and implementation of the change involved "work technology" or that it was otherwise not obligated to bargain about the impact and implementation of the subject change. Rather the Activity raises two basic defenses, first that on June 16, 1975 it advised NTEU Chapter 47 of the decision to make the change and the union official approved the change and didn't then timely request to bargain about the implementation and impact of the change and secondly that at the July 18 meeting it did not refuse to bargain about the impact and implementation of the change.

The law seems clear under the Order that even when an activity is privileged by the Order to make a decision without first bargaining about the basic decision, it is obliged to bargain, upon request, with the collective bargaining representative of its employees concerning the procedures for implementing the decision and the impact of the decision on the employees. 4/

Sometimes the lines between a decision, the procedures for implementing the decision and the impact of that decision are difficult to draw or to see. In the instant case, for example the decision, the precise changes in the entries to be made on a form, is very close to the

4/ cf. Bureau of the Mint, U.S. Department of the Treasury, Case No. A/SLMR No. 750.

procedures for implementing that decision. However, there were some items concerning the decision that were matters of implementation and should have been discussed, such as the effective date of the change, the procedures whereby a Revenue Agent is to make changes in his entries on the form during the month, after he has filled out his form for that month, etc.

The record establishes that the decision to change the method of filling in the Daily Location Record could reasonably be foreseen to have a substantial impact on the working conditions of the employees. The form had to be filled out a month in advance and then, as the month progresses the Revenue Agent was to make any changes in his entries on the form as his appointments and schedules changed. It was pointed out that it would permit the Agent to see, at the beginning of the month, how well he had scheduled his time for the month and whether he had a substantial number of days with no work scheduled. Further it might indicate if an Agent is not carrying sufficient work. All of this raised the question of whether this form be used to rate, appraise or judge the work of Agents. Such a use of the form would of course have substantial impact on the Revenue Agent's working conditions. Further impact would vary depending on what was decided or agreed upon with respect to what would be the effect on an Agent's rating if for various reasons he did not fill out the form, filled it out incorrectly or changes he wished made on his entries on the form were never made.

All of the foregoing illustrates that the decision in the subject case was an appropriate one to afford the collective bargaining representative an adequate opportunity to bargain and negotiate concerning the procedures for implementing the subject decision and its impact on the employees.

In order for the union to be able to timely request to bargain concerning the implementation and impact of the decision, the union must be advised of the details of the decision and the proposed procedures for its implementation, and all in sufficient time to afford a reasonable opportunity to consider and analyze the implementation and the impact of the decision, and to request to bargain and bargain with the Activity concerning the implementation and impact of the decision.

In the foregoing Findings of Fact it was specifically

found that the Activity first advised NTEU Chapter 47 on June 27, not June 16 as the Activity alleges. Upon being so advised the NTEU Chapter 47 President Katz requested that the change then scheduled for July 1 be postponed so as to permit him to consult with the Union. The Activity did not accede to Mr. Katz' request and on June 30 called employees together to explain the change that was to occur on the next day. It is concluded that by advising the Union on June 27 of a change that was to become effective some 4 or 5 days later, the Activity did not give the Union adequate notice and time to permit the Union to consider the change, the procedures for its implementation and its possible and probable impact and to request to bargain and to bargain about the implementation procedures and the impact. Therefore, it is concluded that by the Activity failed to give the Union adequate advance notice of the change and therefore violated Sections 19(a)(6) the Order because it failed in its obligation to bargain about the impact and implementation of the decision to change the method for filling and the Daily Location Record. 5/ The Activity did not submit any justification as to why the notification time was so brief nor did it allege any type of emergency that required the change to be made on July 1 and not to permit the Union, as it requested, more time to consider the ramifications and impact of the changes.

In reaching the foregoing conclusion it of course follows that it is concluded that the Union did not waive its rights to bargain about the impact and implementation of the subject decision. On July 2 the Union requested to negotiate concerning the impact and implementation of

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5/ Even if it be assumed that the Activity notified the Union on June 16 of the change, Mr. Slipowitz testified that he did not advise Mr. Katz that the Daily Location Record would have to be filled out for one month in advance. This was the major part of the change that was decided upon by the Activity and the failure to advise the Union of this aspect of the decision could hardly be said to be advising the Union of the decision with sufficient specificity to permit the Union to meaningfully consider and bargain about the impact and implementation of the decision. Therefore, even based on the Activity's version of the June 16 notification, it would be concluded that the Activity didnot filfull its obligation to give the Union sufficiently specific and timely notification of the decision and therefore violated Section 19(a)(6) of the Order.

the decision and the parties then meet on July 18. 6/ The Union made it clear it wished to negotiate concerning the impact and implementation of the decision to change the method for filling out the form. The Activity replied it was not obligated to negotiate or bargain because this involved a change in "work technology" but stated that it would discuss the matter. The Union, in effect, refused to accept this offer and left. The Union came to the meeting and attempted to exercise its right as granted by the Order, to negotiate concerning the implementation and impact of the decision; the Activity made it quite clear it was not going to negotiate but offered to do something less, to discuss. The Union was under no obligation to accept this offer of less than it was entitled to, so it left.

The Activity contends that had they stayed and "discussed" it might have actually evolved into negotiating. However, the Order can not be read as to require parties to accept less than they are entitled to because it might ultimately evolve into bargaining. Had the Union entered into discussions and had they amounted to negotiations and bargaining, then the Activity would have met to obligation; but that wasn't the case and the Union can insist that its right to negotiate be recognized before it be required to enter into discussions; it can not be required to accept less because it might possibly meet the requirements of negotiations or bargaining. 7/ Thus, it is included that by refusing to negotiate and insisting only on discussions, concerning the impact and implementation of the decision, the Activity again failed to bargain in good faith in violation of Section 19(a)(6) of the Order.

It is further concluded that the foregoing refusals

6/ Had the Activity somehow manage to bargain in good faith about the implementation and impact of the decision, even after it had been implemented, perhaps the Activity could have corrected or remedied the failure to bargain that it had already committed; but, as herein after discussed, the Activity did not.

7/ This is especially so where there would be a possible argument made that the Union, if it agreed to discussions, might have waived its rights to negotiations.

to bargain would by their nature interfer with employees' rights guaranteed by the Order and therefore violated Section 19(a)(1) of the Order.

Recommendation

Having found that the Respondent has engaged in conduct prohibited by Sections 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.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Manhattan District shall:

1. Cease and desist from:

(a) Instituting a change in the method of filling out the Daily Location Record with respect to employees represented exclusively by National Treasury Employees Union, Chapter 47, without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such change and on the impact of such change on adversely affected employees.

(b) In any like or related manner interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Rescind the change in the method of filling out the Daily Location Record that became effective July 1, 1975.

(b) Upon request by the National Treasury Employees Union, Chapter 47, meet and confer, to the extent consonant with law and regulations, concerning the procedures for implementing any change in the method of filling out the Daily Location Record and concerning the impact on adversely affected employees of any such change.

(c) Post at all Department of the Treasury, Internal Revenue Service, Manhattan District facilities and installations 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 Manhattan District and they shall be posted at all Department of the Treasury, Internal Revenue Service, Manhattan District facilities and installations and maintained by the Director 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.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing 30 days from the date of this order as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: December 1, 1976
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 institute any change in the method of filling out the Daily Location Record with respect to employees represented exclusively by the National Treasury Employees Union, Chapter 47, without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating any such change and on the impact of such change 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 by Executive Order 11491, as amended.

WE WILL rescind the change in the method of filling out the Daily Location Record that became effective July 1, 1975.

WE WILL, upon request by the National Treasury Employees Union, Chapter 47, meet and confer, to the extent consonant with law and regulations, concerning th procedures for implementing any change in the method of filling out the Daily Location Record and concerning the impact on adversely affected employees of any such change.

_____
(Activity or Agency)

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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

May 19, 1977

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

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE
A/SLMR No. 842

This case arose when the National Federation of Federal Employees, Independent (NFFE) filed a representation petition seeking an election in a unit of all General Schedule and Wage Grade employees employed by and assigned to Forest Service Headquarters, Washington, D.C., excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Executive Order. The petitioned for unit would include all employees in the Washington, D.C. metropolitan area and includes, in addition to the Activity's employees in Washington, D.C., those in Arlington, Virginia, Reston, Virginia, and Beltsville, Maryland, which are close-by to the Washington, D.C. office. The other employees of the headquarters are located in four locations outside Washington, D. C.; Davis, California, Boise, Idaho, Fort Collins, Colorado, and Salt Lake City, Utah. The Activity agreed that the petitioned for unit is appropriate for the purpose of exclusive recognition.

The national headquarters' mission is to formulate service-wide policy and objectives; to formulate and evaluate programs; and to provide expert advice and assistance to the regions, experiment stations, and state and private area offices on difficult or unusual problems. The Assistant Secretary found that the petitioned for unit was appropriate for the purpose of exclusive recognition. In this regard, he found that the employees in the claimed unit share a clear and distinct community of interest as they share a common mission, general working conditions, overall supervision, and labor relations policies which are initiated in the Office of the Chief; there is substantial interchange among the employees; there is a common area of consideration for promotion and reduction-in-force procedures; and the Washington personnel office services the entire Washington, D. C. metropolitan area headquarters. He further found that this unit, which the Activity agreed was appropriate, would promote effective dealings and efficiency of agency operations. Accordingly, he directed an election in such unit.

A/SLMR No. 842

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE

Activity

and

Case No. 22-7516(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, INDEPENDENT

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 Bridget Sisson. 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 National Federation of Federal Employees, Independent, hereinafter called NFFE, seeks an election in a unit of all General Schedule and Wage Grade employees employed by and assigned to Forest Service Headquarters, Washington, D. C., excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Executive Order. 1/ The Activity agrees that the unit sought is appropriate and that it will promote effective dealings and efficiency of agency operations. However, the Regional Administrator issued a Notice of Hearing in this matter because of certain questions he felt existed as to the scope of the petitioned for unit.

1/ The petitioned for unit would include those employees of the Activity who are located in the Washington, D.C. metropolitan area which includes, in addition to Washington, D.C., Activity employees in Arlington and Reston Virginia, and Beltsville, Maryland.

The mission of the Forest Service is to provide national leadership in forest management, protection, and utilization, involving participation in designating national priorities for land use, formulation of programs to meet national objectives, and the establishment of Federal forestry policies to assure maximum contribution of environmental, social, and economic benefits to present and future generations. Accomplishment of the Forest Service mission includes three major areas of operation: (1) management, protection, and development of the some 187 million acre National Forest system; (2) cooperation with state forestors, private owners of forest lands, wood processors, and private and public agencies; and (3) conducting research activities that directly or indirectly support the Forest Service mission, forestry, and forest-related resources.

The petitioned for employees are employed in the national headquarters of the Forest Service. Its mission is to formulate service-wide policy and objectives, to formulate and evaluate programs, and to provide expert advice and assistance to the regions, experiment stations, and state and private area offices on difficult or unusual problems. The petitioned for unit of headquarters employees in the metropolitan Washington, D.C. area consists of approximately 762 employees. In addition, the record indicates that other employees of the Forest Service Headquarters are located in four locations in the continental United States; Davis, California, Boise, Idaho, Fort Collins, Colorado, and Salt Lake City, Utah. 2/ The Activity contends that these activities are functionally separate and distinct from the national headquarters in the Washington, D.C. metropolitan area, with little or no commonality, and that including such employees in the petitioned for unit would not promote effective dealings and efficiency of agency operations.

The national headquarters of the Activity is an organizational entity under the direction of the Chief of the Forest Service, with offices of administration; research; national forest system; state and private forestry; and programs and legislation, which are under the direction of Deputy Chiefs, who report to the Associate Chief. The record indicates that the petitioned for employees have a common mission, and that they are all subject to the same general working conditions, overall supervision, and labor relations policies which are initiated in the Office of the Chief. Moreover, there is substantial interchange among the employees, particularly those in clerical classifications, and there is a common area of consideration for promotion and reduction-in-force procedures. Further, the record reflects that the Washington personnel office services the entire Washington, D.C. metropolitan area

2/ An Ann Arbor, Michigan, location was established by the Activity for the convenience of one employee who was attending school in Ann Arbor. This employee is employed by the national headquarters in Washington, D.C., and will return there in June of 1977. The Activity desires his inclusion in the petitioned for unit, and the NFFE does not object. In these circumstances, I shall include this employee in the unit found appropriate herein.

headquarters.

Under these circumstances, I find the petitioned for unit to be appropriate for the purpose of exclusive recognition. Thus, as the claimed employees share the same general mission under common supervision, are subject to the same centralized personnel and labor relations policies at the national headquarters, and share the same general working conditions, and as the claimed unit contains all of the nonprofessional employees of the Activity in the Washington, D.C. metropolitan area, I find that the employees in the unit sought by the NFFE share a clear and identifiable community of interest separate and distinct from other employees of the Activity. Further, I find that such a unit will promote effective dealings and efficiency of agency operations. In this latter regard, in addition to the matters set forth above, it was noted that the level of recognition would be at the same level in the Activity's organization where personnel and labor relations policies are initiated. Moreover, the parties are in agreement that such a unit would promote effective dealings and efficiency of agency operations. Accordingly, I find that the unit petitioned for is appropriate for the purpose of exclusive recognition.

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 General Schedule and Wage Grade employees employed by and assigned to U.S. Department of Agriculture, Forest Service Headquarters, and located in the metropolitan area, Washington, D.C., excluding professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, management officials, and supervisors as defined in the Order. 3/

DIRECTION OF ELECTION

An election by secret ballot shall be conducted, 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

3/ At the hearing, the Activity placed in evidence several lists of employees whom it designated as "supervisors," "management" employees, and "professional" employees. As there are no facts in the record to indicate whether these employees were designated properly, I make no findings as to their status and eligibility. See U.S. Department of Agriculture, Region Forester Office, Forest Services, Region 3, Santa Fe National Forest, Santa Fe, New Mexico, A/SLMR No. 88, at footnote 6.

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 by the National Federation of Federal Employees, Independent.

Dated, Washington, D. C.
May 19, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

May 19, 1977

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,
SPRINGFIELD TOWER,
SPRINGFIELD, MISSOURI
A/SLMR No. 843

This case arose as a result of an unfair labor practice complaint filed by the Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by the action of its Facility Chief in summoning a unit employee to his office and asking for his input and opinion on the work schedule for bargaining unit employees. It was also alleged that the discussion constituted a formal meeting within the meaning of Section 10(e) of the Order at which the Complainant was entitled to be present since personnel policies and practices were discussed.

The Administrative Law Judge found that the Respondent did not attempt to bypass the Complainant or unilaterally implement personnel policies or changes affecting unit employees. In his view, the Respondent merely sought information from the unit employee involved for consideration of a basic watch schedule which was a subject of current negotiations. Further, the Administrative Law Judge concluded that, under all the circumstances, the meeting involved did not constitute a formal discussion within the meaning of Section 10(e) of the Order.

The Assistant Secretary noted that the record indicated that the Respondent was engaged in negotiations with the Complainant regarding the basic watch schedule both before and after the meeting in question and that the purpose of the meeting was to seek aid and information from the unit employee involved in order to develop or support its position regarding the basic watch schedule. Under these circumstances, the Assistant Secretary found that the Respondent's action of dealing directly with and soliciting the views of a unit employee concerning a bargainable item which was currently being negotiated constituted an improper bypass and undermining of the status of its employee's exclusive representative in violation of Section 19(a)(1) and (6) of the Order.

The Assistant Secretary, contrary to the finding of the Administrative Law Judge, viewed the meeting in question as being a formal discussion within the meaning of Section 10(e) of the Order as the subject of the meeting between the Facility Chief and the unit employee involved was the basic watch schedule, a matter affecting the general working conditions of bargaining unit employees. Accordingly, the Assistant Secretary

found that the Respondent's failure to afford the Complainant the opportunity to be represented at the formal discussion additionally violated Section 19(a)(1) and (6) of the Order.

Accordingly, 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 to effectuate the purposes and policies of the Order.

A/SLMR No. 843

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
SPRINGFIELD TOWER,
SPRINGFIELD, MISSOURI

Respondent

and

Case No. 62-4873(CA)

PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, M.E.B.A., AFL-CIO

Complainant

DECISION AND ORDER

On December 29, 1976, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order 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 and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order 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, only to the extent consistent herewith.

The amended complainant herein alleged, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by the action of the Facility Chief, Charles C. Pfander, in summoning James Johnston, a unit employee, to his office on April 30, 1976, and asking for Johnston's input and opinion on the work schedule for bargaining unit employees.

It also alleged that the discussion constituted a formal meeting within the meaning of Section 10(e) of the Order at which the Complainant was entitled to be present since personnel policies and practices were discussed.

The Administrative Law Judge found that, under the circumstances, the Respondent did not attempt to bypass the Complainant or unilaterally implement personnel policies or changes affecting unit employees. In his view, the Respondent merely sought information from employee Johnston for consideration of a basic watch schedule. Thus, according to the Administrative Law Judge, the knowledge, experience and expertise of a government agency employee is not an unwarranted source of information in the Respondent's development of a plan that is subject to collective bargaining, nor does the Complainant have a monopoly in this source of information. Further, the Administrative Law Judge concluded that, under all the circumstances, the April 30, 1976, meeting did not constitute a formal discussion within the meaning of Section 10(e) of the Order. I disagree.

The record shows that the Respondent was engaged in negotiations with the Complainant regarding the basic watch schedule both before and after the meeting in question and that the purpose of the meeting was to seek aid and information from Johnston, a unit employee, in order to develop or support its position regarding the basic watch schedule. Under these circumstances, I find that the Respondent's action of dealing directly with and soliciting the views of a unit employee concerning a negotiable item which was currently being negotiated 1/ constituted an improper bypass and undermining of the status of its employees' exclusive representative in violation of Section 19(a)(1) and (6) of the Order. 2/

Also, contrary to the Administrative Law Judge, I view the meeting in question to be a formal discussion within the meaning of Section

1/ Article 33, Section 1 of the parties' negotiated agreement states in pertinent part:

> The basic watch schedule will not be changed without prior consultation with the Union. In developing the basic watch schedule, the Facility Chief shall meet with the principal facility representative and carefully consider his views and recommendations concerning the schedule.

2/ See National Aeronautics and Space Administration (NASA) Washington, D. C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, A/SLMR No. 457, FLRC No. 74A-95, wherein the Council indicated that it viewed as improper a management attempt to "gather information regarding employee sentiments for the purpose of using it subsequently to persuade the union to abandon a position taken during negotiations regarding the personnel policies or practices concerned."

10(e) of the Order as the subject of the meeting between Facility Chief Pfander and unit employee Johnston was the basic watch schedule, a matter affecting the general working conditions of bargaining unit employees. Accordingly, I find that the Respondent's failure to afford the Complainant the opportunity to be represented at the formal discussion involved additionally violated Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, Springfield Tower, Springfield, Missouri, shall:

1. Cease and desist from:

(a) Dealing directly with and soliciting the views of employees represented by the Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, the employees' exclusive representative, regarding the basic watch schedule or any other negotiable item which is a subject of current negotiations;

(b) 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 the Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions;

(c) 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 policies of the Order:

(a) Notify the Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, of, and afford 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 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 Facility Chief 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

Facility Chief shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material;

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
May 19, 1977

Francis X. Burkhardt, 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 deal directly with and solicit the views of employees represented by the Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, the employees' exclusive representative, regarding the basic watch schedule or any other negotiable item which is a subject of current negotiations.

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 the Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions.

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 Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, of, and afford 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.

_____
(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 Regional Administrator, 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
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
Federal Aviation Administration Springfield Tower Springfield, Missouri Respondent	Case No. 62-4873(CA)
and	
Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO* Complainant	

John W. West
Chief, Labor Relations Branch
Federal Aviation Administration
601 East 12th Street
Kansas City, Missouri 64106
For the Respondent

Max K. Winter
Central Region Vice President
Professional Air Traffic Controller Organization
10100 Sante Fe Drive, Suite 111
Overland Park, Kansas 66212
For the Complainant

Before: RHEA M. BURROW
Administrative Law Judges

RECOMMENDED DECISION AND ORDER

Statement of the Case

A Notice of Hearing on the Complaint as amended was issued on August 23, 1976, by the Acting Regional Administrator for Labor-Management Services Administration of the U.S. Department of Labor, Kansas City Region. A hearing on the captioned case was held before the undersigned on October 28, 1976 in Springfield, Missouri.

* Affiliated with the Marine Engineers Beneficial Association, AFL-CIO.

The proceeding was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on June 3, 1976 by Professional Air Traffic Controllers Organization, M.E.B.A., AFL-CIO, (herein called the Complainant), against Federal Aviation Administration, Springfield Tower, Springfield, Missouri, (herein called the Respondent). An amended complaint was filed on June 14, 1976. As amended the complaint alleged in substance that on April 30, 1976, Mr. James Johnson, Air Traffic Control Specialist and a member of the bargaining unit which Complainant PATCO represents, was summoned to the Office of Facility Chief, Charles C. Pfander and asked for input and an opinion on the work schedule for the bargaining unit members; it was also alleged that the discussion or session by Mr. Johnson with the Facility Chief on April 30, 1976 constituted a formal meeting under Section 10(e) of the Order, because personnel policies and practices were discussed and the Union, particularly Mr. A. E. Jones was entitled to be present. The action was alleged to constitute a violation of Section 19(a)(1) and (6) of the Order. 1/

At the hearing held on October 28, 1976, the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved in the case. Upon the basis of the entire record, including my observation of the witnesses and their demeanor and briefs submitted by counsel, I make the following findings, conclusions and recommendation.

Findings of Fact

1. The Complainant is the exclusive representative of various Federal Aviation Department of Transportation units, consisting of all air traffic control specialists employed at certain air traffic control towers, air traffic control centers and combined-station towers in the United States. The Springfield Air Traffic Control Tower, Springfield, Missouri is the FAA installation involved in this proceeding.

1/ The Amended Complaint referenced the alleged violations to be under Sections 19(a)(1) and (6) of the Order instead of 19(a)(1) and (5) as noted in the original complaint. The change was also reflected in the Notice of Hearing and clarified at the Formal Hearing. A Section 19(a)(5) violation is therefore not in issue.

2. The negotiated agreement between the Complainant and the Respondent is dated May 7, 1975 and by its terms was effective July 8, 1975. It was in effect at all times material to this proceeding and covered the Springfield Control Tower. A prior collective bargaining agreement effective in 1973 preceded the current agreement between the parties.

3. The Springfield Control Tower was and had been prior to filing of the complaint a Level 2 non radar approach control tower utilizing its Air Traffic Controllers approximately 12 in number, to control visual flight traffic and instrument traffic within an approximate 30 mile radius. Its primary mission was to expedite the safe movement of air traffic in and on the airport and its vicinity.

4. In anticipation of upgrading the Springfield tower to radar control, which would require staffing at the tower and at TRACON, the radar site, there was more manpower on air traffic controllers added to the staff beginning in early 1976.2/ There were 16 air traffic controllers on duty at the time of the hearing in October 1976.

5. Charles C. Pfander is the Chief of the Air Traffic Control Tower at Springfield, Missouri and has been since it opened in 1953. He is also referred to herein as Facility Chief.

6. Facility Chief Pfander acting for the Respondent, and the Complainant Union negotiated a Work Schedule for the shifts of the Air Controllers effective in June 1973 3/ pursuant to the negotiated agreement then in effect. Such work schedule was followed except for about a two week transition period until November 1975 when another one was approved. 4/

2/ Radar control was scheduled to become effective in November 1976, and was not operative at the time of the hearing on October 28, 1976 although personnel for operation had already been obtained.

3/ Respondent Exhibit No. 1.

4/ Respondent Exhibit No. 2.

7. With the advent of radar control, operation of the Springfield Tower and the TRACON site under a watch schedule 5/ "team concept" basis was considered by management as a feasible plan to begin the new radar control operation. In planning for the change, the team concept principle was discussed at a LMR meeting in February 1976, and in March 1976, by Facility Chief Pfander with Complainant's Union representatives, including Albert E. Jones, President of PATCO Local No. 357. The Union was requested to submit a watch schedule that would encompass the team concept principle. 6/

8. PATCO's response to the request dated April 16, 1976 contained a watch schedule but did not encompass the team concept principle. 7/ All PATCO Air Traffic Controllers

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5/ Basic watch schedule is defined in Article 33 of the negotiated collective bargaining agreement... "as the days in the week, hours of the day, rotation of shifts and changes in regular days off. Assignments of individual employees to the watch schedule are not considered as changes in the basic schedule. The basic schedule shall not be changed without prior consultation with the Union. In developing the basic watch schedule the Facility Chief shall meet with the principal facility representative and carefully consider his views and recommendations concerning the schedule. The objective of this meeting or meetings shall be to carefully and thoroughly examine the alternatives and options available as suggested by the principal facility representative.

6/ The team concept as described at the hearing (Transcript p. 71) stated: "The FAA order that set up these assistant chief positions had a requirement in it that the assistant chief should be assigned a group of controllers of continuing consistency, that is the same people, and they should work together to the greatest extent possible on a rotating basis. This was referred to as the team concept because it was a team of people that were working around the clock on different shifts and as much as possible they were supposed to work together so that their supervisor would be more intimately acquainted with their work and be better able to evaluate them."

7/ For example, people on the same team had different days off on the watch schedule proposed by PATCO and would not be working together at all times as a team.

were reported to have given information or input to the evaluation on which the watch schedule was based.

9. Deficiencies in PATCO's proposed watch schedule were discussed at a meeting on April 29, 1976 that was attended by Local Union President Albert E. Jones and Facility Chief, Pfander. The meeting had been rescheduled from April 26, 1976, in order to permit Union representative Donald L. McCroskey's attendance but the record is not clear as to whether he was actually present.

10. On arrival for work on April 30, 1976, Facility Chief Pfander made his routine visit to the tower to check what had happened since the preceding day. Noting that the Air Traffic Controllers were busily occupied, and desiring to talk with James Johnston, whom he had been informed had some expertise and experience in arranging watch schedules, he asked him to drop by his office sometime during the day when it was convenient to him.

Johnston arrived about lunch time and Pfander mentioned that he understood that he had been working with the watch list. Pfander then talked about his concept of team principle and that he would welcome suggestions or assistance from Johnston or anyone to help incorporate the principle into a watch schedule for consideration. Johnston was then a union member but not an official or representative of the union. He, Johnston was non-committal as to the request, made no response, answer, or contribution thereto and the matter was not pursued further with him. Johnston in a statement dated June 30, 1976 stated that he did not recall Pfander making any remarks about the PATCO schedule. 8/

12. The team concept principle contemplated for the watch schedule was later considered by the Respondent as not practical under the circumstances as existed at Springfield tower and the Complainant Union and Respondent agreed to continue the basic schedule that they had agreed upon in November 1975 with a few basic changes. As amended the Respondent facility is currently operating on the watch schedule agreed upon in November 1975.

8/ I discredit the testimony of Johnston as to remark of Pfander made at the hearing because he was vague and uncertain as to Pfander's remarks and the inferences he attempted to leave were in direct contrast to his statement made after the meeting. In observing the witness' and listening to his testimony, I was not impressed by his demeanor or the truthfulness of his statement regarding Pfander's remarks at their April meeting about the PATCO schedule.

Discussion and Evaulation

The Complainant charges that the Respondent violated Section 19(a)(1) and (6) of the Executive Order when its Facility Chief called James Johnston, a member of the bargaining unit into his office and asked him for his opinion and input on a watch schedule that was then under consideration. It was also alleged that the incident constituted a formal meeting under Section 10(e) of the Order and the Union President, A.E. Jones was entitled to be present.

Sections 19(a)(1) and (6) of the Order provide that Agency management shall not: "(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this order,... (1) refuse to consult, confer, or negotiate with a labor organization as required by this Order."

Section 10(e) of the Order states 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 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."

The record is clear that the team concept principle requested by the Respondent to be included in the Complainant's watch schedule submission had been contemplated previous to 1976 but temporarily abandoned because of insufficient personnel for successful operation. With the advent of radar control and more air traffic controllers the team concept principle was advanced as a feasible proposal for inclusion in the new watch schedule being considered. Beginning at least as early as March 1976 Facility Chief Pfander met with Complainant's facility representative Jones and requested that PATCO submit a watch schedule that would embrace the team concept principle. The schedule submitted by the Union in mid April did not utilize the team concept principle. Deficiencies in Complainant's submission were discussed with Union bargaining representative Jones, President, PATCO Local No. 351 on April 29, 1976.

The record leaves little or no doubt that the Respondent was seeking enlistment of Complainant Union to help it gather information and develop a watch schedule that would encompass the team concept principle. The team concept principle was discussed with the official representatives of the Local Union both before and after submission of PATCO's watch schedule proposal. Under these circumstances it is not and could not be argued that the Respondent was attempting to bypass the Union or unilaterally implement personnel policies or changes affecting unit employees. The bargaining process to this time was decisively one of seeking Union cooperation in the development of a watch schedule that would encompass the team concept principle.

As of April 29, 1976, there was no development or adoption of a watch schedule that ever embraced or encompassed the team concept principle; there was no attempt by the Respondent to unilaterally make any changes in personnel policies or practices adversely affecting unit personnel.

The meeting between Facility Chief Pfander and Air Traffic Controller Johnston on April 30, 1976 sought what employee expert aid and information Respondent could procure to develop for consideration a watch schedule that would encompass the team concept principle. Johnston was a PATCO member but not a representative or elected official who had participated in developing the watch schedule submitted by PATCO. The record substantiates that Pfander had good reason to believe that Johnston had some expertise and experience in watch scheduling that might be helpful in developing a team concept plan. 9/ The knowledge, experience and expertise of a government agency employee is not an unwarranted source of information in Respondent's development of a plan that is subject to collective bargaining before implementation nor does the Complainant have a monoply in this source of information. As a bargaining representative he did have a right to be present at formal discussions concerning personnel policies and practices or other matters affecting general working conditions of employees in the unit. The Respondent Pfander's April 30, 1976 meeting

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9/ Pfander testified that at a staff meeting, one of the Assistant Chief Air Traffic Controllers had reported Johnston had experience in watch scheduling. Johnston confirmed he had contributed to the watch schedule submitted by PATCO and his statement (Complainant Exhibit 3) reflects that he had also helped to make up a previous watch schedule.

with Johnston was an information seeking process. The subject matter discussed did not transcend that discussed with Jones the preceding day. Johnston was aware of the previous request and deficiencies by reason of his past input into the PATCO schedule. When informed of the situation on April 30, 1976, only he and Pfander were present, no notes were taken, no disparaging remarks made by anyone and there was no request for representation. Likewise, Pfander made no promises, threats, offer of reward or imposed any requirement or obligation to comply with the solicitation to make input into a watch schedule comprehending the team concept. He, Johnston never made any response to Respondent's request for input to aid in developing a proposal for consideration of the parties before adoption. Later, the team concept was dropped and the watch schedule of November 1975 was amended after collective bargaining between the parties and became the current schedule under which the facility is now operating.

Article 33, Section 1, of the Collective Bargaining Agreement states that:

> "Basic watch schedule is defined as the days in the week, hours of the day, rotation of shifts and change in regular days off. Assignment of individual employees to the watch schedule are not considered as changes in the basic watch schedule. The basic watch schedule will not be changed without prior consultation with the Union. In developing the basic watch schedule, the Facility Chief shall meet with the principal facility representative and carefully consider his views and recommendations concerning the schedule. The objective of the meeting or meetings shall be to carefully and thoroughly examine the alternatives and options available as suggested by the principal facility representative."

Under the facts and circumstances of this case, there was never a team concept principle in a watch schedule submitted by PATCO pursuant to request of the Respondent after meeting with Complainant's facility representative nor did the Respondent ever unilaterally or otherwise adopt or implement a watch schedule of its own incorporating the team concept principle. While a watch schedule embracing the team concept

principle was solicited by Respondent from the Complainant's facility representative, the answer was not responsive and the matter was never developed by Respondent to the stage of even being a proposed plan for consideration by PATCO. Therefore, there were no personnel policies and practices or other matters affecting general working conditions of employees in the unit that reached or could have reached even a proposed stage of consideration by the parties by reason of Respondent's solicitation. The solicitation by Respondent of a change in a watch schedule to include a team concept principle, apparently not to the liking of the Complianant, did not violate the Order where the Respondent solicited and received input on the watch schedule from the facility representatives, pointed out deficiencies and commented on the schedule submitted by the Complainant, and bargained on the matter with the Complainant until the team concept principle was discarded and the November 1975 schedule previously in effect adopted with minor changes. There was no evidence or contention that Complainant was misled or that the Order imposed an obligation that the parties must agree on the terms of a change in a watch schedule that had been solicited. 10/ In this case however, the schedule finally adopted was one that was collectively bargained.

A remaining issue for consideration is whether the April 30, 1976 meeting between Facility Chief Pfander 11/ and James Johnston constituted a formal discussion with the meaning of the last sentence of Section 10(e) of the Order. The line of demarcation as to what constitutes formal and informal discussion under the order is often narrow and depends upon the particular

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10/ See Department of Health, Education and Welfare, Social Security Administration, Weder Program Center, San Francisco, California, A/SLMR No. 501 where the Assistant Secretary adopted the Administrative Law Judge's conclusion that "although a change in working conditions not be the liking of a Complainant was instituted by the Respondent, the Respondent did engage in prior good faith consultation with the Complainant, received its input on the proposed plan and solicited additional comments prior to final announcement of the plan. The Administrative Law Judge concluded further that in the absence of any evidence that the Respondent intentionally misled the Complainant, or of an obligation imposed by the Order requiring agreement between the parties prior to instituting a change in working conditions upon which there had been prior good faith consultation, the Respondent did not violate Section 19a(1) and (6) of the Order."

11/ Pfander was a second level supervisor of Johnston.

surronding circumstances. In this case the following is evident: (1) the watch schedule team concept principle never advanced even to the proposal stage; (2) there was only one representative of management and one unit employee present at the April 30, 1976 meeting at which time information and opinion of James Johnston was requested concerning a watch schedule embracing the team concept principle; (3) the information sought by Pfander was from employee Johnston who admittedly had some experience in watch scheduling for Air Traffic Comptrollers; (4) the consequences of the meeting were such that no finality attached or could attach to the information being sought regarding the team concept principle; (5) employee Johnston made no request for a union representative to be present at the April 30, 1976 meeting with Pfander. The Complainant was not prejudiced or disparaged by the solicitation in the absence of any derogatory remarks against the Union or unilateral action on the part of the Respondent to alter or change its personnel policies or initiate action affecting the working conditions of employees in the unit; (6) there was no response by Johnston to the solicitation or further action by the Respondent to present a watch schedule embracing the team concept principle; (7) bargaining negotiations continued between the contracting parties. The team concept principle was discarded and Respondent adopted substantially the watch schedule submitted by Complainant.

Under the circumstances, the April 30, 1976 meeting did not constitute a formal meeting within the purview of Section 10(e) of the Order. Further, in view of the many collective bargaining negotiations at meetings concerning the watch schedule both before and after April 30, 1976, the discussion on that date would not be determinative in my opinion of the alleged 19a(1) and (6) violations of the Order regardless of whether formal or informal. The April 30 meeting was an isolated instance of Respondent seeking employee information with no intent to bypass the union, change any personnel policy or practice, or change any other matter affecting general working conditions of unit employees.

While attempting to negotiate directly with an employee would directly violate the Order (FLRC No. 74A-80; 4 FLMC 76-1), I distinguish the situation here as one in which management merely sought information for consideration of a watch schedule.

In accepting the agency's petition for review in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 432, holding that a major policy issue was presented concerning the propriety of the Assistant Secretary's finding 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 those here involved) necessarily tend to undermine the status of the exclusive representative in violation of the Order (Report No. 62), "The Council held that in determining whether a specific communication is violative of the Order, that communication must be judged independently and determination made as to whether it constitutes, for example, an attempt by agency management to deal or negotiate directly with unit employees, or to threaten, or promise benefits to employees, which would be violative of the Order. In other words, all communications between agency management and unit employees over matters relating to the collective bargaining relationship are not violative of the Order, and to the extent that communication is permissible, it is immaterial whether such communication was previously agreed upon by the exclusive representative and the agency or activity concerning the latter's right to engage in such communication. Turning to the specific communications here involved, the Council further held that such communications, (which can be equated with an attempt to bargain directly with employees, and to urge them to put pressure on the union to take certain actions) were in violation of Section 19(a)(1) and (6) of the Order and upheld the Assistant Secretary's finding in this regard as consistent with the purposes of the Order."

In Veterans Administration Hospital, Murfressboro, Tennessee , A/SLMR No. 702, the Complainant alleged "that the Respondent violated the Order by contacting a unit employee regarding the withholding of dues from his back pay and by refusing to withhold dues in the absence of an executed SF 1188 cancellation form.

The Assistant Secretary found that the evidence did not establish that the Respondent attempted to deal or negotiate directly with the unit employee or to threaten or promise benefits to him by contacting him with regard to withholding dues from his back pay. Rather, the Respondent merely sought to ascertain the position of the unit employee regarding the dues withholding. It was further determined that the Respondent's refusal to comply with the Complainant's request for dues withholding was not a violation of the Order inasmuch as the evidence established that the Respondent was uncertain as to the appropriate course of action to be taken and, therefore, sought a decision from the Comptroller General regarding compliance with Complainant's request. In this context, the

Assistant Secretary concluded that where, as here, an agency, in good faith, seeks a decision from the Comptroller General, it should be given a reasonable opportunity to comply with the consequences which flow from the Comptroller General's decision. Finally, it was found that the evidence did not establish that the Respondent's action in the subject case tended to encourage or discourage membership in the Complainant by discrimination in regard to conditions of employment."

The evidence in this proceeding does not establish that Respondent attempted to deal with or negotiate directly with unit employee Johnston or threaten or promise benefits to him by contacting him with regard to furnishing information as to inclusion of a team concept principle in a watch schedule.

Conclusions

In view of the foregoing Findings and Discussion and Evaluation, I conclude that:

1. The Respondent did not refuse to consult, confer or negotiate with the Complainant in violation of the provisions of Section 19(a)(6) of the Order;

2. The Respondent did not interfere with, restrain or coerce an employee in the exercise of rights in violation of the provisions of Section 19(a)(1) of the Order, and

3. The Complainant has not sustained its burden of proving by a preponderance of the evidence that the Respondent violated the provisions of Sections 19(a)(1) and (6) of the Order.

RECOMMENDATION

Upon the basis of the above findings, conclusions, and the entire record, I recommend to the Assistant Secretary that the Complaint in Case No. 62-4873(CA), be dismissed in its entirety.

Rhea M. Burrow

RHEA M. BURROW
Administrative Law Judge

Dated: December 29, 1976
Washington, D.C.

May 20, 1977

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,
CINCINNATI SERVICE CENTER,
COVINGTON, KENTUCKY
A/SLMR No. 844

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and Chapter 73, NTEU, alleging that the Respondent violated Section 19(a)(1) of the Order by certain alleged coercive and threatening remarks made to the Chapter 73 President by one of the Respondent's supervisors.

The Administrative Law Judge concluded that, under the peculiar circumstances of the case, no violation had been committed. In this regard, he found that the remarks made by the supervisor were prompted by his belief that the Chapter 73 President had breached her promise to him, and that, while the atmosphere at the private meeting between the two was hostile, the action which the supervisor threatened to take in retaliation for what he believed to be a breach of promise was not violative. Thus, the supervisor only threatened to hold the Chapter 73 President to the requirements of the negotiated agreement with respect to official time. Under these circumstances, in which no threat was made to impose restrictions on the use of official time beyond the terms of the negotiated agreement and no other adverse action was threatened, the Administrative Law Judge found no interference, restraint, or coercion within the meaning of Section 19(a)(1) of the Order.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendation and ordered that the complaint be dismissed.

A/SLMR No.844

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
CINCINNATI SERVICE CENTER,
COVINGTON, KENTUCKY

Respondent

and Case No. 41-4558(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND CHAPTER NO. 73, NTEU

Complainant

DECISION AND ORDER

On February 23, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order 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 and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 41-4558(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
May 20, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
Internal Revenue Service Cincinnati Service Center Covington, Kentucky Respondent Activity	:	
and	:	Case No. 41-4558(CA)
National Treasury Employees Union and Chapter No. 73, NTEU Complainant	:	

David J. Markman, Esq.
Cincinnati, Ohio
For the Respondent

Lesley Guyton, Esq.
Washington, D.C.
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed November 11, 1975 and an amended complaint filed November 19, 1975, alleging that Internal Revenue Service, Cincinnati Service Center (hereinafter called the Respondent Activity) violated Section 19(a)(1) and (2) of Executive Order 11491, as amended, the Assistant Regional Director for Labor-Management Services for the Atlanta Region issued a Notice of Hearing on Complaint on March 19, 1976. Subsequently, National Treasury Employees Union and Chapter No. 73, NTEU (hereinafter called the Complainant) filed a request for withdrawal of the Section 19(a)(2) allegation from the complaint. This request was granted.

The amended complaint alleges that the Respondent Activity interfered with and coerced the President of Chapter No. 73 of the Complainant in that the Chief of Data Conversion and Accounting at the Respondent Activity threatened her for exercising rights assured by the Executive Order.

A hearing was held on this matter in Cincinnati, Ohio on May 5, 1976. All parties were represented by counsel and afforded full opportunity to be heard and to introduce relavent evidence and testimony on the issues involved. Briefs were submitted by both parties and have been duly considered. Upon the entire record in this case, including my observation of the witneses, I make the following:

Findings of Fact

The Complainant Union is the exclusive representative of the bargaining unit employees at the Respondent Activity, and the parties had a negotiated agreement in effect during the period involved in this complaint. Evalyn Lunkenheimer was the president of Chapter No. 73 of the Complainant Union, which was the Local representing the employees at the Respondent Activity. In addition to her office as president, Lunkenheimer was the union area representative for the employees working in the Data Conversion and Accounting Division on the 12:30 p.m. to 9:00 p.m. shift.

On February 13, 1975, Charles Mitchell, then chief of the division, called Ms. Lunkenheimer into his office for a meeting regarding an employee whose position was being affected by a reorganization taking place at the Respondent Activity. 1/ Mitchell, who was Lunkenheimer's fourth level supervisor, normally met with the chief representative of the Union on matters affecting the bargaining union employees. However, there had been a change of officers and he did not know the chief representative. He also felt that he should meet with Lunkenheimer as the new president in order to get to know her.

Mitchell explained to Lunkenheimer that under the reorganization he had one employee (Celanor Hudson) who did not qualify to promotion to tax technician. He was having

1/ The reorganization had been discussed with union officials prior to its implementation by management. Basically, it involved the elimination of the positions of tax examiner which were grades GS-4, 5 and 6, and establishing a new position of tax technician at grade GS-6. The employees affected who were already in grade GS-6 were automatically converted to the new positions. Those who were in grades GS-4 and 5 had to apply and compete for the new positions.

difficulty finding a position for her in the Service Center. Hudson was approximately 64 years old with 31 years of government service at the Service Center. He offered the employee a position as a clerk in the Accounting Branch, but she rejected the job as it required a considerable amount of walking. Mitchell informed Lunkenheimer that he finally found a position for Hudson in the Research Branch. He stated that the employee would have to accept this transfer or she would have to resign, retire, or be terminated. After some discussion about management's efforts to locate another position for Hudson, Lunkenheimer stated that she needed to "research" the matter and would get back to Mitchell later in the day. He agreed to this, but asked Lunkenheimer not to discuss the matter with the employee until he had a chance to inform her of the transfer at a meeting scheduled for 9:00 a.m. the following morning.

The testimony is conflicting as to whether or not Lunkenheimer agreed to Mitchell's request. According to Lunkenheimer, she told Mitchell she wanted to consult with the area representatives and the employee, as she did not feel it was fair for the employee to be "called in cold and not know what was going on". Mitchell, on the other hand, testified that Lunkenheimer agreed not to discuss the matter with the employee and made no mention of consulting with the area representatives.

After Lunkenheimer left Mitchell's office, she encountered the chief representative of the Union in the hall and related the substance of her meeting with Mitchell. They decided to meet immediately in a small canteen in the Audit Branch with the two area representatives involved to discuss the matter. The Union officials met and then decided it would be best to call in the employee and consult with her. The total time spent on the subject matter was approximately 30 minutes. Prior to calling in Hudson, Lunkenheimer attempted to contact Mitchell by telephone but was unsuccessful.

Before leaving at 4:00 p.m., Mitchell was informed by several supervisors in the Accounting Branch that the Union officials had met with Hudson. These supervisors were aware of the problem involving Hudson. Mitchell attempted to reach Lunkenheimer by phone, but she was on her lunch break. Mitchell then left his office at his customary time and proceeded home.

Upon arriving home, Mitchell began to reflect on the matter and became quite irritated with Lunkenheimer because he felt his confidence had been betrayed. The more he thought about the matter, the more distrubed he became. He then decided to return to the Service Center that evening to confront Lunkenheimer. He arrived at the Respondent Activity

at approximately 7:45 p.m. and called Lunkenheimer into the office of the Section Chief. They then went into a consultation room and closed the door. No one else was present except Mitchell and Lunkenheimer.

There is considerable dispute as to what was said in the conversation between Mitchell and Lunkenheimer, but it is clear that Mitchell was quite angry and both he and Lunkenheimer spoke in loud tones. Mitchell acused Lunkenheimer of breaking a promise to him regarding discussing the transfer with Hudson before he had an opportunity to meet with the employee at 9:00 a.m. the next morning. Lunkenheimer explained that the chief and area representatives decided the employee had to be consulted in advance. Mitchell questioned how they could have overruled the authority of the union president. Lunkenheimer stated she was sorry that she had made the promise not to inform the employee of the proposed transfer, but she was not sorry that she had discussed the matter with the employee or the union representatives. According to Mitchell, he then stated that the meeting was on official time, and in the future, he (Mitchell) was "going to hold her feet to the fire and monitor her time" to be certain that she did not abuse the official time requirements set forth in the negotiated agreement. Lunkenheimer retorted that she too was going to hold Mitchell to the agreement and make certain that he did not violate its terms. Lunkenheimer's testimony was substantially the same as Mitchell in this regard, however she recalled that he stated, "I will have your time monitored and your feet will feel like they are on fire when you walk around here."

The meeting between Lunkenheimer and Mitchell lasted approximately an hour. At the conclusion of the meeting, Mitchell calmed down considerably and stated that they had both made "idle threats that neither one intended to keep, but he would do whatever he had to do."

Concluding Findings

The Complainant Union contends that Mitchell's statements constituted threats of penalty and reprisal against Lunkenheimer for engaging in activity protected by the Executive Order. At first blush, the facts of this case appear to support this argument.

There is no need here to resolve the question of whether Lunkenheimer did or did not promise Mitchell that she would not discuss the transfer with Hudson prior to his meeting with the employee the following morning. If such a promise were made, and I am inclined to believe that it was, it has no bearing on the ultimate resolution of the issue presented in this case. Nor is there any need to reconcile the two versions of his statements to Lunkenheimer regarding "making it hot" for her and monitoring her time. The import of either version is abundantly clear, and each is in substantial agreement with his intended meaning.

It is immaterial whether Lunkenheimer made a promise not to discuss the matter with the employee. What is important, however, is that Mitchell believed she did. 2/ The only question to be decided here is whether Mitchell's reaction to this purported breach of faith violated the Executive Order.

In the peculiar circumstances of this case, I am of the opinion that no violation of the Executive Order has been committed.

As noted, Mitchell was under the impression that he had a commitment from Lunkenheimer that she would not inform the employee of the proposed transfer until he first had an opportunity to tell her of the decision. When it was brought to his attention that Lunkenheimer had in fact talked to the employee, he felt she had violated her promise to him. This feeling was obviously exacerbated by the fact that he had not received any communication from Lunkenheimer that afternoon, although the testimony indicates that she made an unsuccessful attempt to contact him by telephone prior to speaking to the employee. That Mitchell's irritation and aggravation increased the more he reflected on the matter is evidenced by his return to the Service Center to confront Lunkenheimer after having left for the day.

It is evident that his remarks to Lunkenheimer were prompted by his belief that she had breached her promise to him. The atmosphere during the confrontation was hostile

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2/ There is no question that Lunkenheimer in her capacity as union president and area representative had a right to decide, after confering with her colleagues, that the wiser course of action required consultaton with the employee. Indeed, had she not done so, she may have been remiss in her duty as a representative of the employee.

and heated. Mitchell's threat "to hold her feet to the fire" and monitor her time to be certain she did not violate the "official time" provision of the negotiated agreement obviously was made in retaliation for her having spoken to the employee about the transfer. The action Mitchell threatened to take, however, cannot be described as unlawful. Regardless of the tone or the phrasing of his comments, he was stating that henceforth, he was going to be certain Lunkenheimer complied with the "official time" requirements of the negotiated agreement in performing her representation duties. He did not threaten to impose restrictions contrary to the agreement or to take any adverse action other than to insure that she followed the terms of the agreement between the parties.

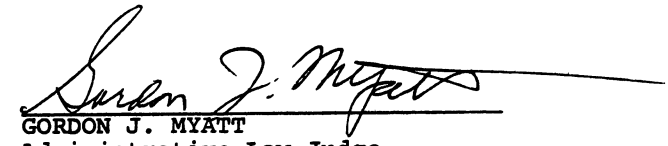
In these circumstances, I do not find that Mitchell's statements violated any rights assured Lunkenheimer under the Executive Order. They did not interfere with or restrain the union official from acting in her capacity as a representative of the employees in the unit. Nor can it be said that the statements were coercive, although made in anger and in retaliation for a putative breach of faith. Mitchell was merely threatening to do that which he had a lawful right to do, i.e., make certain that Lunkenheimer adhered to the "official time" requirements of the agreement in performing her duties as a union representative. Although Lunkenheimer was understandably upset as a result of the discussion, it did not constitute restraint or coercion within the meaning of Section 19(a)(1).

Moreover, the confrontation did not end in the same heated manner and tone as it commenced. After the passions had subsided, Mitchell recanted by stating that they had both made idle threats which neither one intended to keep. In so doing, he effectively and immediately retracted any threats that may have been contained in his prior statements to Lunkenheimer. U.S. Army Natick Laboratories, Natick, Massachuttes, A/SLMR No. 381.

In view of the foregoing, I find and conclude that the Respondent Activity has not violated Section 19(a)(10 of the Executive Order, and that the complaint herein must be dismissed in its entirety.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, I find that Internal Revenue Service, Cincinnati Service Center, Covington, Kentucky did not engage in conduct with violated Section 19(a)(1) of Executive Order 11491, as amended. Accordingly, it is hereby recommended that the complaint in this case be dismissed in its entirety.



GORDON J. MYATT
Administrative Law Judge

Dated: February 23, 1977
Washington, D.C.

May 20, 1977

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 AGRICULTURE,
FOREST SERVICE,
OUACHITA NATIONAL FOREST,
HOT SPRINGS, ARKANSAS
A/SLMR No. 845

This proceeding involved two unfair labor practice complaints filed by the National Federation of Federal Employees, Local 796 (Complainant). The first complaint alleged that the Respondent violated Section 19(a)(1) of the Order when its supervisor, during the course of a private meeting with the Complainant's National Representative, told the National Representative that a member of the Complainant had told a District Ranger that he was ready to withdraw from the Union because the Complainant's President was waging a private battle against management. The second 19(a)(1) allegation by the Complainant alleged, in effect, that the Respondent's supervisor threatened the Complainant's President with physical harm.

The Administrative Law Judge concluded that the Respondent had not in either case violated Section 19(a)(1) of the Order. With regard to the complaint involving the private meeting between the Respondent and the Complainant's National Representative, the Administrative Law Judge found that the alleged critical comment at the private meeting, standing alone, did not constitute a violation of Section 19(a)(1) of the Order. With regard to the second alleged violation of Section 19(a)(1) of the Order, he found, on the basis of the credited testimony, that the Respondent's supervisor's comment did not constitute a threat to the Complainant's President and was, in fact, a positive denial of any threat.

The Assistant Secretary concurred in the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaints be dismissed.

A/SLMR No. 845

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE,
OUACHITA NATIONAL FOREST,
HOT SPRINGS, ARKANSAS

Respondent

and

Case Nos. 64-3032(CA) and
64-3059(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 796

Complainant

DECISION AND ORDER

On February 25, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled consolidated 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. Thereafter, the Complainant filed exceptions to the Administrative Law Judge's Recommended Decision and Order and the Respondent filed an answering brief 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 Recommended Decision and Order and the entire record in the subject cases, including the Complainant's exceptions and the Respondent's answering brief to the exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 64-3032(CA) and 64-3059(CA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
May 20, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

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In the Matter of :

U.S. DEPARTMENT OF AGRICULTURE, :
FOREST SERVICE,
QUACHITA NATIONAL FOREST, :
HOT SPRINGS, ARKANSAS
Respondent :
Case Nos. 64-3032(CA)
and : 64-3059(CA)

NATIONAL FEDERATION OF FEDERAL :
EMPLOYEES, LOCAL 796
Complainant :
. . . . . .

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Forest Service
Quachita National Forest
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On Brief for Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

These cases arise under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). The Complaint in No. 64-3032(CA) was filed November 20, 1975, and alleged certain violations of Sections 19(a)(1) and (4) of the Order and the Complaint in No. 64-3059(CA) was filed January 6, 1976. By letter dated July 26, 1976, the Regional Administrator dismissed those portions of the Complaint in No. 64-3032(CA) concerning the alleged outburst on September 19, 1975, and the alleged violation of Section 19(a)(4) of the Order as a result of a statement on August 20, 1975, by Mr. George W. Whitlock, Deputy Forest Supervisor, to Mr. Eugene W. Haskins, National Representative, National Federation of Federal Employees. The Regional Administrator stated that he intended to consolidate the cases and, in the absence of a request for review, to issue a notice of hearing on that portion of No. 64-3032(CA) not dismissed and No. 64-3059(CA). The Order of consolidation issued October 14, 1976, and on the same date a Notice of Hearing issued for a hearing on November 23, 1976, in Hot Springs, Arkansas. Subsequently, at the request of Complainant, and for good cause shown, the hearing was rescheduled to December 14, 1976, and the Order Rescheduling Hearing issued November 11, 1976 (Ass't. Sec. Exh. 1) pursuant to which a hearing was duly held before the undersigned in Hot Springs, Arkansas on December 14, 1976. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved, and briefs, timely filed by the parties, were received on or about January 24, 1977, and have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendation:

Findings and Conclusions

As there is one alleged violation of Section 19(a)(1) of the Order in each of the consolidated cases, it is appropriate to discuss each case and the conclusions with respect thereto separately.

A. Case No. 64-3032(CA). The alleged violation of Section 19(a)(1) in this case involves a request by Deputy Forest Supervisor George W. Whitlock for a private meeting with Eugene W. Haskins, National Representative of National Federation of Federal Employees (hereinafter also referred to as "NFFE"), on August 20, 1975, and the converstion that took place. Only Messrs. Whitlock and Haskins were present at the private meeting which followed a meeting to discuss unfair labor practice charges filed by Local 796 at which Local 796 had been represented by William B. Roach, President of Local 796 and Mr. Haskins, and Respondent had been represented by Mr. Whitlock and Mr. David Westbrook, Administrative Officer.

There is no dispute that a private meeting was requested by Mr. Whitlock; that a private meeting was held; and that in the course of the meeting Mr. Whitlock told Mr. Haskins that a member of Local 796 had told a District Ranger that he was ready to withdraw from the Union because Mr. Roach was waging a private battle against management (The District Ranger referred the member to the Union). In other respects there are sharp conflicts 1/ but for the purpose of determining this

1/ Mr. Haskins stated that the meeting lasted 5 to 7 minutes; Mr. Whitlock stated that it lasted 10 to 15 minutes. Mr. Haskins' testimony was inherently improbable. On the one hand, he asserted that all that was discussed was the statement of a union member to a District Ranger; but he admitted that Mr. Whitlock was concerned about the number of unfair labor charges and felt that there had to be some kind of a system to resolve them. Mr. Haskins denied that he ever discussed this meeting with anyone outside the Union; but Brent P. Gunderson, a Labor Management Relations Specialist in the Washington Office of the Forest Service, testified that during negotiations at the Shawnee National Forest in Marion, Illinois, Mr. Haskins had a discussion with him in Mr. Gunderson's motel room and that Mr. Haskins had told him about the meeting with Mr. Whitlock and that Mr. Haskins had stated that the purpose (continued)

matter it is unnecessary to resolve these conflicts.

Such private meetings, frequently referred to as "side bar" meetings in labor-management relations are extremely common, the efficacy of such technique being directly proportinate to the mutual trust and confidence of the individuals involved. Indeed, Mr. Haskins admitted that he had requested such private meetings with management. Assuming, which assumption I do not believe was true, that the meeting consisted wholly of a statement by Mr. Whitlock to Mr. Haskins that a union member, or members, had reported dissatisfaction with Mr. Roach to the extent that such member, or members, wanted to get out of the Union (the District Ranger referred the individual to the Union), there simply is no basis to find a violation of Section 19(a)(1) of the Order which provides:

> "(a) Agency management shall not -
>
> (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by the Order.

Mr. Whitlock, by reporting the incident to Mr. Haskins, a National Representative of the Union, did not interfere with, restrain, or coerce Mr. Roach, President of Local 796, in the exercise of any right assured by the Order. There was no bypassing of the exclusive representative to deal directly with employees as was involved in United States Army School/Training Center, Fort

Footnote continued from page 3.

of their meeting (Whitlock - Haskins) was to discuss what could be done to improve the relationship between Whitlock, Mr. Owen and Mr. Roach; that Mr. Haskins also told him that his problems on the Quachita were going to be over because Dave Westbrook was leaving.

Mr. Whitlock's testimony was credible and consistent with all testimony and evidence. He testified that he was concerned about the number of unfair labor practice charges; that he primarily wanted to meet with Mr. Haskins to see if relations could be improved; that Mr. Haskins said that the way to improve relations was to get rid of Dave Westbrook; that he discussed the offer to settle an unfair labor practice charge he had made in the meeting earlier; that Mr. Haskins urged him to put the offer in writing to Mr. Roach; that he (Haskins) believed he (Roach) would find that solution acceptable.

McCellan, Alabama, A/SLMR No. 42 (1971) and Department of Defense, U.S. Navy, Norfolk Naval Shipyard, A/SLMR No. 746 (1971); and no involvement by management in the internal election of a labor organization as was involved in Department of the Navy, Office of the Secretary, Washington, D. C., A/SLMR No. 393 (1974), and, although given most careful consideration, the decisions cited and relied upon by Complainant do not give the slightest support to Complainant's contention that the meeting here involved was in violation of Section 19(a)(1) of the Order. Mr. Haskins voluntarily agreed to meet with Mr. Whitlock and both the request for and the fact of the meeting were open and fully known to Mr. Roach who expressed no opposition. Such meeting, even assuming critical comments by management of local union officers to a national union representative standing alone, does not constitute a violation of 19(a)(1) of the Order. Accordingly, as I find no violation of Section 19(a)(1) of the Order, either from fact that a private meeting was held by Respondent with a National Representative of the Union or from anything that transpired at such meeting, I shall recommend that the Complaint in No. 64-3032(CA) be dismissed.

B. Case No. 64-3059(CA). The alleged violation of Section 19(a)(1) in this case involves a meeting held on October 6, 1975, at which Complainant was represented by Mr. Roach and Mr. James R. Lawrence, Chief Steward of Local 796, and Respondent was represented by Mr. Whitlock and Mr. Phillip M. Ingram, Personnel Officer, Quachita National Forest. The October 6 meeting was a pre-complaint meeting to attempt to resolve an unfair labor practice charge filed by Local 796. At the commencement of the meeting, Mr. Roach submitted an amendment to the charge previously filed and Mr. Whitlock and Mr. Ingram discussed among hemselves whether the amendment should be considered and agreed to handle the amended charge at that time. The amendment related to a September 19, 1975, meeting and Mr. Roach testified that he said,

> "Mr. Whitlock, I'm glad I was about four feet away from you on September the 19th at the Labor Management meeting because when you lost your temper I was afraid that you'd take a swing at me ... When I told Mr. Whitlock that ... he bent over and crouched over and looked me right square in the face and said through clinched teeth that he would like to put his knuckles in my face ... Mr. Whitlock stated that he wouldn't so abase his knuckles, he wouldn't

> skin his knuckles in my face."

Mr. Lawrence testified as follows:

> "Mr. Whitlock read the pre-complaint and he stated to Mr. Ingram that well, maybe we need to postpone these due to the pre-complaint.Mr. Ingram suggested we went on into it. So after Buddy finished reading it, Mr. Roach stated that I'm glad you called a coffee break at this meeting in Hot Springs, because he said, Mr. Roach said, I think you were about ready to take a swing at me. It was at this time that Mr. Whitlock made this statement, that I would have liked to put my knuckes in your face, and then Mr. Whitlock hestitated just for a moment and said, no, my knuckles are too good.

Mr. Ingram testified as follows:

> "When the amendment to the complaint was presented, Mr. Whitlock and I recessed shortly to take a look at it to determine whether or not it would be appropriate to investigate and attempt to resolve that portion of the complaint also at the meeting of October the 6th ... well, when we first went back into the meeting, we told them that we would attempt to resolve and investigate this complaint also in addition to the original complaint ... There was a discussion between Mr. Whitlock, myself and Mr. Roach regarding the meeting of which the supplement complaint was based on. At that time Mr. Roach indicated that he felt like Mr. Whitlock was angered during the meeting and indicated that he felt like Mr. Whitlock was going to take a swing at him during the meeting ... Mr. Whitlock - uh - responded to that by saying that he would not waste the skin on his knuckles on Mr. Roach ... I would not wast the skin on my knuckles on you, Bill."

Mr. Whitlock testified as follows:

> "Mr. Roach began to describe my actions which were not - uh - really actually what happened, his description of it. And - uh - as we discussed it, Mr. Roach said, you wanted to hit me at the meeting. I said Bill, it has never occurred to me to hit you. He said, no, I know you wanted to hit me, you wanted to take a swing at me. I said, Bill, I haven't had a fight since I was a kid - uh - I'm not a fighter, can you say the same thing. He said forget that, you wanted to hit me. And by this time I was pretty disgusted with being accused a third time of wanting to hit him and I said, Bill, I just wouldn't waste the skin on my knuckles to fight with you."

It is prefectly apparent that nothing occurred on September 19, 1975, which would be considered a threat by Mr. Whitlock. To the extent that he may have been angered, he recognized it and called a short recess, after which the September 19, 1975, meeting continued without incident. On October 6, 1975, Mr. Roach said that he thought Mr. Whitlock was going to take a swing at him on September 19 and Mr. Whitlock responded, according to Mr. Lawrence "I would have liked to put my knuckles in your face ... no my knuckles are too good." Although Mr. Roach used quite similar phraselogy, it is recognized that he spoke in the present tense, implying that Mr. Whitlock said on October 6th, that he would like to put his knuckles in Mr. Roach's face; but I do not credit Mr. Roach's testimony in this regard. The testimony of Messrs. Lawrence, Ingram and Whitlock, which I credit in this regard, is wholly to the effect that Mr. Whitlock responded to Mr. Roach's appraisal of his (Whitlock's) attitude on September 19, 1975. In short, Mr. Whitlock made no threat to Mr. Roach on October 6, but, at most, if the substance of Mr. Roach's and Mr. Lawrence's versions are accepted, he responded to Mr. Roach by saying, in effect, "yes on September 19 I would have liked to put my knuckles in your fact - no my knuckles are too good for that." As a retort to Mr. Roach's needling about a past incident, there was no present threat and no interference with, restraint or coercion of Mr. Roach in the exercise of his rights assured by the Order and, accordingly, no violation of Section 19(a)(1) of the Order.

It is also perfectly clear that the meeting on October 6, 1975, after the asserted statements by Messrs. Roach and Whitlock continued without interruption.

Moreover, while the substance of Mr. Roach's and Mr. Lawrence's version of Mr. Whitlock's alleged statement on October 6, 1975, has been accepted for the purpose of discussion and, even if such version is accepted, no violation of Section 19(a)(1) occurred, I am not persuaded that Mr. Whitlock made the statement as attributed to him by Messrs. Roach and Lawrence. Rather, I find the testimony of Mr. Ingram persuasive, namely that Mr. Whitlock responded to Mr. Roach's remark about September 19 by saying "he would not waste the skin on his knuckles on you, Bill" which was fully consistent with the equally credible testimony of Mr. Whitlock that "Bill, I just wouldn't waste the skin on my knuckles to fight with you." The recollection of Messrs. Whitlock and Ingram concerning the details of the October 6 meeting was sharper and clearer than that of Messrs. Roach and Lawrence; and various details supplied by Messrs. Whitlock and Ingram were confirmed by Mr. Lawrence, for example, the private discussion between Mr. Whitlock and Mr. Ingram as to whether the amendment should be considered at that time but which was wholly absent in Mr. Roach's version; Mr. Lawrence confirmed Mr. Whitlock's testimony, denied by Mr. Roach, that Mr. Roach made repeated reference to Mr. Whitlock's attitude on September 19 before Mr. Whitlock made his response, etc. Mr. Roach was the provocator of Mr. Whitlock's response; Mr. Whitlock's response related to a prior (September 19) time; and nothing contained in Mr. Whitlock's response constituted a threat to Mr. Roach, indeed, his statement that he "would not waste the skin on his knuckles on you, Bill" was a positive denial of any threat. While violence, or threats of violence, is not condoned in any manner, the record contains no credible evidence or testimony that Mr. Whitlock made any threat to Mr. Roach, or, on the basis of which it could be said, would have engendered belief that a threat was implied. Accordingly, as nothing contained in Mr. Whitlock's response to Mr. Roach was in violation of Section 19(a)(1) of the Order, I shall recommend that the Complaint in Case No. 64-3059(CA) be dismissed in its entirety.

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 Assistant Secretary of Labor enter an order dismissing the consolidated complaints herein in their entirety.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 25, 1977
Washington, D.C.

May 20, 1977

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,
NATIONAL OFFICE
A/SLMR No. 846

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Internal Revenue Service (IRS) violated Section 19(a)(1) and (6) of the Order by unilaterally issuing Internal Revenue Service Manual Supplement 13G-75 (MS13G-75) without affording the NTEU an opportunity to bargain over the issuance of the Supplement or its impact and implementation on employees represented by the NTEU. The NTEU contended that the Commissioner of Internal Revenue had made a commitment to inform the NTEU prior to any final decision concerning the creation of GS-905 Estate and Gift Tax Attorney positions in the Appellate Conferee classification and, thus, the unilateral issuance of MS13G-75, which concerned qualifications needed currently for consideration for an Appellate Conferee position, violated that commitment and the Order.

The Administrative Law Judge concluded, and the Assistant Secretary concurred, that the IRS had not engaged in conduct which violated the Order. In this regard, it was found that the NTEU had exclusive recognition for employees in a series of separate units located in 56 District Offices, 11 Service Centers and 4 Regional Offices, and that the IRS had an obligation to bargain only at those individual office levels. Thus, absent some form of national exclusive recognition or national consultation rights, the IRS was not obliged to meet and confer or consult with the NTEU at the national level concerning the issuance of MS13G-75 which applied uniformly to all IRS Regional Offices, including those not represented by the NTEU. Moreover, with respect to the substance of MS13G-75, the Administrative Law Judge concluded that it dealt only with existing circumstances as it set forth the criteria to be used currently in crediting attorney education and experience for the Appellate Conferee position and was not a determination on whether to convert the Appellate Conferee position to a GS-905 classification, which was the thrust of the NTEU's position at its meeting with the IRS Commissioner. The Administrative Law Judge concluded also, and the Assistant Secretary agreed, that the NTEU had failed to request bargaining at any level concerning the implementation or impact of MS13G-75.

Having adopted the findings, conclusions, and recommendations of the Administrative Law Judge, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 846

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
NATIONAL OFFICE

Respondent

and Case No. 22-6469(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On January 19, 1977, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order 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, both the Complainant and the Respondent filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including both the Respondent's and Complainant's exceptions and briefs, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6469(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
May 20, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ In view of the disposition herein, I find it unnecessary to pass upon the Administrative Law Judge's finding on pages 10 and 11 of his Recommended Decision and Order that the Respondent and the Complainant intended, by multi-unit bargaining, to merge the separate units represented by the Complainant in the Respondent's District Offices, Service Centers, and Regional Offices into nationwide units, without utilizing the prescribed election procedures.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
INTERNAL REVENUE SERVICE NATIONAL OFFICE	
Respondent	
and	Case No. 22-6469(CA)
NATIONAL TREASURY EMPLOYEES UNION	
Complainant	

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Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This matter comes before me upon a Notice of Hearing on Complaint issued on May 26, 1976 by the U.S. Department of Labor Regional Administrator for Labor-Management Services, Philadelphia Region. The Complaint filed by the National Treasury Employees Union (hereinafter called the Union or NTEU) on November 4, 1975 alleges that the

Internal Revenue Service (hereinafter called the Activity or the IRS) violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended (hereinafter called the Order) by unilaterally issuing a manual supplement without first negotiating with the Union about the decision to issue the manual supplement, its implementation or its impact.

A hearing was held before the undersigned in Washington, D.C. Both parties were represented by counsel and were given full opportunity to present, examine and cross-examine witnesses and to present evidence and arguments in support of their respective positions. Both parties had an opportunity to argue orally and submitted briefs, which have been duly considered.

Upon the basis of the entire record 1/ herein, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendation.

Findings of Fact

A. General Bargaining History 2/

At all times material herein NTEU represented employees in separate units located in each of 56 of IRS' 58 3/

1/ As part of the record herein the parties, by stipulation incorporated the record from Internal Revenue Service, Case No. 22-5243(CA), A/SLMR No. 550.

2/ Those Findings of Fact dealing with the collective bargaining history between the parties are based in a large part, on the record from the IRS case, Case No. 22-5243(CA), A/SLMR No. 550, and the Findings of Fact which I made in that case.

3/ NTEU apparently also represented employees in other units but they were not raised and are therefore not relevant to this case. Also it should be not that originally the Complainant was known as the National Association of Internal Revenue Employees (NAIRE) but subsequently changed its name to NTEU. NTEU represented professional and non-professional employees in 55 District Offices and non-professional employees only, in one.

Districts and 11 of 12 Service Centers and 4 of 7 Regional Offices.

During 1969 through 1972 NTEU negotiated separate collective bargaining agreements for approximately twelve Districts and four Service Centers. In 1970 NTEU filed three CU petitions with the U.S. Department of Labor in attempt to obtain exclusive recognition in three separate units at the national level. 4/ These three petitions were dismissed by the Regional Administrator, who was affirmed by the Assistant Secretary for Labor Management Relations. The Assistant Secretary stated that the merger of the local units into national units should be accomplished by means of RO petitions rather than CU petitions. The Assistant Secretary was affirmed by the Federal Labor Relations Council. No such RO petitions were filed. 5/

In 1972 the IRS and NTEU entered into multi-unit negotiations in regard to the units in the 56 District Offices represented by NTEU. A Multi-District Agreement covering the units located in the 56 District Offices and represented by NTEU was signed on April 5, 1972 6/ and a Multi-Center agreement covering the units located in the Service Centers and represented by NTEU was signed on April 13, 1973. 7/

During the negotiations for these agreements matters involving travel terms and procedures for employees were discussed and some were included in the negotiated agreements. Many of these agreed upon travel terms included in the agreements were at variance with the then existing

4/ NTEU, by these petitions, attempted to merge all the District Office Units composed of both professional and non-professional employees into one nationwide unit; to merge the District Office Units composed solely of professional employees into another nationwide unit; and all the Service Center units into another nationwide unit.

5/ At no time has NTEU sought National Consultation Rights with respect to the employees it represented.

6/ A subsequent Multi-District Agreement was executed on May 3, 1974.

7/ A Multi-Regional Agreement covering the individual Regional Units represented by NTEU was signed on May 21, 1974.

travel regulations contained in the Internal Revenue Service Manual (IRM). It was apparently understood that with respect to the employees covered by the collective bargaining agreements, the terms of those agreements, at least concerning travel, took precedence over the travel regulations contained in the IRM. Where there was no contract term covering a specific area the regulations in the IRM still controlled.

Further, during these negotiations the parties bargained about and in some instance agreed to terms that were outside the normal authority of the individual District Directors' or of the Service Center Directors'. The bargaining took place in Washington. With respect to the Multi-District agreement, the IRS team that apparently negotiated and signed the contract, was composed of two District Directors, one Assistant District Director and four members of the Washington staff. Similarly with respect to the Multi-Center agreement the IRS team was composed of three Service Center Directors and four members of the IRS Washington staff.

In the Multi-District agreement Article 1. Section 1 A provides, in part:

"The following employees comprise the unit covered by this agreement:

All professional and non-professional employees of the districts listed in Appendix A, including those professional employees who did not vote for inclusion with units of non-professional employees."

Article 1 Section 1. A. of the Multi-Center Agreement states, in part:

"The following employees comprise the unit covered by this Agreement:

All certified units of professional and non-professional employees of the Centers listed in Appendix A, including those certified units of professional employees who did not vote for inclusion with units of non-professional employees."

Article 1 Section 1. A. of the Multi-Regional Agreement states, in part:

"The following employees comprise the unit covered by this agreement:

All units of professional and non-professional employees of the regional offices listed in Appendix A, including those units of professional employees who did not vote for inclusion with units of non-professional employees.

B. The Parties' Dealings Regarding Mobility Problems Of Estate And Gift Tax Attorneys Prior to November, 1974.

Those employees of the Internal Revenue Service who are presently referred to as Estate and Gift Tax Attorneys were, prior to 1968, classified as non-attorneys in a GS-526 job series, even though individuals with law degrees were often hired to perform the work. It was the position of NTEU (at that time referred to as National Association of Internal Revenue Employees, "NAIRE" for short) that these employees were more properly classified as attorneys in the GS-905 series. In 1968, The Civil Service Commission agreed with NAIRE and directed that these employees be classified as GS-905's, and that classification remains in effect to date. These attorneys are usually hired as GS-7's or 9's, and can advance competitively to GS-13.

Once having achieved this goal, NTEU sought to create opportunities for these attorneys to advance to other, higher graded positions in the IRS. One such position targeted by NTEU has been the Appellate Conferee position, which is found in IRS Regional Offices and is classified in the GS-512 Auditor series. The highest grade level for these employees is GS-14. Basically, their duties consist of sitting in judgment on taxpayer appeals which have been taken from determinations of tax liabilities established in IRS District Offices. It was NTEU's contended that because the original evaluation and determination of taxes owed was made by Estate and Gift Tax Attorneys (E and G Attorneys) in the District Office, they should be the logical ones to move up to the Regional Office into the position that reviews some determinations made by E and G Attorneys.

Between 1968 and 1974 there were numerous conferences

and discussions concerning this issue. During these meetings, the IRS indicated that it felt that mobility for E & G Attorneys was restricted, in large part, because of their non-competitive status. 8/ Much of the discussions focused on developing legislation that would make these attorneys non-exempt (i.e., in the competitive service).

Normally, these meetings would involve a representative of the IRS National Office, and the Personnel Director, for the IRS; and Vincent L. Connery, President of NTEU, or Robert M. Tobias, General Counsel for NTEU, for the union. Further, there were approximately four such meetings between 1970 and the November 5, 1974 meeting, which is here in question, all involving national representatives of IRS and NTEU.

C. The November 5, 1974 Meeting.

On November 5, 1974, the Commissioner of the IRS, Donald Alexander, met with the NTEU National President Vincent Connery, in the IRS National Office, Washington, D.C. The meeting was arranged by the IRS, in an effort to better the general working relationship between the IRS and NTEU, and to introduce Mr. Alexander and Mr. Connery to each other. No agenda was prepared for the meeting, as a general wide-ranging discussion between Mr. Alexander and Mr. Connery was anticipated. The meeting lasted approximately an hour and one-half, during which time various topics were discussed by Mr. Connery and the Commissioner. Mr. Connery brought up between six and a dozen topics for general discussion in order to acquaint the Commissioner with some of the Union's concerns. Among these topics of discussion were the issues of rearbitration of already-decided issues, over-strictness on the part of the IRS deciding officials in advisory arbitration cases, and the creation of more GS-905 Attorney positions in the IRS.

In regard to this last issue, Mr. Connery expressed the concern of NTEU that E & G Attorneys had limited career opportunities in the IRS because of the fact that no other

8/ The positions that NTEU contended the E & G Attorneys should be eligible to move into were all positions that required competitive Civil Service status.

IRS positions were classified as attorney positions. NTEU's concern was expressed as being that although E & G Attorneys were able in some circumstances to move into other non-supervisory positions in the IRS, such positions were not classified as GS-905 Attorney positions; NTEU felt that more IRS non-supervisory positions should be classified as GS-905 positions. Specifically, NTEU expressed interest in creation of GS-905 classifications in the new E ployee Plans/Exempt Organization (EP/EO) function and in Appellate Conference. In this regard, NTEU ntoed that there would be many positions within the new EP/EO function, then being formulated, that would entail substantial legal work and that such positions should therefore be classified as GS-905 Attorney positions. In addition, NTEU expresed its belief that the position Appellate Conferee, GS-512 (non-attorney), ought to be reclassified as GS-905 Attorney, insofar as the incumbent of that position reviewed the work of E & G attorneys and was called upon regularly in that function to apply complex legal principles. Finally, Mr. Connery noted the difficulties an E & G attorney has in moving from a GS-905 position to a GS-512 position if he/she lacks Civil Service competitive status from a previous job. The discussion in regard to this topic primarily concerned the need, as NTEU viewed it, for more GS-905 Attorney classifications in the IRS. The record does not establish that the discussion involved the qualifications necessary for an E & G attorney with competitive status to move into an Appellate Conferee, GS-512, position.

In regard to all of the matters that were discussed in the meeting, the Commissioner indicated that he was in sympathy with the Union's concerns and that he would look more carefully into each topic on his own, and that he appreciated the information that the union had given him. There is a conflict in testimony whether at any time during the meeting Commissioner Alexander promised Mr. Connery or anyone else that he would have any further discussions with NTEU before implementing any actions in any of these areas. However it is clear that, even if not expressly stated, Commissioner Alexander indicated that he would communicate with NTEU further after he had looked into the matters they had brought up.

When the IRS receives an estate and gift tax return,

the return receives its initial audit in a IRS District Office. If the taxpayer disagrees with the initial audit, he/she may appeal it through two levels of review, culminating in appeal to an Appellate Conferee, in an IRS Regional Office. As noted above, in 1968, the Civil Service Commission determined that initial audits of estate and gift tax returns must be made by an attorney. The IRS accordingly reclassified the position as Estate and Gift (E & G) Attorney, GS-905. GS-905 is the only attorney classification in federal civil service. In addition, the E & G Attorney position is the only position in the IRS (excluding Office of Chief Counsel) that is classified as GS-905. Since 1968, NTEU has been urging the reclassification of Appellate Conferee positions from GS-512 to GS-905, arguing that insofar as an Appellate Conferee reviews the work of an E & G Attorney, Appellate Conferee position should also be classified as GS-905. To the extent that Appellate Conferee positions were discussed during the meeting of November 5, 1974, it was primarily regarding this contention of NTEU's that the position of Appellate Conferee ought to be reclassified as GS-905.

D. The Correspondence Between The Parties Following The November 5th Meeting.

President Connery wrote to Mr. Hastings on November 11, 1974, referring to the November 5, 1974 meeting and the discussion regarding the use of attorneys in EP/EO work stating that it should be classified in the GS-905 Attorney series. Mr. Brown responded on November 19, 1974, indicating that the IRS was "considering your (NTEU's) position and will respond as soon as possible." On December 23, 1974, Mr. Connery wrote to Mr. A exander, again referring to the November 5th meeting, and again referring to the discussion of E and G Attorney mobility generally. 9/ Mr. Orion Birdsall, acting for Mr. Brown, the Personnel Director, indicated that "the matter" was being reviewed, and the IRS would "be in contact with (NTEU in the near future."

Some time between December 10, 1974 and January 15, 1975, NTEU National Headquarters received a copy of a

9/ Specifically Mr. Connery protested a proposed plan to use a test group of GS-512 employees to do estate and gift work, work which he contended had already been determined by the Civil Service Commission, to be GS-905 Attorney work. Apparently no such test was ever put into effect.

letter dated November 19, 1974 sent by Mr. Billy Brown, IRS Personnel Director to a group of E & G Attorneys in Chicago. In Mr. Brown's letter, it was noted that the IRS intended to issue in the near future guidelines for evaluation of the qualifications of E & G Attorneys who had competitive status Appellate Conferee, GS-512, positions. The guidelines thus referred to were those eventually contained in M.S. 13G-75, issued on March 7, 1975. Mr. Connery again wrote Mr. Alexander on January 15, 1975. He again referred to the November 15th meeting, and referred to Mr. Brown's November 19th letter, for the proposition that no decision concerning E and G Attorneys participation in EP/EO work had been reached. He expressed concern that Mr. Brown's November 19 letter to the Chicago Attorneys indicated a contrary state of affairs. On February 3, 1975 Mr. Alexander responded to this letter, stating that no final decision had been made on the use of GS-905 attorneys in EP/EO work and that NTEU would be given advanced notice and an opportunity to discuss the Service's position on this issue before a final decision is made.

Manual Supplement (M.S.) 13G-75 which was issued on March 7, 1975 provides an interpretation fo pertinent Civil Service Commission regulations governing the qualifications necessary for consideration of an applicant for an Appellate Conferee, GS-512, position. More specifically, it provides guidelines for the substitution of experience as an E & G Attorney for experience otherwise required by the Civil Service Commission regulations. Prior to the issuance of M.S. 13G-75, such substitution of experience was determined on an ad-hoc basis by many different personnel technicians and without uniformity throughout the IRS. The purpose of the issuance of M.S. 13G-75 was to establish greater uniformity in the IRS in this regard. M.S. 13G-75 applies only to E & G Attorneys who already have competitive status from a previous job. Further, it applies only as long as the position of Appellate Conferee continues to be classified as GS-512. It has no impact on the classification of that position. 10/

M.S. 13G-75 applies to all IRS Regional Offices; some of these Regional Offices contain units that are

10/ A reclassification of the Appellate Conferee position out of GS-512 would make M.S. 13G-75 obsolete.

represented by NTEU individually, and some do not.

The record does not establish that NTEU asked IRS, or the management of any of the individual units that NTEU represents, to bargain about the decision to issue M.S. 13G-75, or concerning its impact and implementation.

Conclusions of Law

A. Scope of Exclusive Recognition

NTEU was originally accorded recognition in a series of separate units located in the District Offices, Regional Offices and Service Centers. In fact separate collective bargaining agreements were entered into by NTEU and IRS covering certain of these units.

In 1972, however, NTEU and IRS entered into negotiations on a multi-unit basis. The IRS bargaining committee in the Multi-District Agreement was made up of District Office representatives and IRS officials from Washington. Similarly the IRS Multi-Center contract committee was composed of Service Center representatives and IRS officials from Washington. 11/ During their negotiations the parties bargained about, and ultimately agreed to terms that were normally outside the scope of the authority of District Directors' and/or the Service-Center Directors. The IRS representatives had obtained prior authority from the IRS Commissioner to bargain about such terms. All the contracts, in Article 1. Section 1. A., speak in terms of the "Unit" covered by the contract being composed of all pertinent employees in the Districts, Regions or Centers listed in the Appendix attached to each respective contract. In all these circumstances it seems clear that the NTEU and IRS, by this multi-unit bargaining, intended to merge the separate units in the District Offices into one nationwide District Office unit composed of the separate units the represented by NTEU and to merge the separate Service Center units into a nationwide Service Center unit composed of the separate units represented by NTEU. 12/

11/ The record contains nothing about the bargaining for the Multi-Regional Contracts.

12/ Similarly it can be assumed the parties had the same intention with respect to a Nationwide Regional Unit composed of separate units represented by NTEU.

However, the original Executive Order 11491 was signed in October of 1969 and provided that exclusive recognition must be obtained by a vote of the employees in the appropriate unit. It was after effective date of this Order that NTEU first tried to merge the units by means of the CU petitions. In dismissing them, it was held that the use of RO petitions, which could provide for an election, would have been the appropriate procedure for achieving exclusive recognition in these new nationwide units. NTEU failed to pursue such procedures. Rather the parties themselves by the 1972 negotiations voluntarily decided to merge the separate units into new nationwide units without utilizing any elections or RO petitions. To permit this would be to permit the parties to avoid the reasoning behind the dismissals of the CU petitions and to frustrate the purposes of Section 10 of the Order, which provides the method for obtaining exclusive recognitions. 13/

Therefore, despite the wishes and aims of the parties, it is concluded that neither the bargaining nor the multi-unit agreements had the legal effect of merging the separate local units and granting NTEU exclusive recognition in such new nationwide units. Therefore NTEU only had exclusive recognition for the employees in a series of separate units located in 56 District Offices, 11 Service Centers and the 4 Regional Offices. Further it must be noted that NTEU neither sought nor obtained National Consultation Rights.

B. Obligation to Bargain Concerning Issuance of M.S. 13G-75

M.S. 13G-75 which contained the uniform criteria for evaluating attorney experience when considering applicants for the Appellate Conferee GS-512 position applied to all IRS Regional Offices including the 2 or 3 not then represented by NTEU. Similarly these uniform standards would be applied to all E & G Attorney applicants for the Appellate Conferee GS-512 position, even those who came from District Offices not represented by NTEU.

13/ The Report and Recommendation of the FLRC on the Amendment of E.O. 11491, as Amended, on page 20 recommended that Section 10(a) of the Order be amended to permit such a voluntary consolidation of units, and Executive Order 11838, signed on February 5, 1975, followed that recommendation. Thus Section 10(a) of the Order has been amended to permit consolidation of units by the voluntary action of the parties.

Absent national recognition, national consultation rights or any special or peculiar circumstance the IRS was obliged not by the Order to bargain or consult with NTEU concerning the decision to issue and the issuance of M.S. 13G-75, even though that manual item, by imposing uniform criteria, would affect the working conditions of employees, the E & G Attorneys, in units represented by NTEU as well as similar employees not in units represented by NTEU. 14/ cf. U.S. Merchant Marine Academy, FLRC No. 71A-15 (November 20, 1972) and Department of Defense, Air Force Defense Language Institute, English Language Branch, Lackland Air Force Base, FLRC No. 73A-64 (October 25, 1974).

Because NTEU has neither national consultation rights nor national recognition it must be determined whether there were any other circumstances here present, which would somehow have prevented IRS from unilaterally issuing M.S. 13G-75. In this regard it is concluded that the November 5 meeting was, by its nature a rather informal meeting designed to permit the Union and IRS to explore and discuss mutual problems. By engaging in such a meeting the IRS did not waive any right it had to unilaterally issue the subject regulation; any such waiver of a right must be clear and unequivocal, and there was no such waiver present here. Further the thrust of the November 5 meeting was to create more GS-905 jobs. M.S. 13G-75 did not deal with that issue but merely provided that, with respect to the situation as it then actually existed (i.e. the Appellate Conferee position as a GS-512 position) what criteria would be used in crediting attorney experience. It was not a determination on whether to convert the Appellate Conferee position to a GS-905 classification. Therefore it must be concluded that there were no unusual or special circumstances present as a result of the November 5 meeting which in any manner limited the IRS' right to issue the Manual Supplement in question.

IRS had obligation to bargain with NTEU only at the individual District Office, Regional Office and Service

14/ It should be noted that Section 11(a) and (c) of the Order was Amended by Executive Order 11838 signed February 6, 1975 so as to provide in effect that appropriate subjects for bargaining can not be removed from bargaining by an agency regulation unless the agency can establish "a compelling need exists" for such a regulation. These amendments did not become effective until after March 7 and therefore are not applicable to the subject case.

Center level. Further the Order requires an Activity to bargain about the impact and implementation of a privileged change in working conditions only when a request or demand to so bargain is made by an exclusively recognized collective bargaining representative. 15/

In the subject case the record fails to establish that NTEU ever requested IRS at any level, including the units for which it was the collective bargaining representative, to bargain concerning the implementation or impact of M.S. 13G-75. In these circumstances it can not be concluded that the IRS, at any level, failed or refused to bargain about the impact and implementation of the manual supplement. 16/

In light of all of the foregoing, therefore, it is concluded that IRS did not engage in conduct which violated Sections 19(a)(1) and (6) of the Order.

Recommendation

In view of the findings and conclusion made above it is recommended that the Assistant Secretary for Labor-Management Relations dismiss the subject complaint.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: 19 JAN 1977
Washington, D.C.

15/ cf. Albany Metallurgy Research Center, U.S. Bureau of Mines, A/SLMR No. 408; U.S. Electronics Command, Fort Monmouth, A/SLMR No. 395; U.S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341; FAA National Aviation Facilities Experimental Center, A/SLMR No. 329; and Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, A/SLMR No. 289.

16/ In this regard it must be noted that the Complaint named the IRS National Office as having refused to bargain, yet as discussed above, the IRS had no obligation, on the National level, to bargain with NTEU. cf. NASA, A/SLMR No. 457 (November 26, 1974); and OEO, Region V, A/SLMR No. 251 (March 2, 1973).

June 6, 1977

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 WEATHER SERVICE
A/SLMR No. 847

This case involved an unfair labor practice complaint filed by the National Association of Government Employees (NAGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by its denial of the Complainant's request to delay implementation of a Merit Promotion Evaluation Guide and by its unilateral implementation of such Guide. Further, the Complainant alleged that the Respondent refused to discuss its proposals with respect to matters covered by the Guide at subsequent negotiation sessions held by the parties to negotiate a new multi-unit agreement.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) and (6) of the Order when it denied the Complainant's request to delay the implementation of the Guide and unilaterally implemented such Guide. With respect to the allegation that the Respondent had refused to negotiate with respect to subsequent proposals made by the Complainant, the Administrative Law Judge concluded that the Respondent had fulfilled its obligation in this regard. Thus, while the Administrative Law Judge agreed that there was an obligation on the part of the Respondent to negotiate with respect to the proposals made by the Complainant, he found that the Complainant had entered into an understanding with the Respondent over the Guide which effectively waived any right it might have had to object to the failure to negotiate in this regard. Accordingly, the Administrative Law Judge recommended dismissal of this portion of the complaint.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the unfair labor practice complaint should be dismissed in its entirety. Thus, the Assistant Secretary noted that the Respondent was an organizational entity below the agency or primary national subdivision level which contained subordinate organizational elements in which exclusive bargaining units exist. In the Assistant Secretary's view, the Respondent had the authority to issue a policy such as the Guide having uniform application to all of its subordinate organizational elements, including those in which there were exclusive bargaining units, so long as the issuance of the policy did not preclude bargaining on negotiable matters at the level of exclusive recognition. In this regard, the Assistant Secretary found, as noted by the Administrative Law Judge, that the issuance of the Guide by the Respondent did not preclude bargaining on the Guide at the subordinate organizational levels as evidenced by the fact that the Respondent's subordinate activities met and conferred with the Complainant concerning the subject matter encompassed in the Guide, and the Complainant subsequently agreed to accept the Respondent's evaluation plan with regard to merit promotions.

Accordingly, under the particular circumstances, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGMENT RELATIONS

NATIONAL WEATHER SERVICE

Respondent

and Case No. 22-6777(CA)

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

Complainant

DECISION AND ORDER

On January 18, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found certain other conduct of the Respondent not to be violative of the Order. Thereafter, both the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and 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. 1/ The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, including the exceptions and supporting briefs filed by the parties, I hereby adopt the Administrative Law Judge's finding, conclusions, and recommendations, only to the extent consistent herewith.

In his Recommended Decision and Order, the Administrative Law Judge found, among other things, that the Respondent violated Section 19(a)(1) and (6) of the Order when it denied the Complainant's request to delay the implementation of a Merit Promotion Evaluation Guide (Guide) and by its unilateral implementation of such Guide.

1/ At the hearing, the Administrative Law Judge denied the Respondent's Motion to Dismiss, which was based on the action of the Administrative Law Judge in allowing the Complainant's only witness to testify by deposition taken subsequent to the hearing in this matter. In its exceptions, the Respondent argued that it was prejudiced by the ruling of the Administrative Law Judge which compelled the Respondent to present its defense prior to having

(Continued)

The Respondent is an organizational entity below the agency or primary national subdivision level which contains subordinate organizational elements in which exclusive bargaining units exist. The evidence establishes that the Respondent issued a Guide concerning merit promotion evaluations at a time just prior to the commencement of negotiations with the Complainant involving several bargaining units for which the Complainant is the exclusive representative. In my view, an organizational entity, such as the Respondent herein, has the authority to issue a policy such as that involved in the instant case having uniform application to all of its subordinate organizational components, including those in which there are exclusive bargaining units, so long as the issuance of such policy does not preclude bargaining on negotiable matters at the level of exclusive recognition. In the instant case, the evidence establishes that the Respondent did not preclude bargaining on the Guide at its subordinate component levels. In fact, as noted by the Administrative Law Judge, the subordinate activities of the Respondent met and conferred with the Complainant concerning the subject matter encompassed by the Guide, and the Complainant subsequently agreed to accept the Respondent's evaluation plan with regard to merit promotions. 2/ Under these particular circumstances, I shall dismiss the complaint herein in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6777(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 6, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ heard the Complainant's evidence in support of its complaint. In view of the disposition herein, I find that no prejudice was suffered by the Respondent as a result of the Administrative Law Judge's ruling.

2/ Compare Naval Air Rework Facility, Pensacola, Florida, A/SLMR No. 608, FLRC No. 76A-37.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
National Weather Service Respondent	
and	
National Association of Government Employees Complainant	Case No. 22-6777(CA)

James W. Brennan, Esq., and
Charles A. Blake
Washington, D.C.
For the Respondent

Robert J. Canavan, Esq.
Boston, Massachusetts
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on March 31, 1976, by National Association of Government Employees (hereinafter called Complainant Union) alleging that National Weather Service (hereinafter called Respondent Activity) violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, the Acting Regional Director for Labor-Management Services for the Philadelphia Region issued a Notice of Hearing on Complaint on June 16, 1976. The complaint alleged, in essence, that the Respondent Activity unilaterally promulgated a Merit Promotion Evaluation Guide on or about January 5, 1976, despite the demand of the Complainant Union, as the exclusive representative of multiple units of employees of the Respondent Activity, that the contents of the Evaluation Guide were subject to negotiation. Further, that on or about January 16 and March 2, 1976, the Respondent Activity refused to discuss proposals

of the Complainant Union relating to "an objective Merit Promotion Evaluation Procedure" during collective bargaining negotiations, and took the position that there was no duty to negotiate the subject matter.

A hearing was held on July 22, 1976, in Washington, D.C. Prior to the date of the hearing, counsel for the Complainant Union filed a motion to reschedule on the ground that the chief witness and former counsel of the Complainant Union was no longer employed by the labor organization and was not available to testify at the time of the scheduled hearing. The Respondent Activity entered an objection to the motion because it would have worked a hardship on a critical witness who had since retired from federal service. The motion was denied and permission was granted, over the objection of the Respondent Activity, for the parties to take the deposition of the Complainant Union's chief witness at a subsequent date. The record was kept open until this was accomplished. Following the taking of the deposition 1/, the Respondent Activity filed a motion to strike the deposition on the ground that it had been prejudiced in preparing and presenting its defense to the allegations of the complaint. 2/ Upon notificiation to the parties of an intention to reopen the record for the purpose of allowing the Respondent Activity to present any additional evidence or testimony it deemed necessary as a result of the deposition, the Respondent Activity submitted a letter preserving its objection to the procedure followed but indicating that it had no additional new or substantial evidence to offer. 3/

Briefs were submitted by both parties and been duly considered. Upon the entire record in this, including my observation of the witnesses, I make the following:

Findings of Fact

I. Background Facts

The National Weather Service is a primary organizational element, nationwide in scope, of the National Oceanic and Atomspheric Administration (NOAA) which in turn is a primary national subdivision of the Department of Commerce. The

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1/ The deposition, taken on August 9, 1976, is received into the record as Joint Exhibit No. 11.

2/ The Respondent Activity's motion to strike is hereby received into the record as Assistant Secretary'y Exhibit NO. 1(k).

3/ The statement of the Respondent Activity is hereby received into the record as Assistant Secretary's Exhibit No. 1(1).

National Weather Service has a headquarters operation and field offices throughout the United States; which from an organizational standpoint is divided into regions.

The Complainant Union is comprised of Regional Councils having exclusive recognition for units of employees on a region-wide basis and Locals having exclusive recognition in regions where the extent of the recognition was on less than a regional basis. Although the Complainant Union does not have national exclusive recognition with the Respondent Activity, it is the exclusive representative for the vast majority of the employees of the Activity. Of approximately 4100 employees, 3500 belong to units represented by labor organizations. Approximately 3150 of these employees are represented by the Complainant Union in various units throughout the United States. In addition, the Complainant Union was accorded national consultation rights under Section 9 of the Executive Order by NOAA in 1971.

Since 1970, the Complainant Union, on behalf of its Regional Councils and Locals, has bargained for and executed a series of multi-unit agreements with the Respondent Activity. The most recent of the multi-unit agreements covered the period February 1, 1974, to March 31, 1976. (Joint Exhibit No. 2). The predecessor agreement was in effect from January 1, 1972 to Janury 31, 1974. (Joint Exhibit No. 1).

II. The Events Leading to the Alleged Violations of the Executive Order

A. The Proposed Merit Promotion Evaluation Guide

On November 10, 1975, the Director of the Respondent Activity sent a copy of a proposed Merit Promotion Evaluation Guide to the Executive Vice President of the Complainant Union. (Joint Exhibit Nos. 4 and 5). The purpose of the Evaluation Guide was "[t]o ensure uniformity in filling vacancies under the Merit Promotion Program" throughout the Weather Service. The Complainant Union was requested to submit comments on the Evaluation Guide by December 5, 1975. 4/

The Evaluation Guide was the result of the urgings of regional personnel officials at several conferences convened by the Chief of Personnel of the Respondent Activity. Prior to the development of the Guide, each region followed its own

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4/ Two other unions, American Federation of Government Employees and National Federation of Federal Employees represented small units of employees at the Respondent Activity. Their views were also solicited by the Respondent Activity, and each of these unions submitted comments on the Evaluation Guide by the date requested.

procedure, which of course had to conform with the merit promotion plan of NOAA and the policies set forth in the Federal Personnel Manual. The Guide was formulated because the regional personnel officials were anxious to have a uniform procedure applicable throughout the Weather Service.

Because the multi-unit agreement between the parties was scheduled to expire in March 1976, it was mutually agreed that there would be an exchange of proposals for a new agreement in November 1975, and negotiations would commence in January of the following year. The Respondent Activity gave its proposals to the Complainant Union on November 24 and the labor organization submitted its proposals several days later. Included in the Complainant Union's proposals was a specific provision (Article 17) relating to a merit promotion procedure. This proposal included the factors to be considered and the weight to be assigned them in evaluating employees for purposes for promotion. (Joint Exhibit No. 3).

On December 3, 1975, the Executive Vice President of the Complainant Union responded to the Activity's request for comments on the proposed Evaluation Guide. The Complainant Union asked that "discussions be postponed pending scheduled negotiations in January and that no action be taken by the Agency until the subject has been dealt with through the negotiation process." (Joint Exhibit No. 6). The Union reminded the Respondent Activity that it had submitted contract proposals which included proposals on the "Merit Promotion Program," and took the position that "many areas" encompassed in the Evaluation Guide and the contract proposals were negotiable.

In a reply dated January 3, 1976, the Respondent Activity rejected the Complainant Union's request to delay implementation of the Evaluation Guide. (Joint Exhibit No. 7). The letter stated, in part:

> "While matters relative to merit promotion are proposed for the upcoming negotiations, the content and issuance of a nationwide NWS Guide as above are not proper for negotiations since your organization does not hold national exclusive recognition. We will, of course, negotiate any merit promotion matter which is properly within your scope of recognition and not in conflict with national policy."

The Respondent Activity concluded by informing the Complainant Union that it planned to issue the Evaluation Guide on January 6, 1976, to "establish uniform application on a national basis."

B. The Negotiations for a New Multi-Unit Agreement

The parties commenced negotiations on the proposals for a new multi-unit agreement on January 12, 1976. The chief negotiator for the Complainant Union was Phillip Collins, then union counsel in charge of the NWS negotiations. Management was represented by a team of negotiators headed by Perry Walper, Chief of Labor-Management Relations Branch of the NOAA Personnel Division. He was assisted by a number of management officials including Hasker B. Samuel, Jr., Chief of the Personnel Section of the Respondent Activity 5/ and Andrew Husser, Chief of Policy, Planning and Evaluation Branch of the Personnel Division of NOAA.

The testimony 6/ indicates that the parties initially began bargaining as one large group. Subsequently they subdivided into small groups handling specific contract proposals. On the last day of the January negotiations (January 16), Collins attempted to raise the Union's proposal for Article 17 relating to the merit promotion procedures and evaluations. Husser, who was in charge of the management sub-group handling this particular proposal, declined to discuss Section 6 pertaining to the factors and weights to be considered in evaluating employees for promotion and Section 7 pertaining to the determination of the best qualified candidate for promotion. Husser testified that he took this position because he did not have knowledge of the Respondent Activity's plans on this particular area in view of the Evaluation Guide which was recently issued. 7/

5/ The personnel section of the Respondent Activity was a component of the personnel division of NOAA.

6/ The testimony of all of the witnesses including the deposed witness, is in substantial agreement concerning the events that occured during the negotations. There are some minor conflicts between witnesses in recalling the timing of certain statements and events, but I find this to be the result of the passage of time rather than an intent to mislead. Accordingly, I find all of the testimony to be creditable, and the facts set forth above are a synthesis of the testimony of all of the witnesses.

7/ Collin's notes indicate that Section 6 was not discussed because it conflicted with NWS policy.

At the conclusion of the January negotiation sessions, the parties agreed to exchange correspondence delineating the areas of agreement and in setting forth their position on proposals which were in disagreement. Management also submitted a counter proposal for Article 17 entitled "Filling Vacancies". Section 1 of the counter proposal indicated that "vacancies may be filled by lateral reassignment or other means recognized as exceptions to merit promotion programs, or through the NOAA Merit Promotion Program (MPP)." Management's proposal for Article 17 did not spell out the factors to be considered and the weight to be given each in making the evaluation, but contained a section which stated that Regional Councils "through consultation would recommend and assist management in reviewing evaluation ranking systems to make them as objective as possible." (Joint Exhibit No. 8). 8/

On February 20, 1976, the Complainant Union submitted a copy of its assessment of the various proposals to management. (Respondent Activity No. 5). Regarding Section 6 of Article 17, the Complainant Union stated that "[w]e reiterate our demand that the NWS negotiate our proposals for Section 6 prior to implementing the Merit Promotion Plan Evaluation Guide." The parties agreed to resume negotiations during the week of March 1, 1976.

The parties reached Article 17 during the second day of the negotations in March. The Complainant Union's chief representative insisted that the Evaluation Guide and the Union's merit promotion proposals should be negotiated. Samuel, on behalf of management, suggested that the Evaluation Guide remain operational for a period of four months. Then management would be willing to engage in consultation with the Union regarding the results. The Complainant Union rejected this proposal and insisted on negotiating the Guide. Walper, the chief representative for management, stated that the time for consultation had passed

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8/ This section of management's proposal was identical to Article 17, Section 5 of the existing agreement. That provision in the current agreement stated:

> Section 5. Regional Councils, through consultations, will recommend and assist management in reviewing evaluation ranking systems with the aim of making them as objective as possible and follow the prescribed policy on evaluation and ranking as set forth in the Federal Personnel Manual.

and the Guide was not negotiable. He told Collins to get back to the business of negotiation, as the Guide was "not on the table". Collins nevertheless continued to detail the Complainant Union's criticism of the Guide. Finally, the parties began to discuss the proposals relating to Article 17 and, more specifically, Section 6 dealing with the evaluation factors. Management took the position that the evaluation had to be according to the Guide. The record shows that there was some discussion on one portion of Section 6 relating to a provision that management would make an annual promotion evaluation of each employee. However, management refused to discuss the other portions of Section 6 relating to the factors to be considered in the evaluation. It was clear that the chief obstacle was the previously issued evaluation guide, which management stated was not up for negotiation.

On March 5, 1976, Samuel renewed management's offer to leave the Guide in operation for a four month period to gain experience on its effectiveness. Then management would consult with the union representatives on the results. Collins took the position that the Evaulation Guide was a fait accompli, and finally agreed to management's suggestion for the four month trial. He stated however, that the Complainant Union was not waiving its right to object to the implementation of the Guide on January 6 and the failure of management to negotiate the substance of the Guide and the Union's proposals on merit promotion. The parties finally agreed that they would enter into a separate memorandum of understanding regarding the four-month trial period for the Evalution Guide. This memorandum of understanding was to be drafted by management and forwarded to the Complainant Union for signature. The parties also agreed that management would submit a draft of the multi-unit agreement incorporating all items agreed upon during the negotiations.

Later that month, management submitted a draft agreement to the Complainant Union. Collins did not consider it as accurately reflecting the matters agreed upon, and he requested a meeting between the parties be held on March 30 and 31. This meeting was subsequently cancelled by management because several Regional Councils withdrew authority for the Complainant Union to negotiate on their behalf and filed decertification petitions seeking the ouster of the Complainant Union. Management did not submit the memorandum of understanding regarding the operation of the Evaluation Guide either, because of this development

Contentions of the Parties

The Complainant Union contends that by virture of its national consultation rights with NOAA it was entitled to "consult" with the Weather Service regarding the Evaluation Guide. When it requested delay in implementation of the Guide until the parties had an opportunity negotiate the merit promotion provisions of its contract proposals, it did not waive the right to engage in consultation. The Complainant Union also argues that the implementation of the Evaluation Guide, after rejection of its request for delay and on the eve of negotiations for a new multi-unit agreement, was a denial of its national consultation rights and was also a manifestation of an intent to refuse to negotiate the Union's merit promotion proposals during the bargaining sessions. Finally, the Complainant Union contends that the Respondent Activity refused to negotiate the merit promotion evaluation factors during the January and March bargaining sessions, although required to do so under the Executive Order.

The Respondent Activity defends its actions on several grounds. First, it contends that the existing multi-unit agreement contained a provision (Article 17, Section 5) which limited the parties to "consultation" as opposed to negotiation on policies and procedures involving evaluation ranking systems. The Respondent Activity argues that the Complainant Union was afforded an opportunity to "consult" on the Evaluation Guide, but chose not to take advantage of this offer when it asked for a delay until negotiations were completed on the merit promotion proposals. The Respondent Activity further contends that Section 12(b)(2) of the Executive Order reserves to management the right to control the promotion of its employees and to select and weight the criteria upon which such promotions shall be accomplished. It was also argued that even if the Evaluation Guide were considered negotiable, there was no duty to engage in such negotiations with the Complainant Union before the start of the multi-unit negotiations, as the Union did not have national exclusive recognition with the Respondent Activity. An extension of this argument is that during the January and March negotiation sessions, it discharged all negotiating obligations placed upon it by the Executive Order regarding the Union's merit promotion proposals. Finally, the Respondent Activity takes the position that the Complainant Union waived any right that it had regarding a failure to negotiate the merit promotion provisions of the contract proposals when it agreed to allow the Evaluation Guide to remain in effect for a four-month trial period.

Concluding Findings

In my judgment, one of the features of this case which complicates the issues is the reliance the parties place upon the national consultation rights afforded the Complainant Union by the parent organization (NOAA) of the Respondent Activity. It is evident that both parties are attempting to interprete their obligations against the backdrop of a relationship which does not exist between the Respondent Activity and the Complainant Union. National consultation rights arise under Section 9 of the Executive Order and are subject to criteria established by the Federal Labor Relations Council. (5 C.F.R., Part 2412). Within the meaning of the criteria (5 C.F.R. §2412.2) NOAA is a primary national subdivision of the Department of Commerce. 9/ However, the Merit Promotion Evaluation Guide is a promotion policy and procedure developed and promulgated by the National Weather Service; a major operational component of NOAA. Thus, it was not issued at the primary national subdivision level. Samuel testified that the regional personnel officers were pressing for the issuance of a merit promotion procedure which would have uniform application to all regions of the Respondent Activity, and the Evaluation Guide was developed to meet this objective. Therefore, the duties and obligations arising under the national consultation rights accorded to the Complainant Union by NOAA have no material bearing upon a merit promotion plan promulgated by the Respondent Activity and is not a factor to be considered in resolving the issues presented by this case.

The threshold question here is whether the Respondent Activity had a duty under Section 11(a) of the Executive Order to negotiate the substance of the Evaluation Guide with a union which was the exclusive representative of a number of region-wide and local units of employees, but which did not have national exclusive representative status. The Respondent Activity in a well written brief describes the Evaluation Guide as consisting "primarily of a series of tables and worksheets prescribing in detail the factors or criteria... and the precise weight to be given each factor, by the NWS Personnel Officers and Manpower Utilization Councils in making promotion decisions under... the NOAA Merit Promotion Plan." The Respondent Activity asserts that the "right to select and weight promotion criteria is at the very heart of the right to promote reserved to agency

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9/ Cf. Department of Navy, Military Sealift Command, A/SLMR 576.

management under Section 12(b) of the Order." 10/

In my judgment this assertion has too broad a sweep. The Federal Labor Relations Council in interpreting the rights reserved to agency management under the Executive Order has carved out a careful definition of the meaning of these rights. In Veterans Administration Research Hospital 11/ and the subsequent line of cases on this point 12/ the Council has consistently declared that the intent of Section 12(b)(2) is "to bar from agreements provisions which infringe upon management officials' exercise of their existing authority to take the personnel actions specified therein" but does not "preclude negotiations of the procedures which management will follow in exercising that reserved authority", provided "such procedures do not have the effect of negating the authority itself."

It is evident from the Council's decisions that the right to promote employees is unquestionably reserved for management, but the procedures management will follow in exercising this authority are proper subjects for negotiation as long as it does not have the effect of nullifying the authority itself. 13 / In the instant case, the criteria and factors to be considered and the weight to be assigned them are, part of the promotion procedure to enable agency management to evaluate employees for promotion opportunities under the merit promotion

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10/ Section 12 of the Order provides, in pertinent part:

> Sec. 12 Basic Provisions of Agreements. Each agreement between an agency and a labor organization is subject to the following requirements --
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> * * * * *
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations --
>
> (2) to hire, promote, transfer, assign and retain employees in positions within the agency....

11/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 228 (FLRC No. 71A-31).

12/ Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Maryland, 1 FLRC 526 (FLRC No. 72A-18); Naval Air Rework Facility, Pensacola, Florida 1 FLRC 572 (FLRC No. 73A-24); Longbeach Naval Shipyard, Longbeach, California, FLRC No. 73A-16 (July 31, 1974) Report No. 55; Los Alamos Area Office, ERDA, FLRC 74A-30 (May 22, 1975) Report No. 71

13/ Los Alamos Area Office, ERDA, Supra.

plan. There is nothing in the Evaluation Guide which would cause management to negotiate a promotion selection, nor would it interfere with the ultimate decision making and action authority of the agency officials. It would merely establish a uniform procedure by which all employees would be evaluated for purposes of promotion under the merit promotion plan. 14/ Therefore, unless limited to a lesser process by express provision in the existing multi-unit agreement, the substance of the evaluation guide is a proper subject matter for negotiations between the parties.

It is of no consequence that the Complainant Union did not enjoy national exclusive recognition with the Respondent Activity, but was only the exclusive representative of multiple units of employees throughout the Activity. The mere fact that the evaluation guide was to have activity-wide application does not remove the obligation to negotiate its substance, as it relates to personnel policies and practices, with a labor organization which has exclusive recognition for units of employees on a less than activity-wide basis. The evaluation guide clearly involved personnel policies and practices affecting all employees, and under Section 11(a) 15/ was a bargainable subject matter. To hold otherwise would allow the Respondent Activity to circumvent its bargaining obligation on a matter, otherwise negotiable, by the mere extention of its application beyond the scope of the represented units of employees.

It should be noted at this point, that there is serious question as to whether the compelling need provisions of Section 11(a) are applicable to the facts of this case. As

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14/ Cf. Patent Office Professional Association and U.S. Patent Office, Washington, D.C., FLRC No. 75A-13 (October 25, 1975) Report No. 85.

15/ Section 11(a) of the Executive Order provides, in pertinent part:

> Sec. 11 Negotiation of Agreements. (a) An agency or 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 for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; ....

previously indicated, the Respondent Activity is not a primary national subdivision, but is a principle organizational element, albeit nation-wide in scope, of a primary national subdivision (NOAA). 16/ The Evaluation Guide was issued by the Respondent Activity itself and not at the agency headquarters or the primary national subdivision level. Therefore, the "compelling need" criteria would not seem to be a valid basis for excluding the Evaluation Guide from the negotiation process.

But even if this portion of 11(a) is construed to have application, the record does not contain evidence sufficient to meet the criteria established by the Council for a "compelling need" exclusion. The illustrative criteria are set forth in 5 C.F.R., Part 2413. The only provision which would have application to this case is found in Section 2413.2(e). That illustrative example states that the "compelling need" requirement is satisfied when:

> (e) the policy or regulation establishes uniformity for all or a substantial segment of the employees of an agency or a primary subdivision where this is essential to the effectuation of the public interest. (Emphasis Supplied).

Although it is clear that it was management's desire to achieve uniformity in the merit promotion evaluation of the employees throughout the entire organizational component, there is nothing in the record which suggests that it was essential or vital to the effectuation of the public interest. As Samuel testified, prior to the promulgation of the guide there variations in each region, and over a period of time the personnel officers were pressing for the establishment of a uniform procedure. There is no evidence that the prior variations caused the regions to fail to comply with the merit promotion plan of NOAA or the policies prescribed in the Federal Personnel Manual. Nor is there any evidence that the variations were so substantial that they interfered with the agency's efforts to develop sound promotion policies. Hence, there is nothing in the record which causes me to find that the promulgation of the Evaluation Guide was of such a compelling nature as to override the obligation to negotiate its substance under Section 11(a).

The remaining issue regarding the negotiability of the evaluation guide is whether Article 17, Section 5 limited the parties to a process less than negotiation on the substance

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16/ Department of Navy, Military sealift Command, supra.

of the Guide. This provision in the agreement required "Regional Councils, through consultation, " to recommend and assist activity management in reviewing evaluation ranking systems to make them objective and to conform with the prescribed policy in the Federal Personnel Manual. The Respondent Activity argues that this section "effectively limited" the bargaining obligation imposed by Section 11(a) of the Executive Order. While it is true that parties by contractual agreement can place a valid limitation on their obligation to negotiate under Section 11(a) 17/, I am not persuaded that such has occurred here.

Article 17, Section 5 relates solely to Regional Councils, however, the multi-unit agreement involves both Regional Councils and Locals with exclusive recognition. It is not clear whether this provision is intended to impose a limitation on the various Regional Councils and not on the Locals of the same union in instances where there was no region-wide recognition. But more important, when this provision is read in context with Article 6, Section 1 of the agreement 18/ which grants broad authority to the parties for consultation and negotiation on matters relating to working conditions, including promotion plans, the intent of the prior provision is even less clear.

In order to have an effective waiver or limitation restricting the right conferred by Section 11(a) of the Executive Order to negotiate a subject matter, the waiver must be clear and unmistakable. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223; U.S. Department of Navy, Naval Ordinance Station, Louisville, Kentucky, A/SLMR No. 400. It is evident that such is not the case here.

17/ See U.S. Army School/Training Center, Fort Gordon, Georgia, A/SLMR No. 148.

18/ Article 6 relates to "matters appropriate for consultation and negotiation." Section 1 of that provision provides:

> It is agreed that matters appropriate for consultation and negotiation between the parties are policies and practices related to working conditions which are within the discretion of the employer, including but not limited to such matters as safety, training, labor-management cooperation, employee services, methods of adjusting grievances, appeals, granting of leave, promotion plans, demotion practices, pay regulations, reduction-in-force practices, and hours of work. (Emphasis supplied).

Accordingly, I find that Article 17, Section 5 does not constitute a waiver of the right of the Complainant Union to negotiate the substance of the Evaluation Guide with the Respondent Activity.

On the basis of the foregoing, I find and conclude that the Respondent Activity failed to consult and confer with the Complainant Union, as required by Section 19(a)(6) of the Executive Order, when it denied the Complainant Union's request to delay implementation of the Evaluation Guide until the parties had an opportunity to negotiate those matters which were common to the Guide and the proposals submitted by the Union for the pending multi-unit negotiations. I further find that the unilateral implementation of the Evaluation Guide on January 6, 1976, in the face of a timely request to negotiate is a further violation of Section 19(a)(6). In addition, such conduct had a concomitant coercive effect upon and interfered with the rights assured employees in the recognized bargaining units by the Executive Order in violation of Section 19(a)(1) of the Executive Order.

The remaining issue to be decided in this case is whether during the January and March negotiation sessions the Respondent Activity refused to negotiate the merit promotion proposals of the Complainant Union as required by the Executive Order. There is no doubt on the basis of the record in this case that the major obstacle confronting the parties in dealing with the merit promotion proposals was the existence of the Evaluation Guide and the fact that it had already been implemented by the Respondent Activity. It is equally clear that there was full and frank discussion on all of the contract proposals and counterproposals submitted by both parties with the exception of Section 6 of the Complainant Union's merit promotion proposals. The Respondent Activity took the position that the Evaluation Guide was controlling in this area and the subject matter was not for negotiation. Critical to a determination of the issue presented by this portion of the complaint is the agreement entered into by the parties to allow the Evaluation Guide to remain in effect for a four-month period; after which they would engage in further discussion on the results.

Although the chief representative of the Complainant Union entered into the understanding with the express caveat that he was not waiving the Union's right to object to the failure to negotiate that portion of its merit promotion proposal, I find that he did in fact waive this right. By acquiescing to the operation of the Guide for a four-month trial period, and by agreeing to engage in future discussions

with the Respondent Activity on this subject after the trial results were known, the Complainant Union agreed to accept management's counter offer regarding this aspect of the merit promotion proposal. It cannot now be heard to complain about the failure to negotiate the subject matter after having accepted management's evaluation plan, even though it was unlawfully implemented in the first instance, and agreeing to engage in future discussions after the expiration of the trial period. Accordingly, I find in the circumstances of this case that this allegation of the complaint must be dismissed.

Having found that the Respondent Activity engaged in conduct which violated Section 19(a)(1) and (6) of the Executive Order, I shall recommend that the Assistant Secretary adopt the following Recommended 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 202.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that National Weather Service shall:

1. Cease and desist from:

   (a) developing and unilaterally implementing a merit promotion evaluation guide without first notifying and affording National Association of Government Employees, or any other Labor Orgnaization which is the exclusive representative of units of employees, an opportunity to consult and confer, as required by Section 19(6) of the Executive Order, on the subject matter of the evaluation guide relating to personnel policies and practices.

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

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

   (a) upon request, meet and confer in good faith with National Association of Government Employees, or any other exclusive representative of units of employees, regarding the matters contained in the merit promotion evaluation guide insofar as such matters involve personnel policies and practices and affect working conditions.

(b) post at its Washington, D.C. headquarters and in all regional field operation units copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary of Labor for Labor-Managment Relations. Upon receipt of such forms, they shall be signed by the Director of the National Weather Service and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicious places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to ensure that such notices are not altered, defaced, or covered, with any other material.

(c) pursuant to Section 203.27 of the Regulations notify the Assistant Secretary in writing within twenty (20) days from date of this Order as to what steps have been taken to comply herewith.

Gordon J. Myatt

GORDON J. MYATT
Administrative Law Judge

Dated: January 18, 1977
Washington, D.C.

Appendix

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 develop or unilaterally implement a merit promotion evaluation guide without first notifying and affording National Association of Government Employees, or any other exclusive representative of units of employees, an opportunity to meet and confer on the matters contained in the evaluation guide which involve personnel policies and practices and affect working conditions of employees.

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.

WE WILL, upon request, meet and confer with National Association of Government Employees, or any other exclusive representative of unit of employees, regarding the subject matter of the promotion evaluation guide relating to personnel policies and practices affecting 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 Regional Administrator for Labor-Management Services, Labor Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

June 6, 1977

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. CUSTOMS SERVICE,
REGION IV,
MIAMI, FLORIDA
A/SLMR No. 848

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by: (1) failing to give NTEU Chapter 146 an opportunity to be present at a formal meeting between management and an employee for whom the NTEU had filed a grievance, and (2) resolving the grievance in a manner which constituted a change in the past practice of dealing with such matters without prior notice to, or bargaining with, the exclusive representative.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In reaching this conclusion, he found that the record failed to establish that a grievance was presented on behalf of the employee who was unhappy with the overtime assignment he had received. Thus, the Administrative Law Judge concluded that a subsequent discussion of the issue between the employee and a supervisor was not a "formal discussion" within the meaning of Section 10(e) of the Order. Furthermore, the Administrative Law Judge found that the resolution of the questions raised by the complaining employee was consistent with the past practice of the Respondent and, in any event, that there was no clear unilateral breach of the negotiated agreement. In the Administrative Law Judge's view, at most, there were differing and arguable interpretations of the parties' negotiated local agreement.

Noting particularly the absence of exceptions, 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.

A/SLMR No. 848

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. CUSTOMS SERVICE,
REGION IV,
MIAMI, FLORIDA

Respondent

and

Case No. 42-3551(CA)

NATIONAL TREASURY EMPLOYEES
UNION

Complainant

DECISION AND ORDER

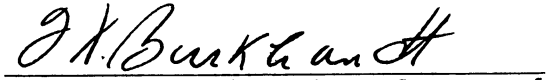
On March 15, 1977, Administrative Law Judge William B. Devaney issued his recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 42-3551(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 6, 1977



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

. . . . . .
In the Matter of
:
U.S. CUSTOMS SERVICE, REGION IV,
MIAMI, FLORIDA :
Respondent
:
and
: Case No. 42-3551(CA)
NATIONAL TREASURY EMPLOYEES UNION
Complainant :
. . . . . .

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For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). It was initiated by a charge filed on, or about, May 28, 1976, and a Complaint filed on August 20, 1976. Notice of Hearing issued on October 29, 1976, pursuant to which a hearing was duly held before the undersigned on December 6, 1976, in Miami, Florida.

On Motion of the parties, and for good cause shown, the time for filing briefs was successively extended to and including March 8, 1977, because of the delay in the receipt of the transcript by the parties.

The Complaint alleged that a grievance was lodged on April 19, 1976, and adjusted that day by Supervisory Inspector Hernandez; that on April 20, 1976, the grievant was summoned to a meeting with Supervisory Inspector Zagar; that the Union was not notified or given an opportunity to be present at the formal meeting with grievant in violation of Section 10(e) of the Order; and that Chief Inspector Recio later on April 20, 1976, advised Inspector Rizzo, President of National Treasury Employees Union Chapter 146 (hereinafter also "NTEU" or "Union"), 1/ that the grievance was denied, i.e., inspectors above grievant would not be red-lined, which overturned a prior settlement in violation of Sections 19(a)(1) and (6) of the Order and was, moreover, a change in policy from published Overtime Rules, without prior notice and bargaining in violation of Sections 19(a)(1) and (6) of the Order.

Respondent had asserted that the National President of NTEU was not a proper party to raise the matters comprising the Complaint but in its Post-Hearing Brief Respondent has withdrawn that position.

All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and briefs, timely filed, have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations:

1/ Region IV was originally represented by the National Customs Service Association which entered into an agreement with Respondent in 1973 (Comp. Exh. 4), which agreement is still in effect. Subsequently, NTEU affiliated with the National Customs Service Association and the certification was amended to NTEU.

Discussion

This case involves the Miami Seaport. This portion of Respondent's operation is headquartered on Dodge Island. The Dodge Island office closes at 5:00 p.m. and calls after 5:00 p.m. go to Respondent's office at the Miami International Airport which is open around the clock. Under the 1911 Act, 19 U.S.C. §267, customs services in connection with the lading or unlading of cargo, etc., outside normal hours are provided only at the request of the shipping agent or master of a vessel and the Government is reimbursed for cost. Inspectors performing such overtime work are paid pursuant to 19 U.S.C. §267, in effect, double time, there are certain minimum hours guaranteed and time is computed by periods. This is quite lucurative; but Respondent is obligated to equalize, as nearly as possible, overtime earnings of its Inspectors. To do so, a record of overtime earnings is maintained and the Inspectors with the least overtime earnings are listed, on the basis of overtime earned, daily as 1-2-3-4 as the order to be called for overtime assignments.

In normal practice arrangements for Customs Inspectors are made well in advance by the shipping agent or master since many interrelated phases must be coordinated. On occasion, of course, the ball is dropped and all will have been arranged except for Customs Inspectors, or some other urgent contingency will arise which requires an immediate assignment of a Customs Inspector. The record shows, without any contradiction, that it is the normal practice of Respondent that Inspectors are not called for overtime assignments between 5:00 p.m. and 6:00 p.m. in order to allow time for the Inspectors to reach their homes after leaving work at 5:00 p.m. The only departure from this practice is when some urgent necessity dictates.

Inspectors who refuse an overtime assignment are penalized. That is, they are "red-lined" and credited with "wooden money" in the amount they would have earned had they accepted the assignment. The record further shows, overwhelmingly, that Inspectors who were not reached prior to 6:00 p.m. were never penalized when another Inspector was reached prior to 6:00 p.m. and given overtime assignment because of some urgent necessity. This practice was thoroughly established by the testimony of Chief Inspector William Recio, Supervisory Inspector Douglas Hernandez, and Senior Inspector Hazel Raymond, which testimony I fully credit. The testimony of Ronald Rizzo and Kenneth W. Brown that they were not aware of this practice does not constitute any evidence that such practice did not exist and in

view of the testimony of Messrs. Recio and Hernandez and Ms. Raymond which has been fully credited no weight is accorded to Mr. Brown's and Mr. Rizzo's testimony that they were unaware of such practice.

1. Overtime Rules Agreement

In 1975, the Inspectors through the Overtime Committee, consisting of Inspectors Stroface, Hartman and Peterson, met with Chief Inspector Recio and agreed upon "Overtime Rules" (Comp. Exh. 1) which was approved at a meeting of all inspectors and the written document, dated October 1, 1975, was signed "Approved" by Inspectors Stroface, Hartman and Peterson and by Chief Inspector Recio. 2/ "Overtime Rules", as pertinent, provide as follows:

> "2. Anyone missing or refusing an overtime assignment will be given 'wooden money' for the number of periods earned by that assignment. You are entitled to one free calloff (call off should be done before 9:00 a.m.), after which a penalty will be assessed for each additional call-off for the amount earned on the job that you would have worked.
>
> "3. All assignments will be given as they are called in to the lowest Inspector available. Any cancellation will not change the order of jobs already assigned. The Inspector whose job is cancelled will be given the next available assignment. All Inspectors will call the Dock Office by 1630 to find their relative overtime standings.
>
> * * * (Comp. Exh. 1).

2/ Mr. Rizzo, President of Chapter 146,acknowledged that this was a duly negotiated local agreement. As such, it may well be a part of the "agreement" of the parties to the same extent as if made a part of the "Basic Agreement"(Comp. Exh. 4), and subject to the negotiated grievance procedure; however, as neither party has urged such result, and it is unnecessary for decision herein, no determination is made, or is to be inferred, that a dispute under the "Overtime Rules" agreement is, or is not, subject to the parties' negotiated grievance procedure.

2. The Johns Incident.

On Saturday, April 17, 1976, the call out list for overtime assignments (Comp. Exh. 2) showed, in order of call out, Mr. Barkdull No. 1, Mr. Ramirez No. 2, Mr. Edwards No. 3, and Mr. Johns No. 4. Each of these Inspectors had worked the regular shift on April 17, although, unknown to anyone involved at the time, Mr. Edwards worked over and, for this reason, was not available for call out, since he was already working and Mr. Johns was, in fact, No. 3 for call out even though he left the Dock Office at 5:00 p.m. believing he was No. 4.

The record shows that the Airport received an urgent call for an Inspector at about 5:20 p.m. and duly called Messrs. Barkdull, Ramirez and Edwards but did not reach them and called Mr. Johns. Mr. Johns had not arrived at home but a message was taken and when he arrived at about 5:30 p.m. he returned the call and was told to report for the overtime assignment which he reluctantly did and his time sheet showed that he entered upon duty at 6:00 p.m. (he worked from 6:00 p.m. to 8:00 p.m. and was paid for 8 hours).

On Sunday, April 18, 1976, Mr. Johns stated to Ms. Raymond, a non-supervisory employee, that he wanted "these other people red-lined because he had been called out on a job the evening before." On Monday, April 19, 1976, Mr. Johns discussed his call out with Mr. Kenneth W. Brown, Vice President of Chapter 146, and Mr. Brown had a discussion with Supervisory Inspector Hernandez. Although Mr. Brown was quite positive at the hearing that he presented a grievance to Mr. Hernandez on behalf of Mr. Johns, I am persuaded from all the testimony that, as Mr. Hernandez testified, Mr. Brown asked, simply, if a person were No. 1 and was not available would he be red-lined, to which Mr. Hernandez replied "yes". Mr. Hernandez was not aware that a grievance was intended; was given no facts pertaining to any actual incident; Mr. Brown admitted that he had made no investigation and did not know which Inspectors were above Mr. Johns, whether or if they had been contacted; Ms. Raymond was not aware of any grievance by, or on behalf of, Mr. Johns; and Mr. Johns testified that he had asked Mr. Brown "was this a red-line situation?", all of which convinces me that Mr. Brown asked Mr. Hernandez the simple question as set forth above. On April 20, Assistant Chief Inspector Harold H. Zagar, accordint to Mr. Johns, asked Mr. Johns whether it was his desire to have these people red-lined. Later On April 20, 1976, Chief Inspector Recio, having been informed of the request of Mr. Johns

to red-line the inspectors above him, informed Ronald Rizzo, President of Chapter 146, that the Inspectors above Mr. Johns would not be red-lined,

> "because those two men stayed in the office until 5:00 o'clock and they hadn't had a chance to get home yet and Mr. Johns, I told him [Rizzo], he should not have taken the job. He should have refused the job and said 'wait til the number one man got home. Those are my exact words.
>
> "Q. . . . If Mr. Johns had refused the assignment, would he have been red-lined?
>
> "A. No, sir. If it had been later, he would have been, if they had given the person time to get home.
>
> * * *
>
> "A. I consider that an unwritten rule ... that you give a man until 6:00 o'clock to get home, in Miami, particularly when our men live anywhere from ten miles to forty miles from here ..." (Tr. 20-21).

Conclusions

The record fails to establish that a grievance was presented on behalf of Mr. Johns to Supervisory Inspector Hernandez, or that Inspector Hernandez adjusted, or purported to adjust, any grievance. On the other hand, the record is clear that Mr. Johns was disturbed at being called for the overtime assignment on the evning of April 17th, when he appeared to have been number four in call out order, and on Sunday, April 18 Mr. Johns informed Ms. Raymond that he wanted the people above him red-lined. In due course this request was reported to Assistant Chief Inspector Zagar and Chief Inspector Recio. The record shows that on April 20, Inspector Zagar asked Mr. Johns if it was his desire to have these people red-lined to which Mr. Johns replied that he wanted to go by the rules. While it is perfectly clear that Complainant was not informed of the Zagar-Johns "meeting" and was neither present nor had any opportunity to be present, the simple inquiry by Mr. Zagar did not constitute a "formal discussion" within the meaning of Section 10(e) of the Order. To the contrary, this was, at most, a nonformal meeting between management and an employee at which the employee was asked whether he desired

to have certain Inspectors red-lined. There was no discussion beyond this inquiry. Accordingly, as this was not a formal discussion, Section 10(e) provides no right of a union to representation at such nonformal meeting. Statement on Major Policy Issue, FLRC No. 75 P-2, Report No. 116, December 2, 1976.

On April 20, 1976, Chief Inspector Reico informed the President of Chapter 146, Mr. Rizzo, that the Inspectors above Mr. Johns for call out on April 17, 1976, would not be red-lined. Complainant's assertaion that this constituted a change in policy was simply not established. To the contrary, the great weight of the testimony shows that Respondent's policy and practice at Miami had consistently been that Inspectors were not penalized, by being red-lined, when not reached when called between 5:00 p.m. and 6:00 p.m. as such time was allowed for Inspectors to reach their homes after completion of their regular work day. While the language in Paragraph 3 of the Overtime Rules agreement that "All assignments will be given as they are called in to the lowest Inspector available" appears to permit assignment on the basis of availability, the word "missing" in Paragraph 2 of the Overtime Rules certainly does not compel, if indeed the word would permit, imposition of a penalty on an employee who had no opportunity whatever to accept or to refuse an overtime assignment because he was in transit from work and could not have reached his home when called. Mr. Rizzo's asserted interpretation strains credulity at best. On the one hand if an Inspector left in his automobile at 5:00 p.m. and Respondent's representative saw him depart and at that moment received an emergency call, Mr. Rizzo indicated that that Inspector, assuming he was No. 1, must be called. If Respondent did not call he stated there would be another grievance; but if Respondent dialed his number and the telephone was not answered, for the obvious reason that the employee had not arrived, then, Mr. Rizzo contended he must be penalized. Be that as it may, Respondent, by adhering to and applying its long established policy and practice of not red-lining Inspectors called, but not reached, prior to 6:00 p.m., did not change policy but, rather, adhered to existing policy and practice.

Moreover, and perhaps most important, it is apparent that the gravamen of the Complaint in this regard is the contention that Respondent breached the negotiated and published Overtime Rules by its failure to red-line employees as Complainant asserted was required by Section 2 of the Overtime Rules agreement. There was no clear, unilateral breach of the negotiated local agreement, but, at most, differing and arguable interpretations of the negotiated local agreement which are not deemed to be violative of the Order. Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677 (1976).

RECOMMENDATION

Having found that Respondent has not violated Section 10(e) of the Order; that Respondent has not engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended; and as a gravamen of the Complaint is a breach of the parties' negotiated local agreement concerning differing and arguable interpretations of such agreement which is not deemed to be violative of the Order, I recommend that the Assistant Secretary of Labor enter an order dismissing the complaint herein in its entirety.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 15, 1977
Washington, D.C.

June 7, 1977

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

NAVAL AIR REWORK FACILITY,
CHERRY POINT, NORTH CAROLINA
A/SLMR No. 849

This case involved an unfair labor practice complaint filed by Local Lodge 2297, International Association of Machinists and Aerospace Workers, AFL-CIO (IAM) alleging, essentially, that the Respondent violated Section 19(a)(1) and (6) of the Order by bargaining in bad faith since on or about December 9, 1975, and by refusing to bargain with the IAM since on or about January 22, 1976.

The Administrative Law Judge found that the gravamen of the complaint herein is that the Respondent was obligated, under the parties' negotiated agreement, to process a grievance submitted by the IAM and to pursue to arbitration the dispute between the parties. The grievance, which concerned assignment of work to a non-unit employee, had been rejected as not arbitrable by the Respondent. The Administrative Law Judge noted that when a party in good faith asserts that a matter is not grievable or arbitrable under a negotiated agreement, a determination of grievability or arbitrability may be obtained from the Assistant Secretary pursuant to Section 13(d) of the Order and that this procedure is the proper vehicle for resolution of such an issue. Accordingly, as he concluded that the Respondent did not evidence bad faith in refusing to process the IAM's grievance beyond the second step of the parties' agreement and resort to arbitration, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

The Assistant Secretary adopted the findings, conclusions and recommendations 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

NAVAL AIR REWORK FACILITY,
CHERRY POINT, NORTH CAROLINA

Respondent

and

Case No. 40-7004(CA)

LOCAL LODGE 2297, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO

Complainant

DECISION AND ORDER

On February 24, 1977, Administrative Law Judge William Naimark issued his Recommended Decision 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 and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

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 Recommended Decision and the

entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-7004(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 7, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ In its exceptions, the Complainant asserted that, in other than questions concerning whether a grievance is subject to a statutory appeal procedure, Section 13(d) of the Order requires the mutual agreement of the parties before questions of grievability or arbitrability under a negotiated procedure may be referred to the Assistant Secretary for decision. However, in my view, it is clear that while Section 13(d) permits the parties to a negotiated agreement to agree bilaterally to refer grievability or arbitrability questions to an arbitrator in lieu of the Assistant Secretary, it does not require bilateral agreement as a precondition to a party referring such matter to the Assistant Secretary for decision. See the Report and Recommendations of the Federal Labor Relations Council (1975).

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

NAVAL AIR REWORK FACILITY
CHERRY POINT, NORTH CAROLINA
Respondent

and

LOCAL LODGE 2297 of the
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO
Complainant

Case No. 40-7004(CA)

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Labor Relations Advisor
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Office of Civilian Personnel
Department of the Navy
Washington, D.C. 20390
For the Respondent

LOUIS E. SCHMIDT
Grand Lodge Representative
International Association of
Machinists, AFL-CIO
6500 Pearl Road, Suite 200
Cleveland, Ohio 44130
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

Pursuant to a Notice of Hearing on complaint issued on July 16, 1976 by the Regional Administrator for Labor-Management Services of the U.S. Department of Labor, Atlanta Region, a hearing in this case was held before the undersigned on October 5, 1976 at New Bern, North Carolina.

The proceeding herein is brought under Executive Order 11491, as amended (herein called the Order). A complaint was filed on April 26, 1976 by Local Lodge 2297 of the International Association of Machinists and Aerospace Workers, AFL-CIO, (herein called the Complainant) against Naval Air Rework Facility, Cherry Point, North Carolina (herein called the Respondent). The said complaint alleged that since on or about December 9, 1975 the employer has bargained in bad faith; that since on or about January 22, 1976 it has refused to bargain with Complainant - all in violation of 19(a)(1) and (6) of the Order.

All 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, briefs were filed which have been duly considered. 1/

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

Findings of Fact

1. At all times material herein, including in 1976, Complainant has been the exclusive bargaining representative of all ungraded employees, journeymen and below employed by Respondent at its Cherry Point, North Carolina facility.

2. The most recent collective bargaining agreement was executed by Complainant and Respondent on February 26, 1973 covering the unit employees as set forth hereinabove. The said agreement was effective by its terms for two years from the date of its approval (March 9, 1973) and to continue in full force and effect for one year thereafter unless modified or terminated as specified.

3. Article 9 of the aforesaid agreement sets forth various provisions with respect to the assignment by the employer of overtime work to unit employees. Section 2 of Article 9 states that overtime will be distributed fairly

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1/ Subsequent to the hearing Complainant moved to correct the transcript by changing the words "has further" on page 5, line 25 to "as per the" and changing the word "trade" on page 11, line 5, to "rate". The motion is granted.

and justly among all employees within their shop and job rating. Section 6 of said Article provides, inter alia, that after overtime requirements have been established, all immediate supervisors will post a listing of employees by rating assigned to work overtime.

4. The aforesaid collective bargaining agreement provides for a grievance procedure (Article XXIV) which is available to the parties and unit employees for processing grievances solely as to the interpretion and application of the agreement. If the grievances are not settled, the dispute will be submitted to arbitration upon written notice by the party invoking arbitration as set forth in Article XXV of the agreement.

5. On December 4, 1975 the acting supervisor of Shop 94201, G.G. Dudley, posted a list of employees who were assigned to work overtime on Saturday, December 6, 1975. The said list included a non-unit employee, C.R. Elson, who was a general schedule employees, GS-9.

6. The Chief Union steward, Charles H. Wilson, notified Dudley that the posting and assignment were in violation of the negotiated agreement. The union official complained that the overtime list was not listed by trade as required under the agreement, and, further, overtime work had been assigned to a non-unit employee.

7. A written grievance was filed by Wilson on December 6, 1975 regarding the improper posting and the assignment of overtime work to a non-unit employee. On December 8, 1975 Dudley sent the shop steward a written denial of the grievance filed. The denial stated that the assignments were in accord with Article 9, Section 6 of the contract since all journeymen were offered the opportunity to work overtime; that while the posted overtime list was not in strict conformity with the agreement, it was in accord with the intent and past practices; that the negotiated agreement does not limit the assignment of employees outside the unit, and the GS-9 Electronics Equipment Specialist rating is not covered by the said agreement.

8. A written formal reply to the grievance was made on December 18, 1975 and signed by L.H. Smith, Division Director. The said reply stated that the union's complaint re the preformance of work of the GS-9 Specialist was denied since the individual is not in the unit and not covered by

the negotiated agreement. Smith further stated that management has the right to hire, promote, or assign under the Order; that unit work restriction in prior agreements was eliminated in the present one because it conflicted with the Order; and the posted overtime list, while not in strict conformity to the agreement, was in accordance with past practices over a two year period.

9. By letter dated January 14, 1976 Complainant's President Lane, Jr. wrote Respondent's commanding officer that since the union's grievance had not been processed in accordance with Article XXIV of the contract, Complainant invoked the arbitration provision of the contract re the interpretation and application of Article IX, Sections 2 and 3 and Article XVIII, Section 3 thereof.

10. Respondent wrote Complainant on January 22, 1976 rejecting the request for arbitration. The union was advised in the letter that management did not consider the subject, i.e. unit work restrictions, as appropriate for submission to arbitration or through the negotiated grievance procedure; that it considered the issue was not negotiable under Section 12(b) of the Order.

Conclusions

The gravamen of the complaint herein is that Respondent was obliged, under the negotiated agreement, to process the grievance submitted by Complainant, and to pursue arbitration of the dispute between the parties. The grievance itself was predicated on the assignment of overtime work to non-unit employee Ronald S. Dick. Since management refused to process the grievance beyond the second step, and resort to arbitration, it is contended that Respondent refused to consult, confer or negotiate in violation of 19(a)(6) of the Order. 2/

2/ In its brief Respondent asserts that the Regional Administrator's letter of July 16, 1976 to the parties suggests litigating an issue beyond the scope of the complaint, i.e. unilaterally changing or violating the agreement. I do not so construe the said letter. Moreover, to litigate the subject of the grievance would run afoul of 19(d) which precludes raising an issue under the complaint procedure when it has been raised, as in this case, under the grievance procedure.

It is provided under Section 13(d) of the Order that questions arising as to whether a grievance concerns a matter subject to the grievance procedure in an agreement, or subject to arbitration under such agreement, may be referred to the Assistant Secretary for decision. Accordingly, the Assistant Secretary declared that in the absence of bad faith, grievability and arbitrability questions should not be resolved under Section 19 of the Order dealing with unfair labor practices. When a party, in good faith, asserts that a matter is not grievable or arbitrable under a negotiated agreement, a determination may be obtained from the Assistant Secretary as to whether the matter is grievable or arbitrable. U.S. Air Force Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, Assistant Secretary, Case No. 42-2649(CA), FLRC No. 75A-82, Report No. 91; See Section 205 et. seq. of Rules and Regulations. Moreover, where an employees notified the union that it did not consider the subject matter of a grievance to involve the interpretation or application of the negotiated agreement, and suggested that the union seek a determination from the Assistant Secretary under 13(d) of the Order, a refusal to process such grievance was not deemed to constitute bad faith. Veterans Administration Hospital, Waco, Texas, A/SLMR No. 735.

In the case at bar Respondent, while it conceded that the posting of a non-unit employee for overtime was not in strict conformity with the negotiated agreement, maintained that assigning overtime to a GS-9 in Shop 94201 has been the accepted policy over the life of the agreement. Since the record lends some validity to this contention, I cannot conclude that management has evinced bad faith in refusing to process the grievance of Complainant beyond the second step of the agreement. The subject matter of said grievance, concerning itself with the assignment of overtime work to a non-unit employee, was not deemed by Respondent to involve the interpretation or application of the agreement herein. In this posture, I consider the instant case to be controlled by the cases cited hereinabove, and agree with management's assertion that the proper vehicle for a determination as to the grievability or arbitrability of Complainant's grievance lies under Section 13(d) of the Order. Accordingly, I conclude that by refusing to process said grievance and resort to arbitration Respondent did not violate Sections 19(a)(1) and (6) of the Order.

RECOMMENDATION

It having been found that Respondent did not violate Sections 19(a)(1) and (6) of the Order by refusing to further process a grievance submitted by Complainant, and to resort to arbitration thereof, I recommend that the complaint herein be dismissed in its entirety.

WILLIAM NAIMARK
Administrative Law Judge

Dated: 24 FEB 1977
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 TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND
FIREARMS, MILWAUKEE, WISCONSIN
A/SLMR No. 850

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and Chapter 094, NTEU (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order when it refused to recognize the Complainant's duly appointed area representative in Milwaukee. The Respondent took the position that the employee in question served in a confidential capacity to the Area Supervisor and was, therefore, prohibited under Section 1(b) of the Order from acting as a representative of a labor organization. In this regard, the Respondent noted the Assistant Secretary's decision in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., A/SLMR No. 538, in which the Assistant Secretary ordered that the Clerk to the Area Supervisor in each of the 45 Area Offices of the Respondent be excluded from the unit as a "confidential employee."

The Administrative Law Judge found that the job description of the employee in question fitted the description of Clerk to the Area Supervisor found by the Assistant Secretary to be confidential in the cited decision. Therefore, he concluded that the Respondent did not violate the Order when it refused to recognize the appointment of such employee as the Complainant's area representative in Milwaukee because a conflict or apparent conflict of interest within the meaning of Section 1(b) of the Order would result from such an appointment.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 850

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
BUREAU OF ALCOHOL, TOBACCO AND
FIREARMS, MILWAUKEE, WISCONSIN

Respondent

and Case No. 51-3387(CA)

NATIONAL TREASURY EMPLOYEES UNION,
AND CHAPTER 094, NTEU

Complainant

DECISION AND ORDER

On April 5, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 51-3387(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 7, 1977

F X Burkhardt

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

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In the Matter of :

DEPARTMENT OF THE TREASURY :
BUREAU OF ALCOHOL, TOBACCO AND :
FIREARMS, MILWAUKEE, WISCONSIN
Respondent :

and : Case No. 51-3387(CA)

NATIONAL TREASURY EMPLOYEES UNION :
and CHAPTER 094, NTEU
Complainant :

. . . . . .

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For the Complainant

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated December 22, 1975 and filed December 29, 1975 alleging a violation of Section 19(a)(1) of the Executive Order by the Respondent in refusing to recognize Ms. Susan A. Backes as the Complainant's area representative in Milwaukee although she was duly appointed to that position by the Chapter President.

On January 28, 1976 the Respondent filed a response to the complaint. It admitted that the Respondent refused to recognize Ms. Backes as the Complainant's area representative and alleged that its refusal was in accordance with the Executive Order because Ms. Backes held a confidential position with the Complainant and her serving as the Complainant's areas representative would result in a conflict of interest.

On August 23, 1976 the Regional Administrator issued a Notice of Hearing to be held October 5, 1976 in Milwaukee, Wisconsin. Pursuant to motion of the Complainant the hearing was postponed to October 19, 1976. Hearings were held that day in Milwaukee. The Complainant was represented by the Associate General Counsel of the Complainant. The Respondent was represented by a staff attorney in the Office of the Chief Counsel of Respondent and by a representative in its Office of Personnel. Witnesses were examined and cross-examined and exhibits introduced. Both parties waived closing argument. The Respondent filed a timely brief.

Facts

National Treasury Employees Union has been the certified national exclusive representative of the non-supervisory employees of the Bureau of Alcohol, Tobacco and Firearms, with certain exceptions, since April 1973. One of the exceptions is "confidential employees". NTEU generally acts through Chapters. Chapter 094 is the Chapter through which it acts for employees it represents in the Area Office in Milwaukee. The parties have had a comprehensive written agreement since March 5, 1974 between the Bureau and the national N.T.E.U.

The Bureau, headquartered in Washington, D.C., operates through seven Regional Offices. The Regional Offices are subdivided into Area Offices. There are 45 Area Offices, each headed by an Area Supervisor. One of the Area Offices is in Milwaukee.

Chapter 94 designated Susan A. Backes as the union representative for the Milwaukee Area Office. On May 2, 1975 the Respondent notified the Chapter that it could not recognize Backes as the representative because she was not a member of the bargaining unit. This case eventuated.

Ms. Backes is a clerk-typist, and has been for several years. Bryan A. Flaa is the Area Supervisor of the Milwaukee Area Office. As such he is the head of that Office. Under him are a number of inspectors and two clerks. The inspectors are included in the unit represented by the Complainant. Ms. Backes, at the times here relevant, was employed as a GS-4. The other clerk is a GS-3. Backes acts as Flaa's secretary. She types evaluation reports for promotions, annual performance ratings, and other material Flaa would not want disclosed in advance of formal action. When asked by his superiors his comments on a new contract proposed by the union, he discussed it with Backes before he made his comments.

Some mail addressed to FLaa or the Milwaukee Area Office is intended and sometimes marked that it is to be opened only by Flaa, the so-called "pink envelopes" because that is the color of the envelopes in which they are usually sent. Backes opens such mail. If he is out of the office and Backes thinks the mail is urgent she calls him and tells him what it is. She decides whether to show the confidential mail to the Acting Area Supervisor, one of the inspectors who is a member of the bargaining unit. Some of the confidential mail concerns matters the Respondent would not want disclosed at the time to the exclusive representative, such as alleged misconduct of one of the inspectors. Although Backes works primarily for Flaa, she sometimes helps the other clerk in the office, who works primarily for the inspectors, when the other girl is overloaded with work.

In some situations, should Backes act as the Complainant's area representative, she would feel a distinct conflict of interest between her obligation to Flaa as his secretary and her obligation to the Chapter.

Discussion and Conclusion

In Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 538, the Complainant filed a petition for clarification of unit in which it sought a clarification of the exclusion from its unit of "confidential employees" in which it contended that employees designated as Clerk to the Area Supervisor were included in the unit because not included

in the exclusion of "confidential employees". The Assistant Secretary held that the Clerk to the Area Supervisor was a "confidential employee" and therefore excluded from the unit. He based this conclusion on the fact that they performed work just about precisely the work performed by Backes for Flaa.

Of course an exclusive representative is not limited to members of the bargaining unit in selecting its spokesmen. However, the right to select a representative of its choice is not absolute. Section 1(b) of the Executive Order expressly does not authorize participation in the management of a labor organization or acting as its representative by, among others, "an employee when the participation or activity would result in a conflict or apparent conflict of interest. ..." The evidence here is uncontradicted that such conflict or at least an apparent conflict would result if Backes should act as the Complainant's area representative.

By expressly not authorizing representation by such an employee the Executive Order was intended to prohibit it. See Department of Defense, Army Material Command, Tooele Army, Depot, A/SLMR No. 406. It follows that in refusing to recognize Backes as the Complainant's area representative for Milwaukee, the Respondent did not violate the Executive Order. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Boston, Massachusetts, A/SLMR No. 695; U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 691.

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: April 5, 1977
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

SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS, BUREAUS AND OFFICES
IN BALTIMORE, MARYLAND
A/SLMR No. 851

This case involved an unfair labor practice complaint filed by American Federation of Government Employees, Local 1923, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to give an employee 60 days notice, as required by Article 19(c)(2) of the parties' negotiated agreement, prior to the denial of that employee's within-grade step increase. The Respondent contended that: (1) the complaint was untimely; (2) that the aggrieved employee had filed an equal employment opportunity complaint and had utilized a statutory appeal procedure concerning the denial of his within-grade step increase, including the failure to give the requisite notice and, therefore, Section 19(d) of the Order precluded the Complainant from raising the same issue in this unfair labor practice proceeding; and (3) that the failure to give the required notice was not violative of the Order.

The Administrative Law Judge found, contrary to the Respondent's contention, that the complaint was timely and that the issue raised in the unfair labor practice proceeding, differed from that raised under the statutory appeal procedure and, thus, the Complainant was not barred by Section 19(d) from raising the issue under the unfair labor practice procedures of the Executive Order. With respect to the Respondent's failure to serve the required notice, the Administrative Law Judge found that such action, while a breach of the parties' negotiated agreement, was not so flagrant a breach as to be violative of Section 19(a)(1) and (6) of the Order, inasmuch as the Respondent recognized is failure to give the required notice and sought to rectify its breach by reconsidering its decision 60 days later.

The Assistant Secretary found, contrary to the Administrative Law Judge, that the Respondent's failure to give the 60 day notice could be construed as a patent unilateral change in terms and conditions of employment in the negotiated agreement and, as such, could be considered violative conduct under the Order. However, in view of the Respondent's immediate rectification of such conduct and thus the de minimis effect of its conduct, the Assistant Secretary found that it would not effectuate the purposes and policies of the Executive Order to find a violation. Under these circumstances, he ordered that the complaint be dismissed.

A/SLMR No. 851

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS, BUREAUS AND OFFICES
IN BALTIMORE

Respondent

and Case No. 22-6667(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO

Complainant

DECISION AND ORDER

On February 11, 1977, Administrative Law Judge William Naimark issued his Recommended Decision 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 and a supporting brief with respect to the Administrative Law Judge's Recommended Decision.

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 Recommended Decision and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the findings, 1/ conclusions, and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

In his decision, the Administrative Law Judge found that the Respondent had failed to give an employee, Dr. Ronald S. Dick, the requisite 60 day notice leading up to the denial of his within-grade step increase as required by Article 19(c)(2) of the parties' negotiated agreement. 2/ The Administrative Law Judge found also that the Respondent had attempted to rectify its failure to give the prescribed notice by subsequently advising Dr. Dick that he would have 60 days from the negative determination to improve his work performance and that a new determination would then be made. In this regard, the Administrative Law Judge concluded that the Respondent's failure to serve the original 60 day notice, while a breach of the negotiated agreement, was not so flagrant a breach as to be violative of the Order inasmuch as the Respondent recognized its failure to give the required notice and sought to rectify its breach by reconsidering its decision 60 days after its original determination.

Contrary to the Administrative Law Judge, I find that the Respondent's failure to serve the prescribed 60 day notice could be construed as a patent unilateral change in terms and conditions of employment in the negotiated agreement and, as such, could be considered violative conduct under the Order. However, in view of the Respondent's immediate rectification of such conduct and thus the de minimis effect of its conduct, I find that it would not effectuate the purposes and policies of the Executive Order to find a violation herein. 3/ Under these particular circumstances, I shall order that the subject complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6667(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 8, 1977

F X Burkhardt

Francis X. Burkhardt, Assistant Secretary o
Labor for Labor-Management Relations

1/ On page 3 of the Recommended Decision, Section "16(a)(1) and (6)" of the Order is cited rather than Section 19(a)(1) and (6). Similarly, on page 4, the Recommended Decision indicates that Dr. Dick became eligible for a within-grade increase on July 8, 1975, rather than on June 8, 1975, and that he was notified that his work was not of an acceptable level of competence on July 5, 1975, rather than on June 5, 1975. These inadvertences are hereby corrected.

2/ Article 19(c)(2) states, in pertinent part:

> When the supervisor's evaluation leads to a conclusion that the employee's work is not of an acceptable level of competence, the supervisor will discuss the situation with the employee and provide a summary of the discussion in writing at least 60 days before the employee is eligible for a step increase. ...

3/ Cf. Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 435, FLRC No. 74A-77.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

SOCIAL SECURITY ADMINISTRATION,
HEADQUARTERS, BUREAUS AND OFFICES
IN BALTIMORE, MD
Respondent

Case No. 22-6667(CA)

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, AFL-CIO,
Complainant

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American Federation of Gov't Employees,
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For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION

Statement of the Case

Pursuant to a Notice of Hearing on an amended complaint issued on July 16, 1976 by the Acting Regional Administrator for Labor-Management Services Administrations of the U.S. Department of Labor, Philadelphia Region, a hearing was held in the above-entitled case on July 28, 1976, at Baltimore, Maryland.

This proceeding was initiated 1/ under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint on February 9, 1976 by American Federation of Government Employees, Local 1923, AFL-CIO, (herein called Complainant) against Social Security Administration, Headquarters, Bureaus and Office in Baltimore (herein called the Respondent). It was alleged that Respondent made unilateral changes in the union-agency agreement, including its failure to discuss with Dr. Ronald S. Dick, under Article 19(cc(2), the basis of its refusal to grant him a within grade increase - all in violation of Sections 7(c), 10(e), 11(a) and (d), and 12(a), of the Order. On February 24, 1976 Respondent filed a response and motion to dismiss the complaint. It contended the complaint did not contain a concise statement of facts, was barred under 19(d) of the Order, and did not establish a violation thereof. No specific ruling thereon was made by the regional office. An amended 2/ complaint was filed on March 5, 1976 which alleged a violation by Respondent of 19(d)(5) and (6) of the Order. It was averred that the employer violated 15 other articles of the Union-Agency agreement which constituted unilateral changes, with reference made to the original complaint as well as the charge against the Respondent.

By letter dated May 21, 1976 the Regional Administrator dismissed all allegations pertaining to violations of "15 other sections of the negotiated agreement" as well as an alleged violation of Section 19(a)(5) of the Order. He found a reasonable basis existed to conduct a hearing in respect to the failure of Respondent to give Dr. Dick a 60 day notice of a denial of a within grade increase in violation of 19(a)(1) and (6) of the Order.

1/ The charge reciting the facts alleged to be violation of the Order was contained in a letter dated November 6, 1975 addressed to Respondent.

2/ The Regional Office solicited an amended complaint herein since the original complaint, which consisted of 10 pages and appended statements, did not constitute a clear and concise statement under 203.3(a)(3) of the Regulations.

Respondent moved to dismiss the complaint on the following grounds

(1) the complaint must be served within 60 days of the date when the final decision letter on the charges is served by Respondent under 203.2(b)(2) of the Regulations. Since the decision letter was served on December 12, 1975, and the amended complaint was not filed until March 4, 1976, it is contended that there is a violation of said Regulations as the hearing is based on the amended, rather than the original complaint herein.

(2) the "purported" complaint of February 9, 1976 is defective in that: (a) it does not allege a violation of Section 19 of the Order or the particular subdivisions thereof; (b) it did not set forth a clear and concise statement of the facts as required under 203(a)(3) of the Regulations.

(3) this proceeding is barred under Section 19(d) of the Order in view of the statutory appeals procedure to the Civil Service Commission which Dick availed himself of, and the fact that Dr. Dick filed a complaint with the Equal Opportunity Officer of the Agency and thereafter appealed an adverse decision by the Deputy Director to the Civil Service Commissions.

(4) there is no basis for concluding that the failure to give a 60 day notice originally to Dick was a violation of 16(a)(1) and (6) of the Order.

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.

Upon the entire record in the 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 material herein Complainant has been, and still is, the collective bargaining representative of all nonsupervisory General Schedule and Wage grade employees of Respondent, including professionals, in the Baltimore SMSA.

2. The most recent collective bargaining agreement (union-agency agreement) between Complainant and Respondent covering the aforesaid unit became effective on September 24, 1974 and expires its terms on July 1, 1977.

3. Article 19, Section C(2) of the said agreement provides, in substance, that when a supervisor's evaluation of an employee leads to a conclusion that said employee's work is not of an acceptable level of competence, the supervisor will discuss the matter with the employee and provide a summary 3/ of the discussion in writing at least 60 days before the employee is eligible for a step increase.

4. At all times material herein Dr. Ronald S. Dick was employed by Respondent at its Baltimore headquarters. In and during July 1975 Dick was an Operations Research Analyst, GS-14 who became eligible for a within grade increase on July 8, 1975.

5. By letter dated July 5, 1975 Respondent notified Dick that his work was not of an acceptable level of competence. The letter also recited the particular areas in which management found the employee deficient, and Dick was advised therein that his within greade increase was being denied. Further, Respondent stated therein that since he was not given 60 days advance notice, 4/ a new determination would be made no later than August 5, 1975 based on his performance "between now and then". 5/

6. A request to management for reconsideration was filed by Dick on June 6, 1975, in which it was asserted that the agency did not follow proper procedure since it failed to send the employee a 60 day notice as required under Article 19, Section C(2) of the Contract.

3/ This section of Article 19 also sets forth the items which should be included in the summary.

4/ Respondent concedes that no 60 days notice was given as required under Article 19, Section C(2) of the contract.

5/ Prior to its negative determination, Respondent requested the Complainant's president, Joseph Rosenberg, to waive the 60 day provision in the contract. Rosenberg refused to do so.

7. On June 20, 1975 Dick sent a letter to the Respondent's Equal Opportunity Officer, reciting that he was lodging a complaint under the Equal Opportunities Act regarding the denial of his within grade increase. It was alleged by Dick that he was discriminated against because of his sex, race, age and national origin; that he was deprived of his employment rights and management failed to act as required by the union-management contract.

8. By letter dated August 14, 1975 Dick was notified of the Respondent's subsequent 60 day determination that the within grade increase was denied on the basis of the employee's work being below the acceptable level of competence.

9. By letter dated November 6, 1975 the Deputy Director for Equal Employment Opportunity, John Ottina, informed Anthony M. McGurrin, Dick's representative, that the allegation of discrimination by Dick against Respondent based on age, race, sex and national origin was rejected. It was stated therein that the evidence submitted established that the denial of a within grade increase was due solely to a failure of Dick to perform at an acceptable level of competence. 6/

10. The request by Dick for reconsideration of the denial of his step increase was the subject of a letter to him from Respondent dated November 28, 1975. Management stated that it saw no reason to grant the increase; that the failure to give a 60 day notice under the Civil Service regulation, FSM Chapter 990, Supp. 990-1, Section 531.407 is no basis for granting the benefit which should otherwise be withheld.

11. The reconsideration decision by Respondent of November 28, sustaining the negative determination of June 5, 1975 was appealed by Dick on December 1 to the Civil Service Commission, Federal Employee Appeals Authority. The said Appeals Authority issued a decision on March 9, 1976 wherein it concluded that the reasons given by the agency for denying

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6/ The Civil Service Commission subsequently reversed the decision of the agency's Deputy Director for EEO. The reversal was based on the failure of the decision to consider any alleged acts of discrimination other than the denial of the step increase, as well as the absence of any evidence that the complaint by Dick was discussed with his EEO counsellor as required under Section 713.213(a) of Civil Service Regulations. The matter was returned to the agency for proper processing.

the within grade increase "form a valid basis for the conclusion reached...that the appellant's work performance during a substantial portion of the awaiting period was not of an acceptable level of competence, thus warranging the withholding of the within grade increase". The decision also referred to the contention that no 60 day notice was given to Dick, and it was concluded that the employee had been adequately notified of the reasons for the negative determination. 7/

12. Respondent issued a reconsideration decision on February 27, 1976 sustaining its negative determination on August 14, 1975 of an acceptable level of competence of Dick. This decision was appeal on March 1, 1976 to the Civil Service Commission, Federal Appeal Authority. On April 26, 1976 the said appeals Authority issued its decision which was limited to a review of Dick's record for a 60 day period beginning June 8, 1975 to decide whether there was a valid basis for the negative determination that the employee's performance during that period was not of an acceptable level of competence. The Appeals Authority concluded there was insufficient evidence of documentation in the record to support the negative determination. It reversed the agency's negative determination of August 14, 1975 and recommended a within grade salary increase for Dick retroactive to June 8, 1975.

Conclusions

In urging the dismissal of this proceeding, Respondent makes three principal contentions: (1) the complaint of March 5, 1976, upon which this hearing is based, was filed more than 60 days after a written decision on the charge was served by Respondent upon Complainant, and is thus untimely filed; (2) Section 19(d) bars this proceeding since appeals were taken by Dick to the Civil Service Commission from adverse decisions by Respondent - all in regard to the denial of a step increase and the failure to provide him a 60 day notice as required; (3) the breach of contract by the Employer in failing to give the said notice is not a unilateral change so as to be a violation of 19(a)(6) of the Order.

7/ The decision quoted 531.407(c)(4) and (5) of the Regulations which states that a failure to inform an employee of a negative determination may not be the basis for changing such determination.

A. Timeliness of the Complaint

Under Section 203.2(b)(2) of the Rules and Regulations a party is required to file a complaint no later than 60 days from the date a written decision on the charge is filed by a Respondent on the charging party. Moreover, Assistant Secretary's Report No. 48 declares that the use of such a phrase as "see attached correspondence" in the space provided for the "basis of the complaint" renders an otherwise adequate complaint invalid. The Report also states that the date to be used in computing timeliness requirements is the date when a valid, properly filled out complaint form is received by the area office.

In the case at bar the original complaint was filed on February 9, 1976 within the 60 day requirement of 203.2(b)(2). However, the regional office solicited an amended 8/ complaint since Complainant had inserted the words "see attached" in the space provided for the basis of the complaint, and had attached ten pages setting forth the basis of the complaint as well as the background and facts in support thereof. The complaint was not deemed to contain a clear and concise statement of facts constituting the unfair labor practices as required under Section 203.3(a)(3) of the Rules and Regulations. While the amended complaint was filed on March 5, 1976, it was not filed within 60 days from the date the Respondent served its decision re the unfair labor practice charge upon Complainant.

After examining the original complaint herein, I am not convinced that the document was invalid within the meaning of Report No. 48. It is true that the words "see attached" are used under the heading "Basis for Complaint". However the attached statement did state the basis for the complaint upon which this proceeding is brought, i.e. the failure by Respondent to adhere to the contract and give the 60 day notice to Dick under Article 19C(2) thereof. The fact that the complaint included in the attachment numerous other allegations

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8/ Respondent argues that the rules do not provide for an amended complaint and that the original complaint, particularly since it is defective, could not be amended. This argument is rejected. The Assistant Secretary has always accepted the principle that complaints may be amended, and his decisions reflect that the right to amend is implied under the Rules and Regulations.

of breach of contract and failed to specify the proper Section of the Order which it claimed had been violated, does not invalidate the complaint. It rendered the document imprecise and lacking in clarity which the regional office attempted to correct with an amended complaint.

In respect to Report No. 48, I read this decision as invalidating a complaint which does not recite or attach facts upon which an unfair labor practice may be founded or based. In such an instance, the attachments neither spell out that which Complainant relies upon to prove a violation, nor informs the Respondent of the basis for its contentions. See Defense Supply Agency, Defense Contract Administration, Burlinghame, California; A/SLMR No. 247; Department of the Air Force, Headquarter, Air Force Flight Test Center, Edwards Air Force Base, California, A/SLMR No. 255. In the instant case Respondent was informed by the original complaint as to various alleged breaches of the contract, including the one at issue herein. Accordingly, I conclude the original complaint dated February 9, 1976 was valid. Since it was filed within the required 60 day period, I reject Respondent's contention that inasmuch as the amended complaint was not so filed the proceeding should be dismissed.

B. Applicability of Section 19(d) of the Order

It is stoutly asserted by Respondent that since 19(d) specifically provides that "issues which can properly be raised under an appeal procedure may not be raised under this section", the present proceeding is barred thereby. Respondent maintains that the resort by Dick to the EEO procedure, under which he filed a complaint, is itself a bar herein. In said complaint Dick referred to the actions leading up to the denial of his step increase, and the issue of Responndent's failure to give a 60 day notice raised in the EEO proceeding. Thus, it is argued that such failure is the precise issue raised herein. Moreover the requirement of a 60 day notice, although incorporated in the contract, is an established procedure for Federal employees under Title 5 of the Code of Federal Regulations, Section 531.407, and provisions is made for a review of negative determination by management. In the instant matter the appeal procedure was both afforded to, and utilized by, the employee. Therefore, the Employer insists complaint has no standing or right under 19(d) to pursue the unfair labor practice procedure.

It is true that Dick, in his EEO proceeding and the appeals to the Civil Service Commission, raised the failure by Respondent to send him the requisite 60 day notice and discuss the proposed denial of his step increase. Moreover,

the Complainant herein alleged said failure as an integral part of its alleged violation by management of 19(a)(6). However, Ido not agree with Respondent that the issue raised, or which could have been presented, under the appeals procedure is identical to that posed herein. The question decided by the Appeals Authority was whether Dick was properly denied a step increase despite the absence of the required notice and discussion. Although the appeals body considered the failure to give said notice, it did so in conjunction with the ultimate issue concerning the denial of the increase itself. In the case at bar we are concerned with whether the failure to give such notice, albeit to Dick, was the type of unilateral breach of contract deemed violative of the Order. In my opinion the issue raised in the appeals procedure differs from the one at hand in this unfair labor practice proceeding. Accordingly, I conclude that 19(d) does not bar this matter. 9/

C. Alleged Refusal to Consult, Confer and Negotiate Under 19(a)(6) of the Contract

It is contended by Complainant that the failure to give employee Dick the required 60 day notice, as set forth in Article 19, Section C(2) of the contract, was a breach of contract and a unilateral change in personnel policies or practices affecting the working conditions of other employees in the bargaining unit. Since the Respondent refused to meet and confer with Complainant in respect thereto, it is alleged that the Employer has violated 19(a)(1) and (6) of the Order.

Past decisions of the Assistant Secretary reflect that agency management violates its obligation to meet and confer under the Order when it unilaterally changes terms and conditions of employment included within the ambit of Section 11(a) of the Order. See U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No 673, Moreoever, actions constituting clear,

9/ See Department of the Navy, Portmouth Naval Shipyard A/SLMR No. 508. The case of Boston District Office, Internal Revenue Service, A/SLMR No. 727 is distinguishable from the case at bar. In that case the precise issue - whether the union was entitled to the requested information - was raised in the proceeding before an arbitrator as well as in the unfair labor practice matter. The union therein alleged its need for the information in order to represent the discharge properly during arbitration. It also raised its need for said data before the Assistant Secretary.

unilateral breaches of an agreement may constitute an unfair labor practice. Watervliet Arsenal, U.S. Armament Command Watervliet, New York, A/SLMR No. 726. Care is taken in recent decision to distinguish between actions involving arguable interpretation of a contract and those which constitute clear and flagrant breaches of the contract. See Watervliet Arsenal, supra.

Despite Respondent's failure to serve the 60 day notice upon Dick and discuss his performance with him, I do not view such breach of the contract as violative of the Order.

It is not every breach of contract which will constitute an unfair labor practice. As stated in past decisions, the breach must be flagrant and evince an intention to avoid management's responsibilities under a negotiated agreement. The record herein does not establish to my satisfaction that Respondent attempted to disregard or change the language in the contract. In truth, the employer, recognizing its failure to give the required noted under Article 19, Section C(2), reconsidered its decision 60 days later after notifying Dick of its intention to do so. Moreover, I do not view the initial failure to give the 60 day notice as so flagrant in nature that it warrants finding a violation under Section 19(a)(6) of the Order. 10/ There was no intention by Respondent to change or modify its obligation under Article 19, Section C(2) of the agreement, but rather a breach thereof which the employer sought to rectify belatedly. In such a posture, I am disinclined to conclude that the failure to give the 60 day notice initially was per se an unfair labor practice. Accordingly, I find that such failure was not violative of 19(a)(1) and (6) of the Order.

10/ Note is also taken that, although Complainant's president was asked to waive the 60 day notice requirement, no request was made by him to bargain over the impact of the decision to omit giving proper notice. Thus I would not, in any event, require Respondent to bargain over the impact or effect of such decision. Cf. Small Business Administration, Hato Rey, Puerto Rico et al, A/SLMR No. 751.

RECOMMENDATION

Upon the basis of the foregoing findings and conclusions, the undersigned recommend that the complaint against the Respondent be dismissed in its entirety.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: 10 FEB 1977
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

LOCAL 3254, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

and

DEPARTMENT OF THE AIR FORCE,
GRISSOM AIR FORCE BASE,
PERU, INDIANA
A/SLMR No. 852

This consolidated proceeding involved separate unfair labor practice complaints filed by Local 1434, National Federation of Federal Employees (NFFE) alleging that the American Federation of Government Employees, Local 3254, AFL-CIO (AFGE) violated Section 19(b)(1) of the Order and that Grissom Air Force Base (Respondent Activity) violated Section 19(a) (3) and (1) of the Order. Both complaints were based on the AFGE's placing of an advertisement in the Grissom Contact, the Respondent Activity's contracted out newspaper, at a time when the AFGE was not in equivalent status with the Respondent Activity's employees exclusively recognized representative, the NFFE.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the AFGE did not violate Section 19(b)(1) of the Order by publishing its advertisement in the Grissom Contact, but that the Respondent Activity violated Section 19(a)(3) and (1) of the Order by permitting such publication. In this latter regard, the Assistant Secretary concurred with the Administrative Law Judge's finding that the publication in the Grissom Contact of the AFGE advertisement constituted the furnishing of services and facilities by the Respondent Activity to a labor organization (AFGE) not in equivalent status with the exclusively recognized representative (NFFE) inasmuch as the Respondent Activity exercised control over the Grissom Contact and the newspaper was, in effect, an instrumentality of the Respondent Activity.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent Activity cease and desist from the conduct found violative and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LOCAL 3254, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Respondent

and

Case No. 50-13119(CO)

LOCAL 1434, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Complainant

and

DEPARTMENT OF THE AIR FORCE, GRISSOM AIR FORCE BASE, PERU, INDIANA

Interested Party

DEPARTMENT OF THE AIR FORCE, GRISSOM AIR FORCE BASE, PERU, INDIANA

Respondent

and

Case No. 50-13120(CA)

LOCAL 1434, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Complainant

and

LOCAL 3254, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Interested Party

DECISION AND ORDER

On December 20, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding in Case No. 50-13119(CO) that the Respondent labor organization had not engaged in conduct which was violative of the Order. In Case No. 50-13120(CA), the Administrative Law Judge found that the Respondent Activity had engaged in certain unfair labor practices and recommended that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, all of the parties filed exceptions and briefs with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject cases, including the parties' exceptions and briefs, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

In agreement with the Administrative Law Judge, I find that Local 3254, American Federation of Government Employees, AFL-CIO, hereinafter called AFGE, did not violate Section 19(b)(1) of the Order in Case No. 50-13119(CO), but that the Respondent Activity violated Section 19(a)(3) and (1) of the Order in Case No. 50-13120(CA). Thus, I concur with the finding of the Administrative Law Judge that the publication in the newspaper, the Grissom Contact, of an advertisement by the AFGE constituted a violation of Section 19(a)(3) and (1) of the Order by the Respondent Activity in that its conduct, in permitting such publication, in effect, constituted the furnishing of services and facilities to a labor organization, the AFGE, which was not in equivalent status with the exclusively recognized representative of the Respondent Activity's employees, Local 1434, National Federation of Federal Employees, hereinafter called NFFE. In reaching this conclusion, it was noted particularly that the evidence established that the Respondent Activity exercised control over the Grissom Contact and that the newspaper was, in effect, an instrumentality of the Respondent Activity. In this regard, I view it as immaterial to the finding of a violation herein that the Respondent Activity's contract with the publisher of the Grissom Contact did not specifically forbid an advertisement such as that involved in the subject case. Thus, in my view, as Section 19(a)(3) of the Order prohibits agency management from providing assistance to a labor organization such as the AFGE, not in equivalent status, permitting the publication of an advertisement by the AFGE in a newspaper which it controls is violative of the Order irrespective of the specific contractual arrangements entered into with the publisher.

Accordingly, I agree with the Administrative Law Judge that the Respondent Activity's conduct herein violated Section 19(a)(3) and (1)

of the Order. 1/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Air Force, Grissom Air Force Base, Peru, Indiana, shall:

1. Cease and desist from:

(a) Assisting Local 3254, American Federation of Government Employees, AFL-CIO, or any other labor organization, by permitting advertisements by such labor organizations in the Grissom Contact, or by otherwise furnishing customary and routine services and facilities to Local 3254, American Federation of Government Employees, AFL-CIO, or any other such labor organization, at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when its employees are represented exclusively by Local 1434, National Federation of Federal Employees.

(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 policies of the Order:

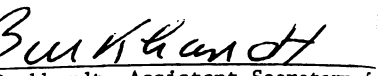
(a) Post at its facility copies of the attached notice marked "Appendix" on forms to be furnished by the Assistant Secretary for Labor-Management Relations. Upon receipt of such forms, they shall be signed by the Commanding Officer and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to emloyees 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 203.27 of the Regulations, notify the Assistant Secretary within 30 days from the date of this order as to what steps have been taken to comply herewith.

1/ It was noted that in January 1976, the AFGE filed a petition seeking an election in the unit represented by the NFFE. Such petition, however, was not consolidated herein with the instant unfair labor practice complaints and, therefore, is not properly before me for decision.

IT IS FURTHER ORDERED that the complaint in Case No. 50-13119(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
June 9, 1977



Francis X. Burkhardt, 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 assist Local 3254, American Federation of Government Employees, AFL-CIO, or any other labor organization, by permitting advertisements by such labor organizations in the Grissom Contact, or by otherwise furnishing customary and routine services and facilities to Local 3254, American Federation of Government Employees, AFL-CIO, or any other such labor organization, at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when our employees are represented exclusively by Local 1434, National Federation of Federal 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.

_____
(Agency or Activity)

Dated_____ By_____
(Commanding Officer)

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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
LOCAL 3254, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Respondent	
and	CASE NO. 50-13119(CO)
LOCAL 1434, NATIONAL FEDERATION OF FEDERAL EMPLOYEES Complainant	
and	
DEPARTMENT OF THE AIR FORCE, GRISSOM AIR FORCE BASE PERU, INDIANA Activity and Interested Party	
DEPARTMENT OF THE AIR FORCE GRISSOM AIR FORCE BASE PERU, INDIANA Respondent	
and	CASE NO. 50-13120(CA)
LOCAL 1434, NATIONAL FEDERATION OF FEDERAL EMPLOYEES Complainant	
and	
LOCAL 3254, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Interested Party	

Janet Cooper, Esquire
Staff Attorney, National Federation of Federal Employees
1016 - 16th Street, N.W.
Washington, D.C. 20036
For Complainant

Captain William C. Walker
Office of the Staff Judge Advocate
Headquarters, Strategic Air Command
Offutt Air Force Base, Nebraska 68113
For Grisson Air Force Base

Raymond J. Malloy, Esquire
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, N.W.
Washington, D.C. 20005
For Local 3254

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

These cases arise under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). Separate charges were filed on, or about, January 8, 1976, by N.T. Wolkomir, President of National Federation of Federal Employees (Complainant), with the American Federation of Government Employees (AFGE), alleging a violation of Section 19(b)(1) of the Order, and with Grissom Air Force Base (Grissom), alleging a violation of Sections 19(a)(1) and (3) of the Order. A complaint against AFGE, alleging a violation of 19(b)(1), was filed February 11, 1976 (Case No. 50-13119(CO)); and a complaint against Grissom, alleging violations of 19(a)(1) and (3) was filed February 12, 1976 (Case No. 50-13120(CA)); an Order Consolidating Cases issued September 15, 1976; and a Notice of Hearing on the consolidated cases also issued on September 15, 1976 (Ass't. Sec. Exh. 4) pursuant to which a hearing was duly held before the undersigned on October 21, 1976, in Peru, Indiana. 1/

The alleged violations of the Order, both against AFGE and against Grissom, turn on a full page advertisement by AFGE which was published in the December 19, 1975, issue of the Grissom Contact, a weekly unofficial newspaper, privately published, pursuant to contract between Grissom and Hometown Publications.

1/ The Complainant's request to correct the transcript as set forth in its motion dated November 23, 1976, no opposition having been filed and as each correction requested appears wholly proper, Complainant's motion is hereby granted and the transcript is hereby corrected as more fully noted in "Appendix B", hereto.

All parties were represented by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and briefs have been timely filed by the parties which have been carefully considered. Upon the basis of the entire record, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

1. Complainant has held exclusive recognition at Grissom since 1967. Its current contract was signed March 16, 1973, and was for a period expiring March 16, 1976. To be timely, a petition challenging Local 1434's right to represent civilian employees at Grissom would have to have been filed on or after December 17, 1975, but prior to January 16, 1976. AFGE filed a petition for Certification of Representatives on January 12, 1976 (Stipulation, Ass't. Sec. Exh. 3). 2/ Because of the unfair labor practice charges here involved, AFGE's petition for certification has been held in abeyance and Complainant's contract has been extended to March, 1977.

2. The Grissom Contact is a weekly unofficial newspaper published in the interest of personnel at Grissom by Hometown Publication, James Bannon, Publisher. Mr. Bannon is not connected with the Air Force. Publication of the Grissom Contact is governed by a contract between James Bannon and Grissom (Ass't. Sec. Exh. 3, Stipulation, Attachment 2) and by AFR 190-7 (Ass't. Sec. Exh. 3, Stipulation, Attachment 1).

3. Grissom furnishes the news content, headlines, editorials, captions and pictures; the Publisher solicits and sells advertising and prepares advertising copy. The Publisher's sole revenue is derived from the sale of advertisements. Copies of the Grissom Contact are deposited at various places on the

2/ Complainant and Grissom in Case No. 50-13120(CA) submitted a stipulation of facts and their request for a decision by the Assistant Secretary without a hearing pursuant to Section 203.5(b) of the Regulations; however, in view of the consolidation of Case No. 50-13120(CA) with Case No. 50-13119(CO) and the absence of a like stipulation of facts and a request for a decision by the Assistant Secretary without a hearing in the latter case, a Notice of Hearing issued as to both cases.

base, such as commissary, chow hall, post office, etc. (See, Ass't. Sec. Exh. 3, Stipulation, Attachment 3), where personnel may, without charge, pick up a copy. The editor of the Grissom Contact is an airman detailed by Grissom for such duty. Airman James D. Rosenberg was editor on December 19, 1975, and Sergeant Youngclause was the editor at the time of the hearing. Grissom's Office of Information, currently headed by Major Herbert Lubin, is responsible for the editorial copy of the Grissom Contact.

4. The contract between Grissom and James Bannon in Paragraph III, Advertising, provided, in part, as follows:

> "c. 'Control.' The Publisher shall not accept for publication advertisements that are in conflict with the principles of the Air Force character guidance program. The Publisher shall not solicit advertising or publish advertisements from establishments that have been declared to be 'Off Limits' to military personnel by the Base Commander or by the Armed Forces Disciplinary Control Board ... In addition, the Publisher may request the Information Officer or designated representative(s) to advise him if the contents of any advertisement would cause the Base Commander to bar the paper's circulation on the base. Advertisements which are essentially political in nature or which have political connations will not be carried in the GRISSOM CONTACT. No advertisement will be carried that is unlawful, detrimental to discipline, that undermines loyalty, or is otherwise contrary to the best interest of Grissom Air Force Base, to the United States Air Force or any part thereof, or to the United States of America. All advertisements shall conform to principles of good taste. In this regard, the Publisher shall not advertise any motion picture or other form of film entertainment which is rated 'X'... In the event of disagreement over advertising content, the commander of Grissom Air Force Base shall have the final authority for determination." (Ass't. Sec. Exh. 3, Stipulation, Attachment 2, pp. 3-4).

Air Force Regulations, provide, in part, as follows:

> "12. Commercial Advertising:
>
> "a. To be acceptable for on-base distibution through official channels, no advertising in commercial enterprise publications shall be worded or phrased to give the reader the impression that the Air Force in any way endorses, guarantees, or sponsors any product or service ...
>
> . . .
>
> "d. The publisher will request advertisers to observe the highest business ethics and applicable laws in describing goods, services, and commodities ...
>
> "e. Active-duty Air Force military and civilian personnel are prohibited from soliciting or endorsing advertisements in commercial enterprise publications.
>
> . . .
>
> "h. Advertisements must conform to the principles of good taste. ..." (AFR 190-7, Ass't. Sec. Exh. 3, Stipulation, Attachment 1).

5. Chester Horning, Sr., then President of AFGE Local 3254 and now Chief Steward, contacted Mrs. Mildred Precourt, sales representative for Hometown Publication, about an advertisement which Mr. Horning, with the assistance of various members of Local 3254, had developed; and Mrs. Precourt, after receiving Mr. Horning's material, wrote the advertisement as it appeared in the December 19, 1975, issue of the Grissom Contact (Jt. Exh. 2, p. 13). The AFGE advertisement was solely the product of AFGE, was paid for by AFGE Local 3254, and Grissom had no knowledge of the advertisement until Editor Rosenberg saw the galley proofs containing the AFGE advertisement on, or about, December 15, 1975. Airman Rosenberg testified that he did not bring the AFGE advertisement to the attention of his superior, Major Lubin, because,

> "I found it not to be in violation of any of our regulations or the contract." (Tr. 59)

Major Lubin testified that after publication he saw the AFGE advertisement and did not find that it violated the provisions of AFR 190-7 or the contract. Mrs. Precourt testified that she did not remember that Mr. Horning asked her whether an advertisement such as he sought was acceptable, but that if he had, she would have told him that we could accept it; that she saw absolutely nothing wrong with the advertisement.

6. The AFGE advertisement, of course, extols AFGE; suggests various reasons why Grissom Civilain employees should support AFGE; does not mention Complainant in any manner; and listed three telephone numbers to call for further details (Peru, Bunker Hill and Kokomo). The testimony of various Local 3254 officers indicated that no calls were received at the numbers listed; nevertheless, a petition was filed on January 12, 1976, supported by the requisite showing of interest.

7. Several newspapers serve the area including the Peru Tribune, the Kokomo Tribune, and two Indianapolis newspapers, and Mr. Horning testified that, while they (AFGE Local officers) had discussed placing an advertisement in either the Peru or Kokomo paper, they felt it would be too expensive and, in addition that coverage would be far less than through the Grissom Contact. Mr. Horning also testified that Local 3254 had tried personal contact but had been unable to make employees aware of AFGE's presence; that consideration had been given to passing out leaflets outside the Base as cars entered and left the Base, but that they thought the best avenue was to place an advertisement in the Grissom Contact.

8. No witness had any knowledge of any prior advertisement in the Grissom Contact by any labor organization.

CONCLUSIONS

A. Section 19(b)(1) Allegation (Case No. 50-13119(CO)).

Complainant asserts that AFGE's advertisement interfered with, restrained, or coerced employees in the exercise of rights assured by the Order. As the advertisement did no more than extol AFGE without mention of Complainant, obviously there was no threat so that the basis for the 19(b)(1) violation is, quite simply, that AFGE violated the Order by utilizing the Grissom Contact at a time that it did not have "equivalent status." It is recognized that under the National Labor Relations Act (NLRA) interference with organization rights by an employer has been premised on the violation of Sections 7 and 8(a)(1), see, for example, NLRB v. Babcock-Wilcox Co., 351 U.S. 105 (1956);

that the rights of employees to self-organization under Section 7 of the NLRA are essentially similar to the rights to self-organization under Section 1(a) of the Order; and that Section 19(b)(1) of the Order, in language essentially parallel to the language of Section 8(a)(1) of the NLRA, as to an employer, makes it an unfair labor practice for a labor organization to "interfere with, restrain, or coerce an employee in the exercise of his rights assured by the Order", while 19(b)(1) of the Order reaches any interference, restraint or coercion practiced by a labor organization, there is no provision prohibiting, for example, organization activity by a labor organization on an agency's or activity's premises at any time. Although Section 19(a)(3) of the Order makes it an unfair labor practice for an agency to furnish services or facilities except to organizations having equivalent status, an agency violation of Section 19(a)(3) does not make coercive, etc., in violation of 19(b)(1) of the Order, union conduct which, in itself, was wholly uncoercive and lawful, except that the agency or activity could not lawfully furnish such services or facilities until such organization achieved "equivalent status". Indeed, the realities of labor relations require that labor organizations have the fullest possible freedom of communication if the basic right of employees to self-organization, etc., is to have meaning. Consequently, in the absence of a clear and unambiguous restriction, I find no warrant in the Order for finding a labor organization quilty of an unfiar labor practice even if it were unlawfully assisted as a result of an employer's violation of 19(a)(3) of the Order.

Thus, even if it is assumed that Grissom violated 19(a)(3) by permitting the advertisement to be carried in the December 19, 1975, issue of the Grissom Contact, I am aware of no precedent, and none has been called to my attention, that a union which solicits or distributes in violation of non-solicitation and non-distribution rules is guilty of an unfair labor practice even if the employer were guilty of an unfair labor practice by permitting or allowing such solicitation or distribution. Indeed, the only precedent called to my attention is to the contrary. In Complaint Against American Federation of Government Employees, Case No. 64-2513(CO), the Assistant Regional Director, Mr. Cullen P. Keough, dismissed the Complaint by letter dated January 27, 1975, stating, in part, as follows:

> "... It is alleged that the American Federation of Government Employees (AFGE) violated Section 19(b)(1) and (2) of the Order by having its representatives conduct an organizational

drive among employees of the Veterans Administration Hospital, New Orleans, Louisiana, who are represented by Local 169, National Federation of Federal Employees (NFFE). It is also alleged that the AFGE representatives were not employees of the hospital, that they conducted the organizational drive on the hospital premises and contrary to the express instructions of agency management.

"Assuming the above allegations to be true, I find no violations of Section 19(b)(1) and (2) of the Order. It does not follow that the complained of conduct interfered with any employee rights assured under the Order (Section 19(b)(1)) or that it constituted an attempt to induce agency management to coerce an employee in the exercise of such rights (19(b)(2)).

"I am, therefore, dismissing the complaint in this matter." (AFGE Exh. 1b)

The Assistant Secretary of Labor, Mr. Paul J. Fasser, Jr., by letter dated May 29, 1975, denied the request for review, stating, in part, as follows:

". . .

"In agreement with the Assistant Regional Director and based on his reasoning, I find that dismissal of the instant complaint is warranted in that a reasonable basis for the complaint has not been established." (AFGE Exh. 1c).

The Federal Labor Relations Council, FLRC No. 75A-64 (September 30, 1975), denied the request for review, stating, in part, as follows:

"... As to the alleged major policy issue, the Council is of the opinion that in the circumstances presented, noting particularly that the cited Assistant Secretary's decisions all involved an allegation and a finding

that an agency had violated section 19(a) when it granted organizational rights to a labor organization (which were not present in the instant case), the decision of the Assistant Secretary does not appear inconsistent with prior decisions and does not raise a major policy issue warranting review." (AFGE Exh. 1a).

As AFGE's conduct did not interfere with any employee rights assured by the Order, I shall recommend that the complaint in Case No. 50-13119(CO) be dismissed.

B. Section 19(a)(1) and (3) Allegations (Case No. 50-13120(CA)).

In the circumstances of this case there is no independent 19(a)(1) violation. Rather, the controlling allegation is that Grissom violated Section 19(a)(3) of the Order by allowing publication of AFGE's advertisement at a time that AFGE did not have "equivalent status" and thereby assisted AFGE. If Grissom violated 19(a)(3) it also, derivatively, violated 19(a)(1). Army and Air Force Exchange Services, Pacific Exchange Systems, Hawaii Regional Exchange, A/SLMR No. 454 (1974); Secretary of the Navy, Department of the Navy, Pentagon and American Federation of Government Employees, AFL-CIO, Case No. 22-6787(CA) (decision of Administrative Law Judge, November 3, 1976).

Section 19(a)(3) provides that Agency management shall not -

"(3) sponsor, control, or otherwise assist a labor organization, except that an agency may furnish customary and routine services and facilities under section 23 of this Order when consistent with the best interests of the agency, its employees, and the organization, and when the services and facilities are furnished, if requested, on an impartial basis to organizations having equivalent status;"

Section 23 provides, in part, as follows:

"Agency implementation. No later than April 1, 1970, each agency shall issue appropriate policies and regulations consistent with this Order for its implementation. This includes but

> is not limited to a clear statement of the rights of its employees under this Order; ... policies with respect to the use of agency facilities by labor organizations. ..."

The terms "an agency may furnish customary and routine services and facilities" (19(a)(3)) and "agency facilities" (23) are not defined. Complainant contends that: a) the Grissom Contact is an agency service or facility; b) that Grissom may furnish such services and/or facilities on an impartial basis only to labor organizations having equivalent status; c) that on December 19, 1975, AFGE had not filed a representation petition and, therefore, did not have equivalent status and, consequently, Grissom violated 19(a)(3) by furnishing services and/or facilities to AFGE, i.e., utilization of the Grissom Contact. Department of the Navy, Navy Commissary Store Complex, Oakland, A/SLMR No. 654 (1976), where Administrative Law Judge Sternburg, whose decision was adopted by the Assistant Secretary, stated:

> "In Department of the Army, U.S. Army Natick Laboratories, Natick, Mass., A/SLMR No. 263 and U.S. Department of Interior, Pacific Coast region, Geological Survey Center, Menlo Park, California, A/SLMR No. 143, the Assistant Secretary concluded that a union which has not raised a question concerning representation by virtue of its action in filing a representation petition ... does not enjoy 'equivalent status' within the meaning of Section 19(a)(3) of the Order. Further, in the absence of 'special circumstances' a labor organization not possessing 'equivalent status' with an incumbent exclusively recognized representative ... may not enjoy the use of the services and facilities of the Activity involved for purposes of organizational activities. Accordingly, in the absence of a showing that the employees involved are inaccessible to reasonable attempts by a labor organization to communicate with them outside the agency's or activity's premises, the granting of access to a union not enjoying 'equivalent status' is violative of Section 19(a)(3) of the Order. ..."

From the foregoing, it is clear that, as AFGE did not, on December 19, 1975, enjoy "equivalent status", if Grissom furnished services and/or facilities within the meaning of Sections 19(a)(3) and (23) it violated Section 19(a)(3).

In the private sector, the importance of freedon of communication to the free exercise of organization rights pursuant to Sections 7 and 8(a)(1) of the National Labor Relations Act (essentially comparable to Sections 1(a) and 19(a)(1) of the Order) has long been recognized and the guiding principle for adjustment of the conflict between §7 rights and property rights has been determined by the Supreme Court. NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956); Central Hardware Co. v. NLRB, 407 U.S. 539 (1972). In Central Hardware Co., supra, the Court stated,

> "The principle of Babcock is limited to this accomodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' §7 rights. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of organization activity. In short, the principle of accomodation announced in Babcock is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." (407 U.S. at 543-545)

In further recognition of organization rights, the Board has long required an employer to provide names and addresses of employees in the unit within a specified time after an election agreement is executed or an election is directed. Excelsior Underwear, Inc., 165 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Under Executive Order 10988, the predecessor of E.O. 11491, and the Standards of Conduct for Employee Organizations and Code of

Fair Practices promulgated pursuant thereto, 3/ it might have been argued with conviction that the private sector standards were reflected in E.O. 10988. Whether this was intended in E.O. 10988 is of little moment as it is perfectly apparent that the Order is vastly different. Thus, the Order in Section 19(a)(3) allows an agency to furnish "services and facilities" to organizations "having equivalent status" which uniformly has been interpreted by the Assistant Secretary to mean that only organizations having equivalent status may be furnished services and facilities. Department of the Treasury, Bureau of Customs, Boston, Massachusetts, A/SLMR No. 169 (1972); Department of the Navy, Navy Commissary Store Complex, Oakland,

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3/ Executive Order 10988, the predecessor of E.O. 11491, contained the following:

> Section 1(a) "... no interference, restraint, coercion or discrimination is practiced within such agency to encourage or discourage membership in any employee organization."
>
> Section 10. "No later than July 1, 1962, the head of each agency shall issue appropriate policies, rules and regulations for the implementation of this order, including ... policies with respect to the use of agency facilities by employee organizations. ..."

Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, published in the Federal Register May 23, 1963, provided, in part, as follows:

> Section 3.2 Prohibited Practices.
>
> "(a) Agency management is prohibited from:
>
> . . .
>
> "(3) Sponsoring, controlling or otherwise assisting any employee organization, except that an agency may furnish customary and routine services and facilities pursuant to section 10 of the Order where consistent with the best interests of the agency, its employees and the organization, and where such services and facilities are furnished, if requested, on an impartial basis. ..."

supra. In short, under the Order, an agency, not only is not required, but is affirmatively prohibited from giving aid to labor organizations prior to an organization attaining "equivalent status". The Assistant Secretary has very clearly stated that to allow an agency to furnish services or facilities at any time prior to attainment of "equivalent status" could place in jeopardy the labor-management relations stability sought to be achieved by the Order. Department of the Army, U.S. Army Natick Laboratories, supra.

There is no doubt whatever that the same advertisement in the Peru Tribune or Kokomo Tribune, for example, would have been protected under the Constitution, Thornhill v. Alabama, 310 U.S. 88 (1940); but the Grissom Contact was not a normal newspaper. Despite Grissom's assertion that the Grisson Contact was Mr. Bannon's publication, and it may very well be in some respects, the Grissom Contact is, nevertheless, very much Grissom's newspaper. Grissom writes all the news and editorial content, provides all pictures, captions and headlines, and retains absolute control over advertising which must be submitted to it in galley form prior to publication. Moreover, the publication bears the imprimatur of Grissom from its title to its content. Thus, the contract provides, inter alia, that Grissom's control over advertising includes:

> 1. Publisher shall not accept advertisements that are in conflict with the principles of the Air Force character guidance program.
>
> 2. Publisher shall not publish advertisements from establishments declared to be "Off Limits".
>
> 3. Publisher may request the Information Officer or designated representative to advise him if the contents of any advertisement would cause the Base Commander to bar the paper's circulation on the base.
>
> 4. Publisher will not accept advertisements which are essentially polical in nature or which have political connotations.
>
> 5. Publisher shall not publish any advertisement that is unlawful, determental to discipline, that undermines loyalty, or is otherwise contrary to the best interests of Grissom Air Force Base, to the United States Air Force or to the United States of America.

6. In the event of disagreement over advertising content, the Commander of Grissom Air Force Base shall have the final authority for determination.

There cannot be the slightest doubt that Grissom retained absolute control over advertising and in the event of disagreement the Base Commander had final authority for determination. Because it had the right to bar any advertisement, exercise of that right would not have constituted a breach of its contract with Hometown Publication; and by its failure to bar AFGE's advertisement in the Base publication with full knowledge of the advertisement prior to its publication, at a time when AFGE did not enjoy "equivalent status", Grissom violated Section 19(a)(3) of the Order. It is with considerable regret that I reach this conclusion as the importance that the electorate be informed of relevant information so as to enable employees to make a reasonable choice seems as compelling in organizing as in the election itself. Nevertheless, in view of the limitation in the Order prohibiting the furnishing of services or facilities except to organizations having equivalent status, I am constrained to conclude that Grissom,with full knowledge of AFGE's advertisement, permitted publication and distribution on its premises of the advertisement in the Grissom Contact which it controlled.

RECOMMENDATIONS

Having found that Respondent AFGE Local 3254 did not violate Section 19(b)(1) of the Order, I recommend that the Complaint in Case No. 50-13119(CO) be dismissed.

Having found that Respondent Department of the Air Force, Grissom Air Force Base, engaged in conduct which was in violation of Section 19(a)(3) of the Executive Order and, derivatively, of Section 19(a)(1) of the Executive Order, I recommend that the Assistant Secretary adopt the following order.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of the Air Force, Grissom Air Force Base, Peru, Indiana, shall:

1. Cease and desist from:

(a) Assisting the AFGE, or any other labor organization, by permitting advertisements by any labor organization in the Grissom Contact or by otherwise furnishing customary and routine services and facilities to AFGE or any other labor organization at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when the employees are represented exclusively by the National Federation of Federal Employees, Local 1434.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Order:

(a) 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 Commanding Officer 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 other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 20, 1976
Washington, D.C.

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 assist the American Federation of Government Employees, AFL-CIO, or any other labor organization, by permitting advertisements by any labor organization in the Grissom Contact, or by otherwise furnishing customary and routine services and facilities to the American Federation of Government Employees, AFL-CIO, or any other labor organization, at a time when such organizations are not party to a pending representation proceeding raising a question concerning representation and when the employees are represented exclusively by the National Federation of Federal Employees, Local 1434.

Dated_____ By _____
Commanding Officer

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 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: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

June 9, 1977

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

INTERNAL REVENUE SERVICE,
WASHINGTON, D. C.
A/SLMR No. 853

This case involved a petition for consolidation of units filed by the National Treasury Employees Union (NTEU) on behalf of itself and/or its constituent local chapters seeking to consolidate 79 units for which the NTEU and/or its constituent local chapters are the current exclusive representatives at 57 of the 58 Internal Revenue Service (IRS) District Offices, 6 of the 7 IRS Regional Offices and the National Office of the IRS. Through the subject petition, the NTEU sought to establish a consolidated unit consisting of all the professional and nonprofessional employees of the IRS's District Offices, Regional Offices, and National Office who are currently represented exclusively by the NTEU and/or its constituent local chapters. The IRS contended, essentially, that the NTEU was without standing to file the instant petition on behalf of its exclusively recognized local chapters as, among other things, the Executive Order requires that consolidation may be sought only by exclusive representatives and the NTEU has not, as a minimum, sought authorization from its exclusively recognized local chapters to file the present petition. Furthermore, the IRS asserted that the proposed consolidated unit was not appropriate because it did not meet the criteria established by Section 10(b) of the Order and that the consolidation of existing bargaining units herein will not promote the goal of fostering more comprehensive collective bargaining as the parties already have a successful history of multi-unit bargaining.

With respect to the IRS's threshold contention that the NTEU was without standing to file the instant petition, the Assistant Secretary found that, as the contentions of the parties and the factual circumstances with respect to this question were identical to those raised in Internal Revenue Service, Washington, D. C., A/SLMR No. 831, and for the reasons stated therein, the NTEU had standing to file the instant petition on behalf of its exclusively recognized local chapters.

The Assistant Secretary also noted, as he had in his previous Internal Revenue Service decision, that consistent with the Federal Labor Relations Council's clear policy guidelines on consolidation of units there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. Given these policy guidelines, he found that the consolidated unit petitioned for by the NTEU was appropriate for the purpose of exclusive recognition under the Order. Thus, he found that the employees in the unit sought constitute

all of the eligible employees of the IRS except for those in the IRS's specialized, computer-oriented Center-type operations. They are part of an integrated organization in which they share a common mission and common supervision on a nationwide level, common job classifications, common types of working conditions, and similar personnel and labor relations practices pursuant to the essentially similar multi-District, multi-Regional and National Office negotiated agreements between the parties. Under these circumstances, he concluded that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest. As the evidence also established that the parties had successfully negotiated at the national level multi-unit agreements covering the District and Regional Office employees sought herein, and that these agreements are essentially similar to the National Office agreement between the parties, he found that the proposed consolidated unit would promote effective dealings. Moreover, noting the scope and history of the parties' current multi-unit collective bargaining relationship, he found that there has already been demonstrated the benefits to be derived from a unit structure related to a combination of employees of the IRS's District Offices, Regional Offices and National Office. In these circumstances, he concluded that the proposed consolidated unit will promote the efficiency of the agency's operations. Although the parties have been voluntarily bargaining for some of the employees sought herein on a multi-unit basis, the Assistant Secretary determined that the petitioned for consolidated unit, which will provide bargaining for employees on a nationwide basis under a single unit structure, will reduce fragmentation, promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order set forth by the Council.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
WASHINGTON, D. C.

Activity

and

Case No. 22-6484(UC)

NATIONAL TREASURY EMPLOYEES
UNION

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 Eugene M. Levine. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Petitioner, National Treasury Employees Union, herein called NTEU, which filed the instant petition on behalf of itself and/or its constituent local chapters, seeks to consolidate 79 units for which the NTEU and/or its constituent local chapters are the current exclusive representatives at 57 of the 58 Internal Revenue Service (IRS) District Offices, 6 of the 7 IRS Regional Offices and the National Office of the IRS. Through the subject petition, the NTEU seeks to establish a consolidated unit consisting of all the professional and nonprofessional employees of the IRS's District Offices, Regional Offices, and National Office, excluding all the employees of the Anchorage, Alaska, District Office, the employees of the Southeast Regional Office, the professional employees of the North Atlantic Regional Office, the National Office employees of the Office of International Operations assigned to the post of duty at Hato Rey, Puerto Rico, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The IRS contends that the NTEU is without standing to file the instant petition on behalf of its exclusively recognized local chapters

as, among other things, the Executive Order requires that consolidation may be sought only by exclusive representatives and the NTEU has not, as a minimum, sought authorization from its exclusively recognized chapters to file the instant petition. The IRS further asserts that the proposed consolidated unit is not appropriate because it does not meet the criteria established by Section 10(b) of the Order. The IRS argues also that the consolidation of the existing bargaining units herein will not promote the goal of fostering more comprehensive collective bargaining as the parties already have a successful history of multi-unit bargaining. The NTEU, on the other hand, takes the position that its standing to file the subject petition on behalf of its constituent chapters is an internal matter not subject to challenge by either the IRS or the Assistant Secretary, that the Report and Recommendations of the Federal Labor Relations Council (1975), which set forth the consolidation procedures, established a presumption favoring consolidation, and that the IRS has not produced evidence which rebuts this presumption. In this latter regard, it contends that the parties' successful history of multi-unit bargaining at the level of the Commissioner, IRS, is the best evidence that recognition at that level will promote effective dealings and the efficiency of the agency's operations. Alternatively, the NTEU indicated its willingness to represent all of the eligible District Office and Regional Office employees in one consolidated unit, with the National Office unit remaining separate, or two separate consolidated units of District Office employees and Regional Office employees, with the National Office unit remaining separate.

The mission of the IRS, which is an organizational component of the Department of the Treasury, is the administration of the tax laws of the United States. The IRS is headed by the Commissioner of Internal Revenue who reports to the Secretary of the Treasury. There are three organizational levels within the IRS. The first level, the National Office, located in Washington, D. C., develops nationwide policies and programs for the administration of the Internal Revenue laws and provides overall direction to the field organization. The day-to-day operations of the National Office are essentially directed by the Deputy Commissioner, IRS. There are seven organizational subdivisions within the National Office, each headed by an Assistant Commissioner who reports to the Deputy Commissioner. The Assistant Commissioners have no line authority with respect to the IRS's field operation. The record reveals that there are approximately 2100 bargaining unit positions within the National Office.

The second level of the IRS's organization is the seven Regional Offices which supervise and evaluate the operations of the District Offices and Service Centers within their geographical purview. The Regional Offices are headed by Regional Commissioners who report to the Deputy Commissioner, IRS. The size of the Regional Offices ranges from approximately 243 to approximately 441 bargaining unit employees. The majority of unit employees within each Regional Office are assigned to the appellate function, which is located in Branch Offices throughout each region and which is concerned with hearing and undertaking final

settlement of taxpayer appeals from determinations of tax liability made in the District Offices. The remaining Regional Office bargaining unit positions primarily involve clerical employees.

The third level of the IRS's field organization, the District Offices and the Service Centers, 1/ constitute the IRS's field operation. The 58 District Offices implement the programs and policies established by the National Office and the Regional Offices. They have initial taxpayer contacts in the areas of taxpayer assistance, audit of tax returns, collection of delinquent tax returns and/or revenue, and settlement efforts of tax disputes. The District Offices are headed by a District Director who reports to the Regional Commissioner. The size of the District Offices ranges from approximately 100 employees at Cheyenne, Wyoming, to approximately 3000 employees at Los Angeles, California. Every District has both a headquarters office and local offices in other cities or towns within the District. Certain districts are designated as "key" districts because they possess the personnel and capability to administer special programs. However, the evidence shows that all the District Offices basically consist of employees in essentially similar job classifications who are required to have essentially similar training, and who share essentially similar working conditions.

As noted above, the IRS has raised a threshold question that the NTEU was without standing to file the instant petition. As the contentions of the parties and the factual circumstances with respect to this question are identical with those raised in Internal Revenue Service, Washington, D. C., cited above, at footnote 1, I find that, for the reasons stated therein, the NTEU had standing to file the instant petition on behalf of its exclusively recognized local chapters.

With respect to the appropriateness of the proposed consolidated unit, the IRS contends that it is an essentially decentralized organization which has delegated primary authority for those decisions concerning the terms and conditions of employment for its employees to its line managers at each level of its organization. In this regard, the record shows that all the Assistant Commissioners (with respect to National Office employees), Regional Commissioners and District Office Directors have been delegated and effectively exercise day-to-day authority with respect to such matters as hiring, firing, transfer, reassignment, promotion, reduction-in-force procedures, resolution of grievances and unfair labor practice complaints, and other matters affecting employee interests. Furthermore, the record shows that only a small number of employees

1/ The ten Service Centers process tax returns and related documents and maintain accountability records for the taxes collected. Their program includes the processing, verification, and accounting control of tax returns, the assessment and refund of taxes, and the preparation of audit selection lists.

In Case No. 22-6486(UC), the NTEU filed a petition seeking to consolidate its exclusively represented Service Centers, the IRS National Computer Center and IRS Data Center units. See Internal Revenue Service, Washington, D. C., A/SLMR No. 831.

receive either temporary details or permanent reassignments/promotions between any of the District Offices, Regional Offices, and/or the National Office and that the effective area of consideration for both reduction-in-force procedures and promotions is either District-wide, or within the purview of the particular Regional Commissioner's or Assistant Commissioner's jurisdiction. Based on these considerations, the IRS argues that consolidation will require the centralization of its decision-making authority with respect to all matters affecting employee terms and conditions of employment.

The IRS's contention that consolidation will necessarily result in the centralization of its decision-making authority must be viewed, however, in the context of the recent bargaining history between the IRS and the NTEU. In 1972, and again in 1974, the IRS and the NTEU negotiated multi-District collective bargaining agreements encompassing all the District Office employees sought to be incorporated in the proposed consolidated unit. In 1974, the IRS and the NTEU negotiated a multi-Regional collective bargaining agreement encompassing all the Regional Office employees sought to be incorporated in the proposed consolidated unit. In 1975, the IRS and the NTEU negotiated a collective bargaining agreement for the National Office employees sought to be incorporated into the proposed consolidated unit. Some of the subjects covered by the agreements, as shown by the record evidence, indicate the extent to which the parties herein have dealt at the national level with problems concerning the terms and conditions of employment of the District Office and Regional Office employees sought herein. Thus, among the subjects covered by the most recent agreements are promotions, details, evaluations of performance, annual ratings, training, position classification, equal employment opportunity, leave, health and safety, hours of work, etc. The IRS contends that multi-District and multi-Regional agreements are based on the active input of the respective District Directors and Regional Commissioners and were negotiated and signed on their behalf, with the central Union Relations Branch staff merely acting as their agents. The IRS contends, further, that it will be unable to continue to do this should the proposed consolidation be approved. However, no evidence was presented to show that the IRS could no longer continue, as before, to utilize its field personnel and use their input as the basis for negotiations with the NTEU at the national level, or that any agreement negotiated at the national level could not continue to delegate to field level managers certain authority, such as the resolution of grievances and the scheduling of meetings with local union representatives to deal with local problems, which currently are incorporated into the present agreements. Furthermore, the evidence shows that the current multi-District, multi-Regional and National Office agreements are essentially similar in many instances, (e.g., employee rights, union rights, union stewards, promotions, details, performance evaluations, discipline, equal employment opportunities, grievance procedures, etc.), thereby evincing the commonality of interests throughout the unit sought by the NTEU herein.

In a recent decision, I found, consistent with the Federal Labor Relations Council's clear policy guidelines on consolidation of units, that there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. 2/ Given these policy guidelines, I find that the petitioned for consolidated unit herein is appropriate for the purpose of exclusive recognition under the Order. As indicated above, the employees in the unit sought constitute all of the eligible employees of the IRS except for those in the IRS's specialized, computer-oriented Center-type operations. They are part of an integrated organization in which they share a common mission and common supervision on a nationwide level, common job classifications, common types of working conditions, and similar personnel and labor relations practices pursuant to the essentially similar multi-District, multi-Regional and National Office negotiated agreements between the parties. Under these circumstances, I find that the employees in the petitioned for consolidated unit share a clear and identifiable community of interest

As the evidence also establishes that the parties have successfully negotiated at the national level multi-unit agreements covering the District and Regional Office employees sought herein, and that these agreements are essentially similar to the National Office agreement between the parties, I find that the proposed consolidated unit will promote effective dealings. Moreover, noting the scope and history of the parties' current multi-unit collective bargaining relationship, I find that there has already been demonstrated the benefits to be derived from a unit structure related to a combination of employees of the IRS's District Offices, Regional Offices and National Office. In these circumstances, I find that the proposed consolidated unit will promote the efficiency of the agency's operations. Although the parties have been voluntarily bargaining for some of the employees sought herein on a multi-unit basis, I also find that the petitioned for consolidated unit, which will provide bargaining for all of the employees sought herein on a nationwide basis under a single unit structure, will reduce fragmentation, promote a more comprehensive bargaining unit structure and is consistent with the policy of the Order set forth above.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended: 3/

2/ Education Division, Department of Health, Education and Welfare, Washington, D. C., A/SLMR No. 822.

3/ The certifications or grants of exclusive recognition held by the NTEU were not made part of the record herein. As noted in the Education Division decision, cited above, proposed consolidated units are limited to, and/or defined by, the parameters of the existing exclusively recognized units at the time of the filing of a consolidation petition. Insofar as the actual state of the exclusively recognized units at the time of the filing of the instant petition may differ, if at all, from the unit found appropriate herein, the unit description should be so modified.

All professional and nonprofessional employees of the Internal Revenue Service District Offices, Regional Offices, and National Office, excluding all the employees of the Anchorage, Alaska, District Office, the employees of the Southeast Regional Office, the professional employees of the North Atlantic Regional Office, the National Office employees in the Office of International Operations assigned to the post of duty at Hato Rey, Puerto Rico, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The IRS requested that in the event the proposed consolidated unit was found to be appropriate, an election be held to determine whether or not the employees involved desire to be represented in the proposed consolidated unit by the NTEU. As noted 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 voting groups:

Voting group (a): All professional employees of the Internal Revenue Service District Offices, Regional Offices, and National Office, excluding all nonprofessional employees, employees of the Anchorage, Alaska, District Office, employees of the Southeast Regional Office, professional employees of the North Atlantic Regional Office, National Office employees in the Office of International Operations assigned to the post of duty at Hato Rey, Puerto Rico, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting group (b): All nonprofessional employees of the Internal Revenue Service District Offices, Regional Offices, and National Office, excluding all professional employees, employees of the Anchorage, Alaska, District Office, employees of the Southeast Regional Office, professional employees of the North Atlantic Regional Office, National Office employees in the Office of International Operations assigned to the post of duty at Hato Rey, Puerto Rico, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors 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 in the proposed consolidated unit by the National Treasury Employees Union.

Employees in the professional voting group (a) will be asked two questions on their ballots: (1) whether they desire to be represented

for the purpose of exclusive recognition in the proposed consolidated unit by the National Treasury Employees Union, and (2) whether or not they desire to be represented in a separate consolidated professional unit if the proposed consolidated unit is approved by a majority of all the employees voting.

The valid votes cast by all the eligible employees will be tallied to determine if a majority of the valid votes have been cast in favor of the proposed consolidated unit. If a majority of the valid votes have not been cast in favor of the proposed consolidated unit, the employees will be taken to have indicated their desire to continue to be represented in their current units of exclusive recognition. If a majority of the valid votes are cast in favor of the proposed consolidated unit, the ballots of the professional employees in voting group (a) will then be tallied to determine whether they wish to be included in the same consolidated unit with the nonprofessional employees. Unless a majority of the valid votes of voting group (a) are cast for inclusion in the same consolidated unit as the nonprofessional employees, the professional employees will be taken to have indicated their desire to constitute a separate consolidated professional unit, and an appropriate certification will be issued by the Area Administrator.

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 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 Internal Revenue Service District Offices, Regional Offices, and National Office, excluding all nonprofessional employees, employees of the Anchorage, Alaska, District Office, employees of the Southeast Regional Office, professional employees of the North Atlantic Regional Office, National Office employees in the Office of International Operations assigned to the post of duty at Hato Rey, Puerto Rico, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

(b): All nonprofessional employees of the Internal Revenue Service District Offices, Regional Offices, and National Office, excluding all professional employees, employees of the Anchorage, Alaska, District Office, employees of the Southeast Regional Office, professional employees of the North Atlantic Regional Office, National Office employees in the Office of International Operations assigned to the post of duty at Hato Rey, Puerto Rico, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

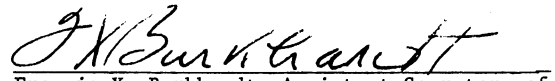
2. If a majority of the professional employees votes for inclusion in the same consolidated unit as the nonprofessional employees, I find the following unit appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

> All professional and nonprofessional employees of the Internal Revenue Service District Offices, Regional Offices, and National Office, excluding all the employees of the Anchorage, Alaska, District Office, the employees of the Southeast Regional Office, the professional employees of the North Atlantic Regional Office, the National Office employees in the Office of International Operations assigned to the post of duty at Hato Rey, Puerto Rico, management officials, guards, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors 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 election, 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 or not they desire to be represented for the purpose of exclusive recognition in the proposed consolidated unit by the National Treasury Employees Union.

Dated, Washington, D. C.
June 9, 1977



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

June 10, 1977

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 THE ARMY,
HEADQUARTERS, XVIII AIRBORNE
CORPS AND FORT BRAGG,
NORTH CAROLINA
A/SLMR No. 854

This case involved a unit clarification petition by the American Federation of Government Employees, Local 1770, AFL-CIO (Petitioner) seeking clarification as to the status of certain employee classifications and requesting that the employee classifications involved be included in its exclusively recognized unit located at Fort Bragg. Contrary to the view of the Petitioner, the Activity contended that all the subject employee classifications should be excluded from the exclusively recognized unit as supervisory.

With respect to certain of the employee classifications covered by the petition, the Assistant Secretary noted that during the course of the hearing the parties agreed to their supervisory or nonsupervisory status. In these circumstances, he concluded that the agreement of the parties constituted, in effect, withdrawal requests insofar as they sought clarification with respect to the agreed upon employees. In the absence of any evidence that the parties' agreement was improper, the Assistant Secretary approved the withdrawal requests. He noted also that in order to expedite the hearing on those employee classifications at issue the parties divided the disputed classifications into three basic categories and stipulated that witnesses testifying within each grouping were representative of all such individuals within that grouping. The Assistant Secretary found that the record demonstrated that such stipulation was not improper.

As to the remaining disputed employee classifications, the Assistant Secretary concluded that all employee classifications within each grouping were supervisory within the meaning of the Order. Accordingly, he excluded from the Petitioner's exclusively recognized unit those employee classifications.

A/SLMR No. 854

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
HEADQUARTERS, XVIII AIRBORNE
CORPS AND FORT BRAGG,
NORTH CAROLINA 1/

Activity

and

Case No. 40-07449(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1770, AFL-CIO

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 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 a brief filed by the Petitioner, the Assistant Secretary finds:

The Petitioner, American Federation of Government Employees, Local 1770, AFL-CIO, hereinafter called AFGE, is the exclusive representative of certain employees of the Activity. 2/ In this proceeding, the AFGE seeks clarification as to the status of approximately 154 employee classifications, requesting that they be included in the exclusively recognized unit located at Fort Bragg, North Carolina. 3/ The Activity contends that the employees in each of the disputed classifications (Groups A, B and C set forth below) are supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the exclusively recognized unit.

During the hearing, the parties stipulated that certain employee classifications were supervisory while others were nonsupervisory. 4/ In order to expedite the hearing on those employee classifications at issue the parties divided the disputed classifications into three basic

1/ The name of the Activity appears as set forth, October 9, 1974, in the amendment of recognition in Case No. 40-5517(AC).

2/ The AFGE was originally granted exclusive recognition under Executive Order 10988. On October 9, 1974, that recognition was amended by changing the wording of the unit description. Currently, the AFGE is the exclusive representative of the following unit: "Included: All General Schedule and Wage Grade employees at Fort Bragg, North Carolina, including employees of the following tenant organizations who are serviced by the Fort Bragg Civilian Personnel Office: Headquarters, First ROTC Region; U.S. Army Communications Command Agency-Fort Bragg; U.S. Army Institute for Military Assistance; U.S. Army Airborne Communications and Electronics Board; U.S. Army Medical Department Activity, Womack Army Hospital; U.S. Forces Command Intelligence Group (FORSIG); and the U.S. Readiness Group-Fort Bragg. Excluded: All professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors and guards as defined in the Executive Order." At the hearing, the parties attempted to amend the above unit description by omitting the U.S. Readiness Group-Fort Bragg because allegedly it no longer is serviced by the Fort Bragg Civilian Personnel Office. Inasmuch as insufficient supporting evidence was adduced on this matter, I shall not pass upon whether the omission of the U.S. Readiness Group from the unit description herein is warranted.

3/ The AFGE represents exclusively approximately 3,500 employees at the Activity.

4/ There is no evidence that such stipulations were improper. I view such stipulations, in the context of a unit clarification petition, as motions to amend the petition to delete and, in effect, withdraw such stipulated classifications. In these circumstances, I grant the motions to amend and therefore find it unnecessary to make a determination concerning the status of the stipulated classifications.

categories; namely, Group A, Group B and Group C. Additionally, the parties stipulated that witnesses testifying within each grouping were representative of all such individuals within that grouping. 5/

DISPUTED EMPLOYEE CLASSIFICATIONS

Group A

The record reveals that employees in Group A closely resemble "limited foremen" who exercise first level supervisory responsibility for control over work operations at the Activity. In this connection, they approve leave and short term absences from work, spot check work priorities to see that they are effectively and economically accomplished, effectively recommend promotions, plan and prescribe deadlines and the sequence of work, counsel and discipline employees, are effectively involved in the process of giving cash awards and letters of commendation, and are authorized to adjust informal complaints and resolve minor grievances. Moreover, the record shows that individuals in Group A exercise independent judgment with respect to the day-to-day supervision given employees and supervise anywhere from 2 to 53 employees.

In view of the fact that employees in Group A possess independent and responsible authority to direct other employees, approve leave and short absences from work, and effectively recommend promotions and discipline employees, I find that such employee classifications found in Group A are supervisory within the meaning of the Order and, therefore, such classifications should be excluded from the unit.

Group B

Record evidence indicates that employees in Group B classifications are foremen with full responsibility for the employees under their direction. Employees in Group B classifications plan weekly and daily work schedules, establish deadlines within job priorities, determine how many work assignments can be done concurrently, how many must be delayed, and decide the type and number of employees to complete work. Also, the record reflects that employees in Group B classifications approve annual and sick leave, effectively recommend discharges and other forms of employee discipline, handle grievances and meet upon occasion with shop stewards, counsel employees, effectively recommend promotions and awards, and hire or select employees for work. Additionally, individuals in Group B classifications are authorized to require written explanations for abuse of sick leave, alcoholism and safety infractions and are able to transfer employees for short periods of time, as well as set performance standards for work. Employees in Group B classifications generally supervise from 15 to 18 individuals.

5/ The record reveals that such stipulation was not improper. Thus, Group A, Group B and Group C reflect the parties' attempt to categorize classifications that fall into the 201 job series, the 202 job series and the GS series, respectively.

Based on the foregoing, I find that the individuals in Group B classifications are supervisors within the meaning of the Order in that the evidence establishes that they possess independent and responsible authority to direct other employees, assign work and leave, adjust grievances and effectively recommend discipline and promotions. I shall, therefore, exclude such classifications from the unit.

Group C

The record evidence indicates that individuals who occupy the classifications in Group C occassionally schedule overtime for employees, establish regular duty schedules, approve annual and sick leave, hire and select employees for work from Civilian Personnel Office registers and referrals, direct and assign work on a daily basis, counsel and admonish employees, effectively recommend terminations, and initiate incentive awards for employees. Also, the record reflects that individuals in Group C classifications train new employees and inform them of their mission and responsibility and annually review job descriptions with employees in addition to regularly evaluating personnel.

Inasmuch as employees in Group C possess independent and responsible authority to direct other employees, establish duty schedules and assign work, hire and select employees for work, and effectively discipline employees, I find that individuals found in Group C classifications are supervisors within the meaning of the Order and, therefore, such classifications should be excluded from 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, Local 1770, AFL-CIO, under Executive Order 10988, and amended on October 9, 1974, be, and hereby is, clarified by excluding from said unit those employee classifications set forth in Groups A, B and C, namely:

GROUP A

Warehouse Foreman WS-4; Warehouse Foreman WS-1; Laundry Worker Foreman WS-1; Presser Foreman WS-3; Presser Foreman Assistant WS-2; Warehouse Foreman WS-3; Store Worker Foreman WS-3; Motor Vehicle Operator Foreman WS-6; Carpenter Foreman WS-7; Carpenter Foreman WS-8; Painter Foreman WS-7; Mobile Industrial Equipment Maintenance Foreman WS-8; Gardener Foreman WS-6; Telephone Mechanic Foreman WS-9; Food Service Worker Foreman WS-2; Artillery Repair Foreman WS-7; Crytographic Equipment Installation and Repair Foreman WS-10; Optical Instrument Repair Foreman WS-9; Powered Support Systems Mechanic Foreman WS-8.

GROUP B

Motor Vehicle Operator Foreman WS-8; Warehouse Foreman WS-5; Warehouse Forklift Operator Foreman WS-7; Warehouse Forklift Operator Foreman WS-4; Fuel Distribution System Worker Foreman WS-4; Maintenance Vehicle Operator Foreman WS-7; Cook Foreman WS-8; Small Arms Repair Foreman WS-4; Warehouse Foreman WS-6; Electronics Mechanic Foreman WS-4; Warehouse Foreman WS-5; Automotive Mechanic Foreman WS-10; Laundry Equipment Mechanic Foreman WS-9; Store Worker Foreman WS-5; Model Maker (Wood) Foreman WS-10; Fuel Distribution System Worker Foreman WS-5; Carpenter Foreman WS-10; Painter Foreman WS-9; Construction and Maintenance Foreman WS-10; Mobile Industrial Equipment Maintenance Foreman WS-10; Gardener Foreman WS-8; Fixed Industrial Equipment Mechanics Foreman WS-10; Boiler Plant Operator Foreman WS-8; Boiler Plant Operator Foreman WS-10; Plumber Foreman WS-10; Motor Operator Vehicle Foreman WS-8; Electrician (High Voltage) Foreman WS-10; Maintenance Mechanic Foreman WS-10; Bindery & Finish Worker Foreman WS-10; Automobile Equipment Repair Inspection Foreman WS-10; Automobile Mechanic Foreman WS-10; Aircraft Engine Mechanic Foreman WS-10; Aircraft Systems Electronic Repair Foreman WS-10; Aircraft Mechanic Foreman WS-10; Aircraft Equipment Repair Inspection Foreman WS-10; Chemical Equipment Repair Foreman WS-9; Fabric Worker Foreman WS-7; Furniture Repair Foreman WS-10; Heavy Mobile Equipment Mechanic Foreman WS-10; Heavy Mobile Equipment Inspection Foreman WS-10; Mobile Industrial Equipment Maintenance Foreman WS-10; Office Appliance Repairer Foreman WS-10; Small Arms Repair Foreman WS-7; Upholstery Foreman WS-8; Maintenance Worker Foreman WS-6; Materials Sorter and Classifier Foreman WS-5; Sheet Metal Mechanic Foreman WS-10; Store Worker Foreman WS-4; Plumber Foreman WS-9.

GROUP C

Voucher Examiner Supervisor GS-7; Voucher Examiner Supervisor GS-6; Supervisory Travel Assistant GS-8; Supervisory Training Instructor-Foreign Language GS-9; Supervisory Medical Record Technician GS-7; Supervisory Military Pay Examination Reviewer GS-7; Supervisory Military Personnel Clerk GS-5; Supervisory Military Personnel Clerk GS-6; Supervisory Military Pay Clerk, Typing GS-6; Supervisory Military Personnel Relations Technician GS-6; Supervisory Military Personnel Technician GS-6; Supervisory Military Personnel Technician GS-7; Supervisory Music Specialist GS-8; Supervisory Photographer GS-9; Supervisory Purchasing Agent GS-7; Supervisory Quarters Inspector GS-7; Supervisory Readiness Equipment Analyst GS-9; Supervisory Recreation Assistant GS-5; Supervisory Recreation Assistant GS-6; Supervisory Sales Store Checker GS-4; Supervisory Sales Store Checker GS-5; Supervisory Sales Store Checker GS-6; Supervisory Shipping Clerk, Household Goods GS-5; Supervisory Shipping Clerk, Household Goods GS-6; Supervisory Shipping Clerk, Household Goods GS-8; Supervisory Shipping Clerk Typist GS-5;

Supervisory Shipping Clerk Typist GS-6; Supervisory Sports Specialist GS-9; Supervisory Subsistence Control Specialty GS-7; Supervisory Supply Clerk GS-4; Supervisory Supply Clerk GS-5; Supervisory Supply Clerk GS-6; Supervisory Supply Technician GS-6; Supervisory Supply Technician GS-7; Supervisory Training Instruction Preventive Maintenance Specialist GS-9; Administrative Officer GS-8; Administrative Assistant GS-5; Administrative Assistant GS-7; Billeting Manager GS-4; Communications Equipment Operator Supervisor GS-7; Education Coordinator GS-9; General Supervisor, Office Publications GS-9; General Supply Officer GS-7; General Supply Officer GS-10; Grocery Department Manager GS-6; Grocery Department Manager GS-7; Grocery Department Manager GS-8; Housing Project Manager GS-10; Mail and File Supervisor GS-5; Mail and File Supervisor GS-6; Mail Supervisor GS-5; Mail Supervisor GS-8; Management Assistant GS-8; Meat Department Manager GS-7; Meat Department Manager GS-8; Meat Department Manager GS-9; Military Pay Supervisor GS-6; Military Pay Supervisor GS-7; Produce Department Manager GS-6; Produce Department Manager GS-7; Self-Service Supply Center Assistant Manager GS-8; Supervisory Accounting Clerk GS-6; Supervisory Accounting Technician GS-6; Supervisory Administrative Specialist GS-6; Supervisory Ambulance Attendant GS-5; Supervisory Clerk GS-5; Supervisory Clerk GS-6; Supervisory Clerk Typist GS-5; Supervisory Coding Clerk GS-5; Supervisory Commuter Operator GS-8; Supervisory Data Control Clerk GS-5; Supervisory Fire Protection Inspector GS-8; Supervisory Forest Technician GS-9; Supervisory Fire Protection Inspector GS-8; Supervisory Freight Rate Specialist GS-9; Supervisory Health Technician, Plastic Mold GS-5; Supervisory Library Technician GS-6; Supervisory Inventory Management Specialist GS-7; Supervisory Inventory Management Specialist GS-8; Supervisory Inventory Management Specialist GS-9; Supervisory Management Technician GS-7; Supervisory Medical Records Technician GS-5.

Dated, Washington, D. C.
June 10, 1977

F X Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-4426(CA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 476

Complainant

DECISION AND ORDER

On January 31, 1977, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Army Electronics Command, Fort Monmouth, New Jersey, shall:

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. 855

This case arose as a result of an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 476 (NFFE) alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order when it changed the competitive areas used for reduction-in-force (RIF) purposes without bargaining with the NFFE, the exclusive representative of certain employees affected by the change, concerning the decision to alter the competitive areas.

The Administrative Law Judge concluded that the Respondent was obligated to bargain, in advance, about the decision to change the competitive areas as the change in the competitive area itself impacts on employees. While the Administrative Law Judge further concluded that the Respondent fulfilled its obligation to supply the NFFE with requested information necessary for the Complainant to adequately bargain about the proposed change and that the record established that the parties had engaged in two bargaining sessions, he concluded that the parties had not, as required, exhausted the bargaining possibilities or reached impasse concerning the issue and, therefore, the Respondent had violated Section 19(a)(1) and (6) of the Order by failing to fulfill its bargaining obligation with the exclusive representative, prior to the implementation of the change of competitive areas.

The Assistant Secretary, noting particularly the absence of exceptions, adopted the findings, conclusions and recommendations of the Administrative Law Judge and he ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions.

1. Cease and desist from:

(a) Changing the composition of Competitive Area No. 10 without notifying National Federation of Federal Employees, Local 476, the exclusive representative of units of employees in Competitive Area No. 10, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such change.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Rescind its command letter of January 26, 1976, modifying the competitive areas for RIF purposes at Fort Monmouth, New Jersey, insofar as Competitive Area No. 10 is affected.

(b) Notify the National Federation of Federal Employees, Local 476, of any intended changes in the composition of Competitive Area No. 10 and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate such changes.

(c) Post at its facility at the U.S. Army Electronics Command, Fort Monmouth, 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 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.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
June 13, 1977

F. X. Burkhardt

Francis X. Burkhardt, 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 change the composition of Competitive Area No. 10 without notifying National Federation of Federal Employees, Local 476, the exclusive representative of units of employees in Competitive Area No. 10, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such change.

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 rescind the command letter of January 26, 1976, modifying the competitive areas for reduction-in-force purposes at Fort Monmouth, New Jersey, insofar as Competitive Area No. 10 is affected.

WE WILL notify the National Federation of Federal Employees, Local 476, of any intended changes in the composition of Competitive Area No. 10 and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate 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 questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, 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
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
UNITED STATES ARMY ELECTRONICS COMMAND, FORT MONMOUTH, N.J.	:	
Respondent	:	
and	:	
	:	Case No. 32-4426(CA)
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 476	:	
Complainant	:	

Capt. Patrick V. Terranova, Esquire
U.S. Army Electronics Command
Legal Office
Fort Monmouth, New Jersey 07703
For the Respondent

Herbert Cahn
President, Local 476, NFFE
P.O. Box 204
Little Silver, New Jersey 07739
For the Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under the provisions of Executive Order 11491, as amended, (hereinafter called the Order). National Federation of Federal Employees Local 476 (hereinafter called the Union and NFFE Local 476) filed a complaint on March 5, 1976 and an amended complaint on March 19, 1976 alleging that the United States Army Electronics Command, Fort Monmouth, New Jersey (hereinafter called the Activity)

violated Sections 19(a)(1), (2) 1/ and (6) of the Order by making certain changes in the competitive areas for reduction in force without bargaining with the Union and providing it with sufficient information and also subsequent to the change refused to supply the Union with sufficient information to permit it to bargain about the change.

A Notice of Hearing on Complaint was issued on September 30, 1976 by the U.S. Department of Labor Regional Administrator, New York Region. Pursuant to said Notice of Hearing, a hearing was held before the undersigned in Fort Monmouth, New Jersey. At the hearing both parties were represented and were afforded full opportunity to be heard; to call, examine and cross-examine witnesses; and to introduce evidence. The parties were afforded an opportunity to argue orally and to submit briefs. Both parties submitted briefs, which have been duly considered.

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 material herein the Union was the exclusive collective bargaining representative for a number of units composed of various employees of the Activity. One of the units so represented by NFFE Local 476 was one composed of employees of the Activity's Directorate of Research, Development and Engineering.

2. On or about December 17, 1975 Mr. Lester Edminston, a labor management specialist for the Activity, requested Union President Herbert Cahn meet with Activity representatives concerning a proposed change in the competitive areas. Mr. Cahn requested Activity representative Woolsey to bring population figures by competitive areas to the meeting. Mr. Woolsey refused, but nevertheless did bring them.

3. A meeting was held on December 19, 1975. Present at the meeting were representatives of NFFE Local 476,

1/ The allegation that Section 19(a)(2) of the Order was violated was dismissed by the Regional Administrator.

American Federation of Government Employees Local 1904 2/ and the Activity. The Activity proposed to change the competitive areas by moving the headquarters personnel of the Directorate of Research, Development and Engineering (RD&E) from Competitive Area #1 to Competitive Area #10, which was basically composed of the Research and Development Complex. 3/ The Unions requested that representatives from RD&E Directorate be present at a future meeting to explain the reasons for the proposed change and also they proposed the establishment of a single competitive area for all of the Activity and Fort Monmouth. NFFE Local 476 asked for retention registers and was advised there were none present. Mr. Cahn requested there be another meeting when the requested information, the retention registers, were available.

4. The next meeting was held on January 8, 1976. Representatives of NFFE Local 476, AFGE Local 1904 and the Activity, including representatives of the RD&E Directorate, were present. The parties discussed the background and reason for the proposed change. The two unions again suggested that there be one competitive area for all of Fort Monmouth and the tenant activities. NFFE Local 476 President Cahn renewed his request for copies of retention registers that would show how the retention registers would appear before and after the proposed change in competitive areas. They were not provided at the meeting.

5. A few days later Mr. Cahn received a retention register for Competitive Area #1 as prepared on April 10, 1975 and one for Competitive Area #10 as prepared August 28, 1974.

6. On January 20, 1976 Mr. Cahn spoke to Mr. Robert Woolsey of the Activity's personnel office. Mr. Woolsey advised Mr. Cahn of the procedure for determining, by, examining retention registers, which persons from Area #1 are

2/ AFGE Local 1904 also represented employees of the Activity.

3/ This involved moving approximately 450 employees from Competitive Area #1 to Competitive Area #10. No employees in Competitive Area #1 were in units represented by NFFE Local 476, but some employees in Competitive Area #10 were in such units.

proposed to be shifted to Area #10 and how to determine precisely where they would fit on the Area #10 retention register.

7. On January 21, 1976 Mr. Cahn telephonically advised an Activity representative that the Union's analysis would be completed in about a week and requested an additional meeting on the competitive area change in about one week.

8. By letter dated January 21, 1976 the Activity advised the Union that the Union's suggested change in competitive areas was rejected and that when the new competitive alignment is published the Union would be provided a copy.

9. On January 23, 1976 the Union telephonically requested that the Union wanted to meet with Activity Commander General Crawford to discuss the proposed change in competitive areas. The Activity representative agreed to try to set up such a meeting.

10. On January 26, 1976 the proposed change of shifting the RD&E Directorate from Competitive Area #1 to Competitive Area #10 was implemented.

11. By letter dated January 28, 1976 the Activity provided the Union with a copy of the changes that had been instituted.

12. On February 4, 1976 the Union sent the charge letter in the instant case to the Activity.

13. On February 20, 1976 the Union learned that new retention registers had been prepared on February 12, 1976 reflecting the new change in the competitive areas. On February 24 Mr. Cahn requested copies of these registers. He was not given copies of these registers but he was permitted to use them at the personnel office.

14. Mr. Cahn by letter dated March 3, 1976 advised the Activity that this arrangement was a satisfactory interim arrangement until such time as complete "before" and "after" retention registers were made available.

15. The Union apparently was not provided with copies of

such registers.

16. The record does not establish that the Union tried to make any arrangements to see the new retention registers or that the Activity failed in any way to permit the Union to see them and/or copy them at times requested by or convenient for the Union.

17. The result of the change in competitive areas was to move about 450 employees from Competitive Area #1, none of whom were in units represented by the Union, to Competitive Area #10, which contained a number of employees in units represented by the Union. It is the placement on the retention register by competitive areas that is used during Reduction in Force. Therefore it is reasonably foreseeable that in the event of a Reduction in Force this change, which added the 450 new employees to the Competitive Area #10 retention register, would probably have an impact and affect on some of the employees in Competitive Area #10 that are represented by NFFE Local 476.

Conclusions of Law

1. The Activity takes the position that it had no obligation to bargain about the decision to change competitive areas because it contends that this decision had no impact on the employees until a RIF was actually implemented. The Activity misinterprets the thrust of the Order. The change in the competitive areas itself, by affecting and changing employees' placement on the retention registers, has an impact on the employees. Therefore the Order mandates that the Activity bargain with the collective bargaining representative before it decides to make such changes. 4/ Therefore the Activity's position,

4/ If it were concluded that the Activity was not obliged to bargain about this change of competitive areas until an actual RIF, and a RIF was decided upon 2 or 3 years later, the parties would be in the strange and impractical situation of having to bargain about the decision to change competitive areas some 2 or 3 years after it had been put into effect. A clearly unacceptable procedure in any practical system of labor-management relations.

in this regard is rejected and it is concluded that the Activity was obliged to bargain, in advance, about the decision to change the competitive areas. cf. Department of the Army, U.S. Army Electronics Command, Fort Monmouth, N.J., A/SLMR No. 679.

2. The Activity was obliged, upon request, to supply the Union with available information needed by the Union to intelligently bargain about the proposed change in competitive areas. 5/ cf. Boston District Office, IRS, A/SLMR No. 727; Department of Navy, Long Beach Naval Shipyard, A/SLMR No. 728; and GSA Region 3, A/SLMR No. 734. The retention registers requested by the Union were necessary for the Union to bargain about the proposed change. However, prior to the finalization of the decision the Union was supplied with some rather dated retention registers for Competitive Areas #1 and #10. Although the Union might have been entitled to more recent retention registers, the Union did not protest that the retention registers that it was actually supplied were too old or not useful. Rather the Union did start to analyze the registers. Further although the Union wanted a retention register that reflected Competitive Area #10 after the proposed change, the record establishes that from the then existing retention registers for Areas #1 and #10, the Union could have itself figured out the changes in the retention register for Competitive Area #10. In these circumstances it is concluded that the Activity fulfilled its obligation to supply the Union with requested information necessary for the Union to adequately bargain about the proposed change. Therefore the Activity did not, in this regard, violate Sections 19(a)(1) and (6) of the Order.

3. It is concluded, however, that the Activity did violate the Order with respect to the decision and implementation of the change in the competitive areas. The record establishes that the parties had only engaged in two bargaining meetings; the Union wasn't supplied with the requested retention registers until after the second bargaining meeting; the Union, after promptly analyzing the registers, requested another bargaining meeting. Further the record does not establish that the parties had exhausted

5/ The record did not sufficiently establish that to supply the retention registers would have been to burdensome or costly.

bargaining possibilities or reached impasse. In these circumstances it is concluded that the Activity reached it final decision to change the competitive areas and implemented these changes prematurely; that is before it had fulfilled its obligation to bargain with the Union about the change and its implementation. cf. U.S. Army Electronics Command, Fort Monmouth, N.J., A/SLMR No. 653. In this regard it is therefore concluded that the Activity violated Sections 19(a)(1) and (6) of the Order.

4. With respect to making the new retention registers available after the change, in February 1976, it is concluded that the Activity made the registers available to the Union and the record fails to establish that the Union ever requested or was denied their use at the Union's convenience. Thus it is concluded that the Activity did not violate the Order in this regard.

Recommendation

Having found that the Activity engaged in conduct which violates Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following Order designed to effectuate the policies of Executive Order 11491, as amended.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Army Electronics Command, Fort Monmouth, New Jersey, shall:

1. Cease and desist from:

(a) Changing the composition of Competitive Area No. 10 without notifying Local 476, National Federation of Federal Employees, the exclusive representative of units of employees in Competitive Area No. 10, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such change.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Rescind its command letter of January 26, 1976, modifying the competitive areas for RIF purposes at Fort Monmouth, New Jersey, insofar as Competitive Area No. 10 is affected.

(b) Notify Local 476, National Federation of Federal Employees, of any intended changes in the composition of Competitive Area No. 10 and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate such changes.

(c) Post at its facility at the U.S. Army Electronics Command, Fort Monmouth, 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 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.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: January 31, 1977
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 change the composition of Competitive Area No. 10 without notifying Local 476, National Federation of Federal Employees, the exclusive representative of units of employees in Competitive Area No. 10, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such change.

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 rescind the command letter of January 26, 1976, modifying the competitive areas for reduction-in-force purposes at Fort Monmouth, New Jersey, insofar as Competitive Area No. 10 is affected.

WE WILL notify Local 476, National Federation of Federal Employees, of any intended changes in the composition of the Competitive Area No. 10 and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate 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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 3515 - 1515 Broadway, New York, New York 10036.

June 13, 1977

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

UNITED STATES PATENT AND TRADEMARK OFFICE
A/SLMR No. 856

This case involved a petition for amendment and clarification of unit (AC/CU) filed by the Activity. Thus, the Activity sought to amend a unit of essentially all of its professional employees other than Trademark professionals, for which the Patent Office Professional Association (POPA) has been the exclusive representative since 1965, by adding certain specific exclusions. In this regard, the Activity asserted that certain Patent Attorneys, Management Analysts, Program Analysts, and an Information Systems Analyst should be excluded from the POPA's unit as management officials within the meaning of the Order and/or as confidential employees. It asserted, further, that its Personnel Psychologist should be excluded from the POPA's unit as a management official, a confidential employee, and/or as an employee engaged in Federal personnel work in other than a purely clerical capacity. Conversely, the POPA contended that all of the employees in the disputed classifications were within the POPA's exclusively recognized unit.

As requested by the Activity, the Assistant Secretary amended the POPA's exclusively recognized unit to encompass the normal exclusions under Executive Order 11491, as amended. With respect to the employees in dispute, the Assistant Secretary, while excluding from the POPA's exclusively recognized unit two of the Patent Attorneys whom he found to be "representatives of management" within the meaning of Section 2(f) of the Order and the Personnel Psychologist whom he found to be engaged in non-clerical Federal personnel work within the meaning of Section 10(b)(2) of the Order, concluded that the remainder of said employees were neither management officials within the meaning of the Order nor confidential employees and, therefore, should be included in the POPA's exclusively recognized unit.

Accordingly, the Assistant Secretary ordered that the POPA's unit be clarified consistent with his conclusions herein.

exclusions as prescribed by the Order and the decisions of the Assistant Secretary:

> management officials, supervisors, employees engaged in Federal personnel work other than in a purely clerical capacity, confidential employees, Trademark professionals, 3/ and nonprofessionals.

In this regard, the PTO asserts that certain Patent Attorneys, Management Analysts, Program Analysts, and an Information Systems Analyst should be excluded from the POPA's unit as management officials within the meaning of the Order and/or as confidential employees. 4/ It asserts, further, that its Personnel Psychologist should be excluded from the POPA's unit as a management official within the meaning of the Order, a confidential employee, and/or an employee engaged in Federal personnel work other than in a purely clerical capacity, and seeks to clarify the POPA's unit accordingly. Conversely, the POPA contends that all of the employees in the disputed classifications are within its exclusively recognized unit.

The mission of the PTO is essentially to examine applications for trademark registrations and patents to determine if they meet the requirements of law and, upon such determination, issue patents and certificates of trademark registration. Organizationally, overall direction of the PTO is vested in the Commissioner of Patents and Trademarks who has several "offices," three Assistant Commissioners, and a Solicitor who report directly to him. The Assistant Commissioners and the Solicitor, in turn, have various "offices" reporting to them. With the exception of the Patent Attorneys, who report to the Solicitor, and one Program Analyst, who is located in a sub-unit of the Commissioner's Office, all of the employees in dispute herein are employed in "offices" which report to the PTO's Assistant Commissioner for Administration.

3/ The Patent Office Employees Union, Local 2600, also a party to this proceeding, is the exclusive representative of all nonprofessional employees at the PTO while the Trademark Society, Inc., which is not a party to this proceeding, is the exclusive representative of the PTO's trademark professionals. At the hearing in this matter, all parties to the proceeding stipulated that the disputed employees herein are professional employees within the meaning of the Order.

4/ In Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69, the Assistant Secretary held that it would effectuate the purposes of the Order to exclude from bargaining units employees who assist and act in a confidential capacity to persons who formulate and effectuate management policies in the field of labor relations.

A/SLMR No. 856

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES PATENT AND TRADEMARK OFFICE

Activity-Petitioner

and Case No. 22-6607(AC/CU)

PATENT OFFICE PROFESSIONAL ASSOCIATION

Labor Organization

and

PATENT OFFICE EMPLOYEES UNION, LOCAL 2600

Labor Organization

DECISION AND ORDER AMENDING AND CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Jonathan Kaufmann. 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 briefs filed by the parties, the Assistant Secretary finds:

The Activity-Petitioner, the United States Patent and Trademark Office, 2/ hereinafter called PTO, seeks to amend the unit for which the POPA is the exclusive representative by adding the following specific

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1/ At the hearing in this matter and in its post-hearing brief, the Patent Office Professional Association, hereinafter called POPA, made several motions to dismiss the instant petition based on the specificity of the petition, the alleged inadequacy of the posting of the petition, and the failure of the Activity-Petitioner to answer certain POPA written "interrogatories." These motions are hereby denied.

2/ Previously, in this same case, the Regional Administrator amended the POPA's unit recognition by changing the name of the Activity-Petitioner from the United States Patent Office to the United States Patent and Trademark Office.

The POPA is the exclusive representative of a unit of essentially all professional employees at the PTO other than Trademark professionals. In this regard, the record reveals that, when, on September 3, 1965, and pursuant to Executive Order 10988, the POPA was recognized by the PTO as the exclusive representative of the aforementioned unit, no specific exclusions from the unit were set forth other than nonprofessionals and Trademark professionals employed by the PTO, although the parties' most recent negotiated agreement, executed in December 1972, contains a unit description which excludes, in essence, management officials, supervisors and employees engaged in Federal personnel work other than in a purely clerical capacity. Under these circumstances, and inasmuch as PTO's request to amend the POPA's unit recognition is consistent with the specific requirements of Executive Order 11491, as amended, I shall amend the POPA's unit recognition as set forth below.

With respect to the particular employees whose status is in dispute herein, I make the following findings and conclusions: 5/

Jack E. Armore, Fred E. McKelvey, John W. Dewhirst, Fred W. Sherling, Gerald H. Bjorge, Robert D. Edmonds, Henry W. Tarring III, Thomas E. Lynch, Harry I. Moatz, Patent Attorneys, GS-1222-15, 14, and 13, Office of the Solicitor

The PTO asserts that as the above-named employees represent or advise PTO management on various labor relations matters they are management officials and/or confidential employees and should, therefore, be excluded from the POPA's exclusively recognized unit.

5/ Subsequent to the hearing in this matter, the PTO stipulated that Steve L. Mathis, Management Analyst, GS-343-5, Jean E. Burkhart, Program Analyst, GS-345-5, William J. Maykrantz, Information Systems Analyst, GS-301-13 and Franz A. Lancaster, Program Analyst, GS-345-9 did not meet the criteria for exclusion as management officials and/or confidential employees and, therefore, should be included in the POPA's exclusively recognized unit. Under such circumstances, I view the PTO's stipulation as, in effect, a withdrawal of the request for clarification with respect to these employees. Accordingly, I approve the withdrawal request and, therefore, find it unnecessary to make a determination as to these particular employees. Cf. New Jersey Department of Defense, A/SLMR No. 121. Also, during and subsequent to the hearing in this matter, the parties stipulated that Raphael Lupo and Roger Holland are no longer employees of the PTO and, accordingly, I shall make no finding as to their status. Moreover, in their post-hearing briefs, the parties, in essence, noted that Linus Liddle was no longer in the position described in the hearing record due to a promotion to a supervisory position. Accordingly, I find it unnecessary to make a determination with respect to this individual. Finally, the PTO indicated in its post-hearing brief that Jankwell Rossen is no longer in the position described in the hearing record due to reassignment and, accordingly, I shall make no determination as to his status.

The record indicates that while these employees' primary function is to represent the Commissioner of Patents and Trademarks in suits where he is a defendant, they may also be assigned to represent management at administrative and judicial hearings involving such matters as performance rating appeals, grievances, adverse personnel actions, and equal employment opportunity matters. However, the evidence establishes that labor relations matters are a minor activity within the Office of the Solicitor and that only two members of the Solicitor's staff, Armore and McKelvey, are involved in labor relations matters on a continuing basis. Thus, Armore is responsible for reviewing proposed adverse personnel actions for legal sufficiency and has the capacity, based on his findings, to make recommendations without prior review by the Solicitor as to the disposition of such proposals, which recommendations generally have been accepted. He has also represented the PTO at adverse personnel action appeal hearings and has reviewed negotiated agreements as to their conformance with law and regulations prior to the signing of such agreements by the Commissioner of Patents and Trademarks. With respect to McKelvey, the record reveals that he is the "general representative" on the PTO's Performance Rating Board of Review. In this capacity, McKelvey is responsible for representing PTO officials at administrative hearings before the aforementioned Board called for the purpose of adjudicating disputed performance evaluations of PTO employees. Further, he serves as a "grievance examiner" to the "Deciding Official" (generally an Assistant Commissioner) under the POPA's negotiated grievance procedure. In this capacity, McKelvey conducts investigations into the circumstances surrounding a grieved act and, based on such investigations, makes recommendations as to the disposition of the grievance to the "Deciding Official" who makes the final decision. In this regard, the record indicates that McKelvey's recommendations as a "grievance examiner" have always been accepted by the "Deciding Official".

Under all of these circumstances, I find that both Armore and McKelvey serve as "representatives of management" and, thus, are, in effect, "agency management" within the meaning of Section 2(f) of the Order, clearly acting on behalf of management on a continuing basis with respect to the implementation of the Activity's labor-management relations program. Accordingly, I shall exclude them from the POPA's unit. 6/

Although the PTO contends that the other Patent Attorneys in dispute herein are also management officials and/or confidential employees because they also represent or advise PTO management on various labor

6/ Cf. United States Department of Justice, Immigration and Naturalization Service, San Francisco District, San Francisco, California, A/SLMR No. 730. In view of this disposition, I find it unnecessary to decide whether Armore and McKelvey are management officials and/or confidential employees.

relations matters, the record reveals that Dewhirst, Tarring, and Moatz have engaged in such conduct infrequently, 7/ and that Sherling, Bjorge, Edmonds, and Lynch have had no involvement in PTO labor relations matters whatsoever. Moreover, the record fails to establish that Dewhirst, Sherling, Bjorge, Edmonds, Tarring, Lynch, or Moatz have the authority to make, or to influence effectively the making of, policy necessary to the PTO with respect to personnel procedures or programs. In these circumstances, I find that the aforementioned Patent Attorneys are neither management officials nor "representatives of management" within the meaning of the Order. 8/ Additionally, based on the aforementioned Patent Attorneys' past sporadic involvement in labor relations matters, and the highly speculative nature of any future involvement in such matters, I find that they are not confidential employees. Accordingly, they should be included in the POPA's exclusively recognized unit. 9/

John R. Bain, Mary E. Turowski, Tyrone B. Ayers, Carolyn A. Bryant, Sharon L. Holmes, Herbert M. Hoop, Louis L. Primovich, Florence R. Stanmore, Carol A. Hearn, and Susan J. Nelms, Management Analysts, GS-343-13, 12, 11, 7 and 5, Office of Management and Organization

The PTO asserts that the above-named employees are management officials and/or confidential employees and should, therefore, be excluded from the POPA's unit.

7/ In this regard, the record indicates that Dewhirst has advised PTO officials on approximately two occasions with respect to the Privacy Act implications of certain negotiated agreement proposals set forth by the POPA; that approximately four years prior to the hearing in this matter Tarring was assigned to represent the PTO at an adverse action appeal before the Civil Service Commission which was withdrawn before the hearing occurred; and that approximately two weeks prior to the hearing in this matter Moatz was assigned to represent the PTO at an equal employment opportunity hearing.

8/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135. Compare United States Department of Justice, etc., cited above, at footnote 6, and United States Department of the Treasury, Office of Regional Counsel, Western Region, A/SLMR No. 161, FLRC No. 72A-32.

9/ Cf. United States Department of Health, Education and Welfare, Regional Office VI, A/SLMR No. 266, and Virginia National Guard Headquarters, cited above, at footnote 4. With respect to the Federal Labor Relations Council's policy on the inclusion of attorneys in units of exclusive recognition, see Section I of the Report and Recommendations of the Federal Labor Relations Council (1975), which accompanied the issuance of Executive Order 11838.

The record indicates that these Management Analysts are within a single career ladder ranging from GS-5 to GS-13, with Analysts at the GS-11, 12, and 13 levels considered "senior analysts", and with those at the GS-5, 7, and 9 levels considered "junior analysts." They are engaged in the same general overall duties, performing various organizational studies involving work flow, work analysis and resource analysis pursuant to the direction of the Director of the Office of Management Organization, with the senior analysts performing more complex assignments as well as acting as "team leaders" when teams are utilized. Recommendations contained in the organizational studies may result in new organizational structures, new work procedures, or changes in staffing patterns. The record reflects that these Analysts' studies and resulting recommendations are developed within generally established policies and guidelines and that they are implemented only after review and approval by higher management authority. In this regard, the record indicates that the senior management analysts may be present during such review and approval sessions for the purpose of supporting, justifying, and/or clarifying their recommendations. At times, the management analysts herein may also be involved in the implementaion of their recommendations after approval, but the evidence establishes that such implementation, which may include the teaching of new work procedures to employees, does not proceed without the assurance that higher management is in accord with the implementation plan. Certain senior Management Analysts may also brief representatives of labor organizations at the PTO with respect to their study or implementation activities but, it appears from the record, that they do not have the authority to change implementation plans previously approved by higher management based on any labor organization comments made at such briefing meetings.

Aside from their general duties described above, the record reveals that certain senior Management Analysts also have or have had other individual duties. Thus, for example, from approximately April 1975, through April 1976, Bain was involved in writing certain procedures for the implementation of the Privacy Act at the PTO. However, he does not have an ongoing assignment in this area, and the record characterizes the assignment in the particular instance as a "once in a lifetime" assignment. On the other hand, Turowski spends approximately 75 percent of her time in the implementation of the Patent Cooperation Treaty (hereinafter called PCT) a world-wide, although as yet a nonoperational, agreement to harmonize the formalities of Patent applications. In this regard, the record reveals that in the past two years, she has attended two international conferences concerning the form and implementation of the PCT as one of three United States delegates. However, the record reveals also that the decision as to what the United States position would be at the conferences in which she had certain input was developed prior to being presented at the conferences with all position papers submitted to higher management authority for review.

The record indicates also that the Office of Management Organization and, more specifically, Primovich, has been delegated the authority to coordinate the acquisition and placement of copying machines within the PTO. Thus, any office within the PTO wishing to obtain new copying equipment funnels its request through Primovich who conducts a copier evaluation study based on generally established criteria, including cost and volume or projected volume, and then either recommends a particular copier or denies the request based on his delegated authority. However, if he is going to deny such a request, or has uncertainties, he generally consults with the Director of his office. An approved request is sent over Primovich's signature to the PTO's Procurement Office who handles the purchase order. However, it appears that the decision to acquire certain additional copying machines for use within the PTO was made by persons other than Primovich.

Under all of the circumstances herein, I find that none of the Management Analysts at issue are management officials within the meaning of the Order. Thus, in my view, the evidence fails to establish that such employees have the authority to make, or influence effectively, PTO policies with respect to personnel, procedures, or programs. Rather, I find that in their various job functions they serve as experts or resource persons rendering resource information or recommendations with respect to the implementation of existing policies. 10/ Nor do I find that their involvement in recommendations concerning PTO staffing patterns warrants their exclusion from the POPA's exclusively recognized unit as employees engaged in non-clerical Federal personnel work within the meaning of Section 10(b)(2) of the Order. 11/ In addition, I find that the Management Analysts herein are not confidential employees. 12/ Thus,

10/ See Department of the Army, Tooele Army Depot, Tooele, Utah, A/SLMR No. 717; Energy Research and Development Administration, Headquarters, A/SLMR No. 634; Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota, A/SLMR No. 621; Department of Health, Education and Welfare, Office of the Secretary, Headquarters, A/SLMR No. 596; and Department of the Air Force, Arnold Engineering Development Center, etc., cited above, at footnote 8.

11/ Cf. Defense Supply Agency, Defense Depot Tracy, Tracy, California, A/SLMR No. 386.

12/ See Virginia Air National Guard Headquarters, cited above, at footnote 4. In that decision, the Assistant Secretary held that employees who merely have access to personnel or statistical information would not be deemed to be confidential employees within his definition of the term.

while these employees may have access to various "confidential" records if needed and may be privy to contemplated staffing and/or general disciplinary problems of line management because of their rapport with such managers, the record clearly establishes that their studies do not directly concern labor relations matters, and that it is not part of their designated duties to act in a confidential capacity with respect to any specific labor relations matters. 13/

Frank S. Abate, Personnel Psychologist, GS-108-12, Office of Personnel

The PTO asserts that Abate is a management official, confidential employee, and/or an employee engaged in Federal personnel work other than in a purely clerical capacity and should, therefore, be excluded from the POPA's unit.

The record indicates that Abate, who works under the general supervision of the Employment and Classification Officer within the PTO's Office of Personnel, has responsibilities in two general areas: (1) implementing the PTO's Alcohol and Drug Abuse Program, and (2) designing and conducting attitudinal surveys for the purpose of improving employee morale and motivation. In carrying out these responsibilities, he provides counseling for employees with behavioral problems, has access to employee personnel files, and interacts with PTO Personnel Specialists in determining how to deal with specific problem employees. Thus, the record reveals that if the PTO's Personnel Office suspects that there is an emotional or medical problem behind a disciplinary problem, Abate is asked to investigate the situation and that the PTO's Personnel Specialists generally check with Abate prior to taking disciplinary action against an employee to ascertain whether the employee has "unique problems". Moreover, the record reflects that Abate is privy to essentially the same personnel related information that Personnel Specialists within the PTO's Office of Personnel are privy to.

Under these circumstances, I find that Abate is engaged in non-clerical Federal personnel work for the PTO. As Section 10(b)(2) of the Order specifically excludes employees engaged in Federal personnel work in other than a purely clerical capacity from units of exclusive recognition,

13/ Although, in its post hearing brief, the PTO asserted also "that the official duties of these employees on behalf of agency management are such that their inclusion in a bargaining unit results in a conflict or apparent conflict of interest as contemplated by Section 1(b) of the Order", it is noted that Section 1(b) of the Order refers to a conflict of interest regarding participation in the management of a labor organization, and does not preclude membership in such an organization and inclusion within an exclusively recognized unit.

I shall exclude Abate from the POPA's unit. 14/

Henry C. Rosicky, Jr., Information Systems Analyst, GS-301-13 and Alvin L. Dorsey, Gladys B. Dates, Theodore S. Miseveth and Miguel B. Perez, Program Analysts, GS-345-12, 11, and 7, Program Measurement System Staff 15/

The PTO asserts that the above named employees are management officials and/or confidential employees and should, therefore, be excluded from the POPA's exclusively recognized unit.

Despite their different position titles, the record indicates that these employees perform essentially the same duties, sometimes operating as a team, under common supervision with the only distinctions being the complexity of matters assigned to each and the degree of supervision required, although all are "actively" supervised. Among their duties, is the implementation throughout the PTO of the Program Measurement System, a time reporting system, developed and introduced into the PTO by the PTO's Assistant Commissioner for Administration, which records all specific tasks performed by individual employees, the time spent performing these tasks, the quantity of acceptable output, and the percentage of the employees' quantitative performance against the established production standard for the tasks. In this regard, the record reflects that the implementation of the Program Management System evolves from generally established policies developed by the Assistant Commissioner from which these employees may not substantially deviate without the approval of their supervisor and/or the chain of command in the affected area. The record also indicates that these employees perform manpower utilization studies, which are used to determine whether available manpower is sufficient to perform desired tasks, and work measurement studies which, in effect, are time studies from which specific quantitative production standards for given tasks are established. With respect to the preparation of these studies, the evidence establishes that generally established guidelines and procedures are followed.

14/ In view of the disposition herein, I find it unnecessary to decide whether Abate is a management official and/or a confidential employee.

15/ Prior to the hearing in this matter these employees were located within the Evaluation Division of the Office of Program Planning and Evaluation. However, a reorganization at the PTO, which apparently occurred while the instant hearing was in progress, resulted in the abolition of the Office of Program Planning and Evaluation. Although the former Evaluation Division is now called the Program Measurement System Staff, the record reflects that the duties of of these employees as described at the hearing herein did not change as a result of the reorganization.

Moreover, all final reports and recommendations arising from such studies 16/ are reviewed by these employees' supervisor, who may make substantive content changes in them, and are submitted to the managers in the areas studied, over the supervisor's signature, with the final determination of acceptance or rejection of recommendations contained therein made by higher management authority.

Based on the foregoing circumstances, I find that the Information Systems Analyst and the Program Analysts involved herein are not management officials within the meaning of the Order. Thus, in my view, the evidence fails to establish that these employees have the authority to make, or influence effectively, PTO policies with respect to personnel, procedures, or programs. Rather, I find that in their various job functions they serve as experts or resource persons rendering resource information or recommendations with respect to existing policies.

As noted above, the Activity asserts also that these employees are confidential employees. However, while the record indicates that they have access to certain personnel records and other statistical "confidential" information concerning employee productivity matters in connection with specific studies, the evidence does not establish that these employees serve in a confidential capacity to an individual or individuals involved in the formulation and effectuation of management policies in the field of labor relations. As noted above, employees who merely have access to personnel or statistical information will not be deemed to be confidential employees. Accordingly, I conclude that these employees should not be excluded from the POPA's exclusively recognized unit on this basis. 17/

Vaughan L. Beucler, Program Analyst, GS-345-14, Office of Planning and Evaluation

The PTO asserts that Beucler is a management official and/or a confidential employee. Beucler is employed in the Office of Planning and Evaluation, a three person "sub-unit" in the Office of the Commissioner of Patents and Trademarks, which "sub-unit" receives its assignments from the Commissioner. This unit performs program planning and evaluation studies involving the various major activities at the PTO

16/ The record establishes that Miseveth and Perez, Program Analysts at the GS-7 level and characterized as "trainees" by their supervisor, have not prepared any reports containing recommendations concerning changes in the policies of the PTO.

17/ See also footnote 13, above.

in order to arrive at long range objectives by which an integrated plan of action for future years for all organizational units may be developed. In this regard, the record indicates that reports and recommendations evolving from such studies may involve such matters as staffing patterns, work flow, position ceilings, overtime, automation, and productivity goals. However, the record reveals also that any of Beucler's reports which contain significant recommendations regarding policy matters are reviewed by his supervisor, the Director of the Office of Planning and Evaluation, who may make changes prior to their submission to the Commissioner. Moreover, in most instances, Beucler's supervisor, rather than Beucler himself, discusses Beucler's recommendations with the Commissioner and/or the managers of the operating units involved. 18/ Thus, the record characterizes Beucler's role as essentially one of analyzing, recommending, and justifying, through his supervisor, the recommendations he makes, with the final determination of acceptance or rejection being the prerogative of higher management authority.

Under these circumstances, I find that Beucler is not a management official within the meaning of the Order. Thus, in my view, the studies performed by Beucler do not, in effect, extend beyond that of an expert rendering resource information or recommendations with respect to the future policy issue in question. It is also clear that Beucler's role does not extend to the point of active participation as to what the future policy, in fact, will be. 19/ In addition, I find that Beucler is not a confidential employee. While the record indicates that Beucler may, at times, make certain reports and recommendations directly to the Commissioner and also has access to certain "confidential" information, including PTO budgetary positions and aggregate employee productivity records, the record reveals that his studies do not directly concern labor relations and that he does not act in a confidential capacity with respect to any labor relations matters. 20/ Rather, the evidence establishes merely that Beucler has learned of PTO labor relations matters through the PTO's "grapevine."

18/ The record reveals that Beucler will meet with the Commissioner himself to discuss his recommendations only when the topic in question is in an area in which he has "99 percent of the expertise" or when Beucler's supervisor is on vacation and Beucler is acting in his place.

19/ Cf. Department of Transportation, National Highway Traffic Safety Administration, A/SLMR No. 193.

20/ Cf. Department of the Army, Tooele Army Depot, cited above, at footnote 10, and Virginia National Guard Headquarters, cited above, at footnote 4.

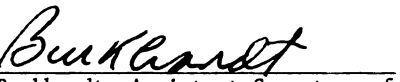
Accordingly, I find that Beucler is neither a management official nor a confidential employee and should be included in the POPA's exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the recognition granted to the Patent Office Professional Association on September 3, 1965, be, and it hereby is, amended to exclude: management officials, employees engaged in Federal personnel work other than in a purely clericial capacity, confidential employees, Trademark professionals, nonprofessionals, and supervisors as defined in the Order.

IT IS FURTHER ORDERED that the unit sought to be clarified herein, located at the United States Patent and Trademark Office, in which exclusive recognition was granted on September 3, 1965, to the Patent Office Professional Association, be, and hereby is, clarified by including in the said unit those employees or employee classifications set forth in Group A, attached hereto, and by excluding from said unit those employees or employee classifications set forth in Group B, attached hereto.

Dated, Washington, D.C.
June 13, 1977



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

GROUP A

John W. Dewhirst, Fred W. Sherling, Gerald H. Bjorge, Robert D. Edmonds, Henry W. Tarring, III, Thomas E. Lynch, and Harry I. Moatz, Patent Attorneys, GS-1222-15, 14, and 13, Office of the Solicitor

John R. Bain, Mary E. Turowski, Tyrone B. Ayers, Carolyn A. Bryant, Sharon L. Holmes, Herbert M. Hoop, Louis L. Primovich, Florence R. Stanmore, Carol A. Hearn, and Susan Nelms, Management Analysts, GS-343-13, 12, 11, 7, and 5, Office of Management and Organization

Alvin L. Dorsey, Gladys B. Dates, Theodore S. Miseveth, and Miguel B. Perez, Program Analysts, GS-345-12, 11, 7, and 5, Program Measurement Staff

Henry C. Rosicky, Jr., Informational Systems Analyst, GS-301-13, Program Measurement Staff

Vaughan L. Beucler, Program Analyst, GS-345-14, Office of Planning and Evaluation

GROUP B

Jack E. Armore and Fred E. McKelvey, Patent Attorneys, GS-1222-15, Office of the Solicitor

Frank Abate, Personnel Psychologist, GS-108-12, Office of Personnel

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

U.S. ARMY MORTUARY,
OAKLAND ARMY BASE,
OAKLAND, CALIFORNIA
A/SLMR No. 857

The Petitioner, an employee of the Activity, sought the decertification of the Intervenor, American Federation of Government Employees, Local 1157, AFL-CIO, as the exclusive representative of a unit of all General Schedule and Wage Grade employees at the Activity. The Intervenor contended that there was a current negotiated multi-unit agreement covering employees in the exclusively represented unit which constituted a bar to the petition. The Petitioner and the Activity contended that the negotiated agreement terminated, insofar as it applied to the subject exclusively represented bargaining unit, as a consequence of a reorganization and transfer of the Activity from the Military Traffic Management Command, Western Area (MTMCWA), to the Casualty and Memorial Affairs Directorate, U.S. Army Adjutant General Center (TAGCEN), and that there is no agreement bar to the petition.

The Assistant Secretary, citing Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Md., FLRC No. 74A-22, found that as a consequence of the reorganization and transfer of the Activity from MTMCWA to TAGCEN, the latter became a "successor" employer. In this regard, the Assistant Secretary noted, among other things, that the exclusively recognized unit was transferred substantially intact and its appropriateness remained unimpaired in the gaining employer. The Assistant Secretary also found insufficient evidence that the successor agency promised to, or did, in fact, assume the existing negotiated agreement. In this latter regard, he noted that TAGCEN's conduct subsequent to the transfer of the Activity was pursuant to its duty as a successor to continue to accord recognition to the incumbent exclusive representative.

The Assistant Secretary decided, pursuant to the Rules and Regulations of the Federal Labor Relations Council, to refer the following major policy issue to the Council for its consideration:

> Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the successor employer and the exclusive representative a period

of stability free from rival claims or other questions concerning majority status?

The Assistant Secretary stated that but for a possible conflict in policy, he would, for the purpose of maintaining labor relations stability following a reorganization where a successor employer emerges, allow the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative to continue in effect after the successor employer assumes control so as to afford the successor employer and exclusive representative a stable period free from the raising of questions concerning representation. The Assistant Secretary further stated that he would also allow the agreement bar to continue for the same period as would have been present had the gaining employer adopted the predecessor's agreement. Under such an approach, questions concerning representation could be raised only during the "open period" in the term of the predecessor's agreement.

A/SLMR No. 857

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY MORTUARY,
OAKLAND ARMY BASE,
OAKLAND, CALIFORNIA

Activity

and

Case No. 70-5223(DR)

WALTER D. SMITH

Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1157, AFL-CIO

Intervenor

ORDER REFERRING MAJOR POLICY ISSUE TO THE
FEDERAL LABOR RELATIONS COUNCIL

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Eric F. Norman. 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 Intervenor, American Federation of Government Employees, Local 1157, AFL-CIO, the Assistant Secretary finds:

The Petitioner, Walter D. Smith, an employee of the Activity, U.S. Army Mortuary, Oakland Army Base, Oakland, California, seeks the decertification of the Intervenor as the exclusive representative of employees of the Activity.

The record reveals that the Activity herein formerly was a component of the Military Traffic Management Command, Western Area, hereinafter called MTMCWA. At that time, the Intervenor was the exclusive representative of the certified unit composed of mortuary employees. 1/ In 1975, while the mortuary was still a component of MTMCWA, the latter and the Intervenor entered into a two-year negotiated agreement covering the mortuary unit and other units at the Oakland Army Base. 2/

Pursuant to a study conducted by the U.S. Army Adjutant General Center, hereinafter called TAGCEN, the Department of the Army transferred the ten employees of the Oakland Mortuary from MTMCWA to TAGCEN; however, the duty station of the employees remained at the Oakland Army Base. 3/

The Petitioner and the Activity assert that the transfer of the mortuary unit from MTMCWA to TAGCEN terminated the multi-unit collective bargaining agreement between MTMCWA and the Intervenor insofar as it applied to the mortuary unit. Hence, they argue that there was no agreement bar to the filing of a petition after February 15, 1976, the date on which the unit was transferred to TAGCEN. The Intervenor on the other hand, asserts that as TAGCEN is a successor employer there exists an agreement bar to the filing of a petition because the Executive Order requires the gaining command to adhere, insofar as practicable, to existing personnel policies and practices and matters affecting working conditions, maintain recognition, and to adhere to the terms of a negotiated

1/ The unit description reads: "Includes all General Schedule and Wage Grade employees engaged in receiving, reprocessing, and reshipment of remains returned from overseas, with the Memorial Division, WAMTMTS, OAB. Excluded are any management officials, supervisors, guards, and employees engaged in Federal personnel work in other than a purely clerical capacity."

2/ This agreement expired on April 20, 1977.

3/ After the transfer, the Intervenor filed a petition seeking to amend its certification by changing the name of the Activity to reflect the change in operational control. The petition was approved by the Regional Administrator, and an amendment of certification was issued on June 8, 1976. The unit description, as amended, reads:

> "Included: All General Schedule and Wage Grade employees of the mortuary function located at Oakland Army Base under the operational control of the Casualty and Memorial Affairs Directorate, the Adjutant General Center, Department of the Army, and,
>
> Excluded: All management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order."

agreement, including dues withholding, to the maximum extent possible. The Intervenor argues that until the "successor" TAGCEN has fulfilled its bargaining obligation, the prior agreement should be honored in toto, until either its expiration in April 1977, or until a new agreement is negotiated.

At the hearing, all parties stipulated that the present unit is appropriate for the purpose of exclusive recognition because the included employees share a clear and identifiable community of interest and the unit promotes effective dealings and efficiency of operations. The parties further stipulated that, subsequent to the reorganization, the mortuary employees continue to work together, share common duties, report through the same supervisory chain of command, and are subject to uniform personnel policies and practices. Further, it was stipulated that TAGCEN continued to withhold union dues in accordance with the MTMCWA agreement. The record reveals that the area of initial consideration for merit promotions at the Oakland Army Base and the applicability of Base, Department of the Army and Department of Defense regulations also remained unchanged subsequent to the reorganization.

It appears from the record that, in addition to the change in the command structure, the following matters were altered by the transfer to TAGCEN: Command personnel regulations; supervision above the first level; payroll office and pay dates; job classification appeals; personnel responsible for making disciplinary decisions above first level; competitive area for reduction-in-force; channels for equal employment opportunity grievances; and the fact that the Civilian Personnel Office no longer applied the MTMCWA agreement to mortuary employees.

In connection with the facts present in this case, I note that the Federal Labor Relations Council in its decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, FLRC No. 74A-22, determined that an agency or employing entity is a "successor" when: (1) the recognized unit is transferred substantially intact to the gaining employer; (2) the appropriateness of the unit remains unimpaired in the gaining employer; and (3) a question concerning representation is not timely raised as to the representative status of the incumbent labor organization.

I also note that the Council further held that while the gaining employer, as a "successor," assumes the same duty as the losing employer to grant recognition, this does not mean that the "successor" is required to adopt and be bound by any agreement which may have been entered into between the losing employer and the incumbent union. The Council reasoned that a contrary rule would impose upon the gaining employer an agreement entered into with a different employing entity having different objectives and different organizational and regulatory policies, disrupting the

operating capabilities of the gaining employer and the accomplishment of its assigned mission. The Council stated, however, that the gaining employer nevertheless is enjoined under the Order to adhere, insofar as practicable, to the terms of the prior agreement, including dues withholding, and to adhere to existing personnel policies and matters affecting working conditions until the "successor" has fulfilled its bargaining obligation under the Order with the incumbent union.

Based on the record herein, I find that the Casualty and Memorial Affairs Directorate of the Adjutant General Center is a "successor" activity in that the recognized unit herein was transferred substantially intact to its jurisdiction and the appropriateness of the unit remained unimpaired in the gaining employer. 4/ I find also that TAGCEN's conduct subsequent to the transfer of the mortuary unit was in accordance with its duty as a "successor" activity to continue to accord recognition to the incumbent union and that there is insufficient evidence to show that as a "successor" activity it promised to assume, or did, in fact, assume the MTMCWA negotiated agreement.

In its Defense Supply Agency decision, cited above, the Council stated that where a successorship is established there is no requirement that a new secret ballot election be conducted since the election requirement in Section 10(a) was previously satisfied at the time the previous recognition was accorded. However, the Council went on to state that if, after a reorganization, a question concerning representation is duly raised by the employees or a rival labor organization, then, as provided in the Order, a new secret ballot election would be required. 5/ The Council also indicated that the gaining employer must also be able to initiate a representation election in order to resolve its doubts as to the representative status of the incumbent. The decision, however, does not set forth any specific time frame during which representational questions can be raised.

The Council's policy set forth in its Defense Supply Agency decision, which is binding on the Assistant Secretary, of allowing questions concerning representation to be raised by employees, rival labor organizations or the gaining employer immediately subsequent to the establishment of a successorship would appear to be inconsistent with another consideration noted by the Council i.e., the maintenance of stable labor

4/ In reaching the above disposition, it was noted particularly that TAGCEN is a separate employing entity since both it and the Military Traffic Management Command are separate commands, with separate missions, functions, regulations and administration. Further, there was no evidence in the record to suggest that either Command, before or after the transfer, shared any common control or direction over their respective employees.

5/ See footnote 17 of the Council's decision in Defense Supply Agency, cited above.

relations during the transition period by requiring the "successor" employer to bargain with the incumbent union. Thus, it could be argued that allowing employees and rival labor organizations to raise representational questions during the transition period would have the effect of frustrating the efforts of the gaining employer and the incumbent union to reach an agreement by barring further negotiations until the representation question is resolved. However, as noted above, I am bound by the Council's policy set forth in the Defense Supply Agency decision.

But for a possible conflict in policy, I would, for the purpose of maintaining labor relations stability following a reorganization where a successor employer emerges, allow the agreement bar which existed pursuant to the precedessor's negotiated agreement with the exclusive representative to continue in effect after the successor employer assumes control so as to afford the successor employer and exclusive representative a stable period free from the raising of questions concerning representation. I would allow the agreement bar to continue for the same period as would have been present had the gaining employer adopted the predecessor's agreement. Under such an approach, questions concerning representation could be raised only during the "open period" in the term of the predecessor's agreement. 6/

Therefore, it is my view that this case raises the following major policy issue: Whether the Assistant Secretary can find that in a successorship situation the agreement bar which existed pursuant to the predecessor's negotiated agreement with the exclusive representative may continue in effect after the reorganization so as to afford the successor employer and the exclusive representative a period of stability free from rival claims or other questions concerning majority status?

In my judgment, the purposes of the Order will best be served by not permitting, within the period of the previous negotiated agreement, a questioning of the majority status of the incumbent union. All bar periods represent an accommodation in balancing the interest of employee freedom to choose representatives and the interest of stability in labor relations. The application of the agreement bar period to successorship situations will restore the predictability of periods when representation petitions may be filed. It will reduce administrative confusion in reorganizations; it will enable the gaining employer and incumbent representative to engage in long range planning free from unnecessary disruption; and it will promote effective dealings and efficiency of

6/ Under such a rule, since the predecessor's agreement was for a term of two years and became effective on April 29, 1975, the petition herein would be considered untimely. I have been advised administratively that the Petitioner herein filed a second petition, which is currently pending, during the open period of the predecessor's negotiated agreement.

agency operations. Under these circumstances, and pursuant to Section 2411.4 of the Rules and Regulations of the Federal Labor Relations Council, the above stated major policy issue is hereby referred to the Federal Labor Relations Council for its consideration.

Dated, Washington, D. C.
June 28, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

June 28, 1977

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,
INTERNAL REVENUE SERVICE,
SOUTHWEST REGION,
DALLAS, TEXAS
A/SLMR No. 858

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and National Treasury Employees Union, Chapter 91 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally discontinuing the practice of flexible starting and quitting times at certain of its appellate branch offices. The Respondent, citing Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., FLRC No. 71A-11 and Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486, among others, maintained that it was not obligated to bargain over a change in the starting and quitting times pursuant to Section 11(b) of the Order. It contended further that, assuming the issue to be a mandatory subject of bargaining, the Complainant waived its right to bargain when it entered into the parties' Multi-Regional Agreement in which Article 20 (Hours of Work) obligates the Respondent "to notify the [Complainant], as far in advance as possible" of any proposed change in the regular scheduled workweek which consists of five consecutive eight hour days, Monday through Friday. On the other hand, the Complainant, citing Office of Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36, among others, took the position that the issue involved is negotiable under Section 11(a) of the Order and that Article 20 did not waive its right to negotiate a change in starting and quitting times.

The Administrative Law Judge found that the Respondent had violated Section 19(a)(1) and (6) of the Order by unilaterally abolishing the optional starting and quitting times in certain of its regional appellate offices. In this regard, he noted the distinction between the Federal Labor Relations Council's decisions in Plum Island, above, and U.S. Department of Agriculture, above. Applying these decisions to the instant case he found insufficient evidence to establish that the starting and quitting times of the appellate regional offices are integrally related to and consequently determinative of the Respondent's staffing patterns. Thus, he found that the Respondent was obligated to negotiate with regard to any change in the flexible starting and quitting times. He also found insufficient evidence to establish that the Complainant had waived its right to negotiate changes in flexitime and, further, that Article 20 was only concerned with the maximum hours of work not the

starting and quitting times. The Administrative Law Judge recommended, among other things, that the Respondent refrain from unilaterally changing flexitime without first notifying and negotiating with the Complainant.

In agreement with the Administrative Law Judge, the Assistant Secretary found that the Respondent's conduct herein violated Section 19(a)(1) and (6) of the Order. Accordingly, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions, which included the return to the status quo ante.

A/SLMR No. 858

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
SOUTHWEST REGION,
DALLAS, TEXAS

Respondent

and Case No. 63-6195(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 91

Complainant

DECISION AND ORDER

On January 21, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order, and the Complainant filed an answering brief to Respondent'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 Recommended Decision and Order and the entire record in this case, including the Respondent's and the Complainant's exceptions and supporting briefs and the Complainant's

answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations to the extent consistent herein. 1/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, shall:

1. Cease and desist from:

(a) Changing the work hours schedule of its employees without notifying the National Treasury Employees Union, Chapter 91, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Rescind the memoranda of April 14 and September 2, 1975, pertaining to changes in working hours and restore the work hours schedule in effect prior to April 14, 1975, in the appellate branch offices.

(b) Notify the National Treasury Employees Union, Chapter 91, of any intended change in the work hours schedule of unit employees and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate such a change.

(c) Post at its facilities in the Southwest Region of the Department of the Treasury, Internal Revenue Service, 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 Regional Commissioner

1/ In its exceptions, the Complainant contended that, as part of the remedial order herein, the Respondent should be required to return to the status quo ante. I agree with the Complainant's contention. Thus, in my view, where, as here, there has been a unilateral change in terms and conditions of employment in violation of Section 19(a)(1) and (6) involving a subject matter within the purview of Section 11(a) of the Order, generally it will effectuate the purposes and policies of the Order to require that the Respondent reestablish the terms and conditions of employment in existence prior to the unilateral change and maintain such terms and conditions during the period in which the parties are engaged in bargaining with respect to the proposed change.

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 Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
June 28, 1977

Francis X. Burkhardt, 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 change the work hours schedule without notifying the National Treasury Employees Union, Chapter 91, the exclusive bargaining representative of our employees, and affording such representative the opportunity to meet and confer, to the extent consonant with the law and regulations, on the decision to effectuate such change.

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 rescind the memoranda of April 14 and September 2, 1975, pertaining to changes in working hours and restore the work hours schedule in effect prior to April 14, 1975, in the appellate branch offices.

WE WILL notify the National Treasury Employees Union, Chapter 91, of any intended change in the work hours of unit employees and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the decision to effectuate such change.

_____
(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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Rm. 2200, Fed. Office Bldg., 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, SOUTHWEST REGION, DALLAS, TEXAS	:	
Respondent	:	
and	:	Case No. 63-6195(CA)
NATIONAL TREASURY EMPLOYEES UNION AND NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 91	:	
Complainant	:	

DAVID N. REDA, ESQUIRE
Internal Revenue Service
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For Respondent

HENRY ROBINSON, ESQUIRE
Assistant Counsel
National Treasury Employees Union
8301 Balcones Drive, Suite 315
Austin, Texas 78759
For Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on November 7, 1975, under Executive Order 11491, as amended, by the National Treasury Employees Union and NTEU Chapter 91, (hereinafter called the Union or Complainant), against the Department of the Treasury, Internal Revenue Service,

Southwest Region, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Assistant Regional Director for the Kansas City, Missouri, Region on September 10, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by virtue of its actions in unilaterally discontinuing "the practice of flexible working hours."

A hearing was held in the captioned matter on October 29, 1976, in New Orleans, Louisiana. 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. Subsequently, both parties filed post hearing briefs which have been duly considered. The Complainant also filed a motion to strike certain portions of Respondent's brief on the ground that they contained inaccurate matter. 1/

Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive representative of a number of employees employed in the appellate branch offices of the Activity's Southwest Regional Office and a party to the Multi-Regional Agreement (MRA) negotiated in 1974 covering such employees.

The Southwest Regional Office's appellate branch offices are located in the cities of Dallas, Houston, New Orleans, Denver and Oklahoma City. Other than Oklahoma City, each of the unit employees in the appellate branch offices enjoyed several optional sets of flexible starting and quitting times. An employee could switch from one set of starting and quitting times to another set whenever daylight savings time started or ended. 2/

1/ Complainant's motion to strike is hereby denied as being without merit, since it erroneously presumes that triers of fact accept all citations of law and fact in briefs without further independent research.

2/ The employees were given their option of two or three starting times within a thirty minute period, i.e. 8 a.m., 8:15 a.m. or 8:30 a.m. Their respective quitting times would of course vary with their starting times.

Sometime during early April of 1975 the Respondent decided to abolish flexitime in the appellate branch offices. The decision to abolish flexitime was announced directly to the employees at meetings in the respective appellate branch offices. No advance notice was given to the Union of the aforementioned decision on flexitime. In fact the Union learned of Respondent's decision only through the medium of complaints from individual employees concerning same.

On April 4, 1975, Mr. Pilie, Acting President of NTEU Chapter 91, submitted a letter to Mr. Coppinger, Commissioner of the Southwest Region, wherein the Union requested negotiations on both the decision to abolish flexitime and its implementation. On April 7, the Chief of the New Orleans appellate branch office communicated directly with the employees in his office and requested their preference for one permanent starting time. On the basis of their respective responses, the starting time of 8:00 a.m. for all employees was eventually selected and announced. On April 10, 1975, Mr. Coppinger responded to Mr. Pilie's letter and requested a list of his proposals concerning the matter.

On April 14, 1975, Respondent, without any notification or discussion with the Union, unilaterally changed the starting hours at the Houston office. Thereafter, following the filing of an unfair labor practice charge by the Union predicated on the change in the Houston starting time, the parties entered into a settlement which called for, among other things, a withdrawal of the ULP charge.

On June 2, 1975, Mr. Pilie sent the Respondent his proposals on flexitime and also enclosed a Civil Service booklet thereon. Mr. Pilie made it clear in his June 2, 1975 letter that the Union would like to meet with the Respondent for purposes of discussing its proposals.

On August 1, 1975, without any prior discussions with the Union, Mr. Williams, Assistant Regional Commissioner, Appellate, wrote a letter to Mr. Pilie wherein he informed Mr. Pilie that effective September 2, 1975, the starting and quitting times would be unilaterally changed at the respective appellate branch offices in the Southwest Region. Also on August 1, 1975, Mr. Ellis, Chief, Southwest Regional Personnel Branch, wrote a letter to Mr. Pilie which was in response to Mr. Pilie's June 2, 1975

proposals on flexitime. In this letter Mr. Ellis informed the Union that

> After carefully reviewing and considering your proposal, it is management's position that the Union has, through Article 20, Section 3, waived the right to negotiate changes to a regularly scheduled work week during the life of the Agreement. It is our position that hours of work was thoroughly explored and discussed during bargaining and the language of Article 20, Section 1, is the result.
>
> Questions of negotiability aside, however, we have studied your proposal carefully and believe it would be inadvisable to adopt such a system at this time. The core time you have proposed does not assure sufficient staff to provide the service we need for our clients in the latter part of the day.

On September 2, 1975, Respondent, without further discussion with the Union, changed the starting and quitting times as announced in its August 1, 1975 letter.

Article 20 of the Multi-Regional Agreement between the Union and the Respondent which is cited in Respondent's letter supra, and which is applicable to the employees involved herein, reads as follows:

HOURS OF WORK

Section 1.
The normal scheduled work week will consist of five (5) consecutive eight (8) hour days. Monday through Friday.

Section 2.
The Employer may establish special tours of duty not to exceed eight (8) hours a day or forty (40) hours a week to enable employees to take educational courses at their expense.

Section 3.
Prior to implementing a general change in any regularly scheduled work week, the Employer agrees to notify the Union, as far in advance as possible.

According to the record testimony, the above quoted provision of the Multi-Regional Agreement is tailored after the Second Multi-District Agreement between Respondent and the Union which covers the Respondent's employees working in various District Offices who are also represented by the Union. Both the first and second Multi-District Agreements contained similar Articles dealing with "Hours of Work." The only difference in the Articles for the years 1973 and 1974 appears in Section 3. Thus, in the 1973 Multi-District Agreement the Employer agrees to "consult" with the Union as far in advance as possible prior to implementing a change in any regularly scheduled work week. In the 1974 Multi-District Agreement the Employer agrees to "notify" rather than "consult." It is the "notify" which is included in the Multi-Regional Agreement involved in the instant proceedings. According to the record, "consult" was changed to "notify" in order avoid reaching a specific definition of the meaning of "consult" which at the time was being considered by the Federal Labor Relations Council in the context of a decision of the Assistant Secretary of Labor for Labor-Management Relations. Although the record sets forth the reasons for the change from "consult" to "notify," the record is almost barren of any evidence bearing on the meaning of Article 20, Hours of Work. In fact the only evidence concerning Article 20 appears in the deposition of Russell Bowden. According to Mr. Bowden, at the time the parties reached Article 20 Hours of Work in the negotiations leading up to the second Multi-District Agreement most of the contract had already been agreed upon. The Union proposed a section on variable time for working housewives. This was later abandoned when the negotiators realized that they had almost covered the complete contract and were at the end of negotiations. The parties thereupon, without any further discussion, agreed to incorporate the language from their earlier agreement and change "consult" in Section 3 of Article 20 to "notify." Subsequently, Article 20 of the 1974 Multi-District Agreement was incorporated into the Multi-Regional Agreement of 1974, again, without any meaningful discussion. Other than the foregoing there is no evidence in the record bearing on the meaning of Article 20, Hours of Work, as it applies to starting and quitting times.

With respect to the reasons for the unilateral change in

flexitime, management witnesses testified that it was the intent of the Respondent to make the Appellate Offices' hours of work coincide with those in the District Office. Other than the foregoing, no probative evidence was introduced which would support Respondent's contention that the failure to change the flexitime schedules of the employees in the appellate offices would have a distinct or significant effect on the staffing requirements or operations of the Agency.

Discussion and Conclusions

Respondent takes the position that inasmuch as starting and quitting times are integrally related to "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty," as set forth in Section 11(b) of the Order, it is under no obligation to bargain with the Union concerning its decision to change same. In support of its position in this regard, Respondent relies on the Federal Labor Relations Council's decision in Plum Island Animal Disease Laboratory, Department of Agriculture, FLRC No. 74A-11 (July 9, 1971). Respondent further argues that even assuming an obligation to bargain, Complainant waived any rights it may have had in relation thereto by virtue of Article 20 of the Multi-Regional Agreement which obligates the Respondent to only give notice of any proposed change in the regularly scheduled work week.

The Complainant, on the other hand, relying specifically on the Council decision in American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (Supplemental Decision (1975) Report No. 73), takes the position that starting and quitting times are negotiable subject matter under Section 11(a) of the Order; the Union did not waive its right to negotiate by signing the contract containing Article 20, Hours of Work; and that in any event, any possible waiver was nullified by a settlement in a prior unfair labor practice proceeding.

In Plum Island, supra, the Council found that a reduction in shifts from three to two andthe consequent change in the amount of employees on the remaining two

shifts and tours of duty was integrally related to the staffing patterns of the agency and hence non-negotiable. Under Section 11(b) of the Order.

In the U.S. Department of Agriculture case, supra, the Council concluded that Union proposals concerning the basic workweek and the starting times for the agency's food inspectors "is clearly not excluded from the agency's obligation to negotiate under the 'staffing pattern' provisions of Section 11(b)." Citing an earlier decision in Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, FLRC No. 71A-52 (November 24, 1972, Report No. 31), wherein an agency was also found obligated to bargain with a union concerning a union proposal on the basic workweek and hours of work of unit employees, the Council stated:

> In summary, therefore, as decided by the Council in Plum Island, Charleston, FLRC No. 71A-52, and related cases, a proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under Section 11(b) unless, based on the special circumstances of a particular case (as in Plum Island), the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e. the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency.

Applying the above principles to the U.S. Department of Agriculture, FLRC No. 73A-76, the Council went on to find that the proposal did not fall within the Section 11(b) exclusion

> For unlike in Plum Island, the Union's proposal here is not shown to be integrally related to and determinative of the types of employees assigned to the proposed tours of duty of the agency: All employees on each tour in the present case would continue to be food inspectors; whereas in Plum Island the Union proposal extended to changes in the types of the employees to be assigned to the new fixed

> shifts and the rotating shifts, which the agency intended to result in improved staffing. Also unlike in Plum Island, the subject proposal would not be integrally related to and determinative of the numbers of employees assigned to the proposed tours. The proposed changes here relate only to the days of the basic work week and the range of starting times of that work week, which would impact on overtime, but not on the numbers of employees assigned to tours; whereas in Plum Island the Union's proposal would have required bargaining on the elimination of the rotating third shift in one laboratory, and the reassignment of employees to two new shifts and to the rotating shifts, which of necessity involved the numbers of employees assigned to particular tours of duty.

Based upon the foregoing analysis of the Council, I find that the evidence is insufficient to establish that the starting and quitting times of the employees in the appellate offices are integrally related to and consequently determinative of the staffing patterns of the Respondent, i.e. the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the Respondent agency. In these circumstances, Respondent's actions do not fall within the exception set forth in Section 11(b) of the Order. Accordingly, I find that the Respondent is under an obligation to bargain and negotiate any changes in the flexible starting and quitting times. I further find that the Respondent has failed in such obligation. 3/

Lastly, contrary to the contention of the Respondent, I find that the Union has not waived its right to negotiate changes in "flexitime" by virtue of Article 20 of the Multi-Regional Agreement to which the Union is a signatory. A literal reading of Article 20 indicates that it is only concerned with the "Hours of Work" and not the starting and quitting times. Thus, Article 20 sets forth the maximum

3/ See Southeast Exchange Region of the Army and Air Force Exchange Service, A/SLMR No. 656, for a similar analysis and result.

hours. In view of the foregoing and particularly in the absence of any probative evidence in the record concerning the negotiations leading up to Article 20 which would support the broader interpretation urged by the Respondent, insufficient basis exists for a finding that the Union has waived its right to negotiate about any changes in flexitime. 4/

Based upon the foregoing considerations, I find that the Respondent has violated Sections 19(a)(1) and (6) of the Order by virtue of its actions in unilaterally abolishing the optional starting and quitting times in its appellate offices without negotiating with the Union.

Recommendation

Having found that Respondent has engaged in conduct prohibited by Sections 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the order hereinafter set forth which is designed to effectuate the policies of Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, shall:

1. Cease and desist from:

(a) Instituting a change in work hours of employees represented exlcusively by the National Treasury Employees Union, NTEU, Chapter 91, without notifying the National Treasury Employees Union, NTEU, Chapter 91, and affording such representative the opportunity to meet and confer on the decision to effectuate such a change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise

4/ Cf. NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223 wherein the Assistant Secretary made it clear that in order to establish a waiver, "such waiver must be clear and unmistakable."

of their rights assured by Executive Order 11491, as amended.

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

(a) Notify the National Treasury Employees Union, NTEU, Chapter 91, of any intended change in work hours of unit employees and, upon request, meet and confer in good faith on such intended change.

(b) Post at its facilities in the Southwest Region of the Department of the Treasury, Internal Revenue Service, Southwest Region, 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 Commissioner 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 Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: January 21, 1977
Washington, D.C.

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 refuse to meet and confer in good faith by instituting a change in work hours of employees exclusively represented by the National Treasury Employees Union, NTEU Chapter 91, without notifying National Treasury Employees Union, NTEU Chapter 91, and affording such representative the opportunity to meet and confer on the decision to effectuate such change.

WE WILL notify the National Treasury Employees Union, NTEU Chapter 91, of any intended change in work hours of unit employees and, upon request, meet and confer in good faith on such intended change.

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 Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: 911 Walnut Street, Room 2200, Kansas City, Missouri 64106.

June 29, 1977

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,
INTERNAL REVENUE SERVICE,
BROOKHAVEN SERVICE CENTER
A/SLMR No. 859

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and its Chapter No. 099 alleging that the Respondent had: (1) unilaterally altered the negotiated grievance procedure after the negotiated agreement had expired by eliminating the arbitration provision of such negotiated agreement; (2) refused to process grievances filed thereafter pursuant to the agency grievance procedure; and (3) attempted to bargain directly with unit employees through a memorandum of the Respondent's Commissioner to unit employees dated May 29, 1975, concerning the expiration of the negotiated agreement, all in violation of Section 19(a)(1) and (6) of the Order. The Respondent took the position that the "institutional benefits" of the negotiated agreement, which were those agreement provisions concerning benefits accruing to the NTEU as an organization, as opposed to those agreement provisions concerning the terms and conditions accruing to the unit employees, did not continue after the expiration of a negotiated agreement. Therefore, the Respondent contended that its elimination of the arbitration provision, which in its view was one of those "institutional benefits," was not an improper unilateral change of terms and conditions of employment and that the Commissioner's memorandum to unit employees was intended only to communicate to the unit employees that their terms and conditions of employment would not change upon the negotiated agreement's expiration. With respect to the aspect of the unfair labor practice complaint alleging a failure to process grievances pursuant to the agency grievance procedure, the Respondent contended that the negotiated grievance procedure was still available to unit employees. The Respondent also contended, with respect to the aspect of the unfair labor practice complaint alleging that the Commissioner's memorandum constituted direct bargaining with unit employees, that such allegation should be dismissed because the NTEU had raised the same issue in another unfair labor practice complaint proceeding and because no pre-complaint charge had been filed with respect to this allegation as required by the Assistant Secretary's Regulations.

The Assistant Secretary adopted the Administrative Law Judge's findings that the aspect of the complaint, alleging that the Commissioner's memorandum to unit employees dated May 29, 1975, constituted direct bargaining with unit employees, be dismissed. In this regard the Administrative Law Judge concluded, and the Assistant Secretary agreed, that the issue raised was identical to an issue previously raised in another unfair labor practice complaint before the Assistant Secretary. He noted that it is contrary to the basic legal concepts of res judicata and collateral estoppel to allow simultaneous litigation of the same issue arising out of the same set of facts in two different unfair labor practice proceedings before the same forum.

The Assistant Secretary also adopted the Administrative Law Judge's finding that the aspect of the complaint alleging that the Respondent had failed to process grievances filed pursuant to the agency grievance procedure in violation of Section 19(a)(1) and (6) of the Order be dismissed. Thus, the Administrative Law Judge concluded, and the Assistant Secretary agreed, that it has consistently been held that, absent anti-union animus, allegations of violations of unilaterally established agency grievance procedures, even if proven, do not constitute violations of the Order.

The Assistant Secretary also agreed with the Administrative Law Judge's ultimate conclusion that the Respondent violated Section 19(a)(1) and (6) of the Order with respect to the aspect of the unfair labor practice complaint alleging that the arbitration provision of the negotiated grievance procedure had been unilaterally eliminated after expiration of the parties' negotiated agreement. In this regard, the Assistant Secretary noted that it had been found previously in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et. al., A/SLMR No. 806, that only those rights and privileges which are based solely on the existence of a written agreement, in effect, terminate with the expiration of a negotiated agreement. In the Assistant Secretary's view, arbitration was not one of those rights or privileges uniquely tied to a written agreement which terminates upon the expiration of a Federal sector negotiated agreement. Rather, he found that generally arbitration, once agreed upon by the parties as the final step for the settling of disputes arising under a negotiated agreement, continued thereafter as a term and condition of employment unless it was expressly agreed by the parties that it terminated with the expiration of the agreement.

Accordingly, the Assistant Secretary ordered that the Respondent take certain affirmative action with respect to the violation of Section 19(a)(1) and (6) found, and that the complaint, insofar as it alleges additional violations of the Order, be dismissed.

A/SLMR No. 859

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
BROOKHAVEN SERVICE CENTER

Respondent

and

Case No. 30-6612(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND CHAPTER NO. 099, NTEU

Complainant

DECISION AND ORDER

On November 17, 1976, Administrative Law Judge Garvin Lee Oliver issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. The Administrative Law Judge found other alleged conduct of the Respondent not to be violative of the Order. Thereafter, the Respondent and the Complainant filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by the parties, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, except as modified below. 1/

In his Recommended Decision and Order, the Administrative Law Judge found that the Respondent unilaterally altered terms and conditions of employment by making changes in the negotiated grievance procedure, including abolishing the arbitration provision in the parties' negotiated agreement, in violation of Section 19(a)(1) and (6) of the Order. In this regard, the Administrative Law Judge applied the Assistant Secretary's decision in U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, which held that, when an impasse in negotiations has been reached and one of the parties to such negotiations exercises its option under Section 17 of the Order to request the services of the Federal Service Impasses Panel, then "...it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in terms and conditions of employment can be effectuated." Applying this decision to the instant case, the Administrative Law Judge found that the Respondent's failure to maintain the status quo, i.e., the complete negotiated grievance procedure, including arbitration as the final step, after an impasse in negotiations had been reached, constituted a unilateral change in terms and conditions of employment in violation of Section 19(a)(1) and (6) of the Order. In reaching his conclusion, the Administrative Law Judge noted that since Federal employees are prohibited from striking, arbitration may not, as in the private sector, be viewed as a quid pro quo for waiving the right to strike. Consequently, the Administrative Law Judge was of the view that arbitration should be viewed as part of the negotiated grievance procedure and as an established condition of employment which continued after the expiration of a negotiated agreement.

In agreement with the Administrative Law Judge's conclusion, I find that the Respondent violated Section 19(a)(1) and (6) of the Order by

1/ In its exceptions to the Administrative Law Judge's Recommended Decision and Order, the Respondent argued, among other things, that the allegation in the complaint that there had been a unilateral change in the negotiated grievance procedure should be dismissed under the provisions of Section 203.2 of the Assistant Secretary's Regulations, as there had been no pre-complaint charge filed with respect to this allegation. However, as the Respondent raised this issue for the first time in its exceptions to the Administrative Law Judge's Recommended Decision and Order, and as the merits of the unilateral change allegation were fully litigated at the hearing, I find that dismissal of the allegation on procedural grounds is unwarranted. See Veterans Administration Hospital, Charleston, South Carolina, A/SLMR No. 87.

unilaterally excluding arbitration from the negotiated grievance procedure following the expiration of the parties' negotiated agreement. Thus, it has been found previously in Internal Revenue Service, Ogden Service Center, and Internal Revenue Service, et. al., A/SLMR No. 806, that, "...only those rights and privileges which are based solely on the existence of a written agreement - e.g., checkoff privileges - in effect, terminated with the expiration of a negotiated agreement." In my view, arbitration is not one of those rights or privileges uniquely tied to a written agreement which terminates upon the expiration of a Federal sector negotiated agreement. Rather, I find that arbitration, once agreed upon by the parties as the final step for the settling of disputes arising under a negotiated agreement, continues thereafter as a term and condition of employment, unless the parties have expressly agreed that it terminates with the expiration of such negotiated agreement. 2/ Noted in this regard was the Study Committee's Report and Recommendation on Labor-Management Relations in the Federal Service, August 1969, (Section G), in which the Study Committee found "that arbitration of grievances has worked well and has benefited both employees and agencies." 3/ Under these circumstances, I adopt the Administrative Law Judge's conclusion that the Respondent's conduct in unilaterally altering the parties' negotiated grievance-arbitration procedure was in violation of Section 19(a)(1) and (6) of the Order.

2/ This is not to say that an activity may not unilaterally change a term or condition of employment if such change does not exceed the scope of its proposals made in prior negotiations, and if such change is made after the activity has bargained to impasse in good faith, and where the matter involved has not been submitted to the Federal Service Impasses Panel pursuant to Section 17 of the Order. See U.S. Army Corps of Engineers, Philadelphia District, cited above.

3/ Moreover, it was noted particularly that the Supreme Court recently held in Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionary Workers Union, AFL-CIO, 94 L.R.R.M. 2753 (March 7, 1977), which involved a request by a union to arbitrate a dispute over severance pay which arose after the expiration of the parties' negotiated agreement, that, "where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication." In this regard, the Supreme Court stated that, "[t]he parties must be deemed to have been conscious of this policy [i.e., the presumptions favoring arbitrability established by the Courts] when they agree to resolve their contractual differences through arbitration." Consequently, the Court concluded that, "...the parties' failure to exclude from arbitrability contract disputes arising after termination,...affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship."

ORDER 4/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, shall:

1. Cease and desist from:

(a) Changing the negotiated grievance-arbitration procedure, or any other term or condition of employment which is not based solely on the existence of a written agreement, following the expiration of the negotiated agreement without notifying and, upon request, meeting and conferring with the National Treasury Employees Union, Chapter No. 099, the exclusive representative of its unit employees.

(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 policies of Executive Order 11491, as amended. 5/

(a) Post at the facilities of the Internal Revenue Service, Brookhaven Service Center, 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 Brookhaven Service 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 of the Brookhaven Service Center shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

4/ In its exceptions to the Administrative Law Judge's Recommended Order in the subject case, the Complainant contended that the Respondent should be ordered to entertain the grievances which it refused to process through the agency grievance procedure. As no evidence was presented at the hearing that the Complainant ever attempted to process the subject grievances through the negotiated grievance procedure, and noting my adoption of the Administrative Law Judge's finding that the Respondent did not violate Section 19(a)(1) and (6) of the Order by refusing to process the grievances through the agency grievance procedure, I find that the Complainant's contention should be rejected.

5/ The record reflects that the parties subsequently signed a new negotiated agreement on July 18, 1975, which became effective October 18, 1975. In my view, this action by the parties rendered moot the need for any affirmative action other than that indicated.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
June 29, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 unilaterally change the negotiated grievance-arbitration procedure, or any other term or condition of employment which is not based solely on the existence of a written agreement, following the expiration of the negotiated agreement without notifying and, upon request, meeting and conferring with the National Treasury Employees Union, Chapter No. 099, the exclusive representative of the unit employees.

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

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, BROOKHAVEN SERVICE CENTER	
Respondent	
	Case No. 30-6612 (CA)
and	
NATIONAL TREASURY EMPLOYEES UNION AND CHAPTER NO. 099, NTEU	
Complainant	

Robert F. Herman, Staff Assistant
Office of the Regional Counsel
Internal Revenue Service
26 Federal Plaza, 12th Floor
New York, New York 10007

For the Respondent

Michael E. Goldman, Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006

For the Complainant

Before: GARVIN LEE OLIVER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on October 16, 1975, and an amended complaint filed on February 3, 1976, under Executive Order 11491, as amended, by the National Treasury Employees Union (NTEU) and Chapter No. 099, NTEU (hereinafter called the Complainant or Union) against the Department of

the Treasury, Internal Revenue Service (IRS), Brookhaven Service Center (hereinafter called the Respondent or Agency), a Notice of Hearing on Complaint was issued by the Regional Administrator for the New York Region.

The Complaint alleged, in substance, that the Respondent violated Sections 19(a)(1) and (6) of the Executive Order by unilaterally declaring a procedure to be used to process employee grievances after a collective bargaining agreement had expired and the union had declared an impasse in negotiations and by refusing and failing to process grievances filed thereafter pursuant to the agency grievance procedure.

The amended complaint reiterated the previous allegations and alleged in addition thereto that a communication by Respondent's Commissioner regarding the changed grievance procedure constituted bargaining directly with unit employees in violation of Sections 19(a)(1) and (6) of the Executive Order.

A hearing was held in this matter before the undersigned in Holtsville, New York. Both parties were represented by counsel and afforded full opportunity to be heard, adduce evidence, and to examine and cross-examine witnesses. Thereafter, the parties submitted briefs.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

The Complainant and the Respondent were parties to a collective bargaining agreement covering the employees at the Brookhaven Service Center and at various other service centers throughout the country. This agreement, which was first negotiated on April 13, 1973 (Joint Ex. 9) was due to expire on April 12, 1975. Accordingly, on February 18, 1975, the NTEU and the IRS commenced negotiations for a new multi-center agreement. During the course of negotiations, the parties twice extended the expiration date of the agreement (Tr. 23). On April 24, 1975 the parties executed a formal memorandum of agreement providing that the agreement would remain in effect until negotiations were completed, or the Union invoked the impasse procedures provided for in the Executive Order, and that the agreement would terminate at midnight of the fifth calendar day after receipt by either party of notice of termination. (Joint Ex. 7).

On May 27, 1975, Union President Vincent L. Connery notified the IRS that NTEU declared an impasse, thereby terminating the Memorandum of Agreement, and would file its appeal with the Federal Service Impasses Panel on June 2, 1975. (Joint Ex. 6).

By letter dated May 28, 1975, the Director, Personnel Division, IRS, advised the Union that IRS acknowledged receipt of the notice "indicating that impasse invocation would take place June 2, 1975." The letter informed the union that "your unilateral decision and right to terminate the agreement and thus give up the institutional benefits contained therein will of course be honored. There are other benefits in the agreement which accrue to individual employees. We wish to advise you that it is our intent to continue these benefits to employees intact. (Detailed list attached)." The Respondent attached a detailed list of the provisions in the agreement which it intended to continue. (Respondent's Ex. 1; Tr 201). This list indicated that, effective June 2, 1975, Article 32 of the multi-center agreement, pertaining to the grievance procedure, would remain in effect except for "second sentence of Section 3A and all of Section 8." (Respondent's Ex. 1; Tr. 199; Complainant's Ex. 4). The second sentence of Section 3A, which it was indicated would not remain in effect, provided that, "In any case, the Union may initiate a grievance when it believes that rights assured it under the terms of this agreement have been denied." Section 8, which was also indicated as not remaining in effect after June 2, 1975, provided for the appeal of an adverse grievance decision rendered at the step five (division chief) level to arbitration as provided in Article 33, so long as proper notice was given by the Union. (Joint Ex. 9).

Thereafter, Commissioner Donald C. Alexander sent a memorandum to all Center employees, dated May 29, 1975, which made several observations, including advising the employees that "Service management will continue to observe your right to file and process grievances in accordance with Article 32, Section 7 of the agreement." However, the detailed list of articles and sections of the multi-center agreement which were to remain in effect as of June 2, 1975 was identical to that noted above and indicated that the second sentence of Section 3A and all of Section 8 of Article 32 would not remain in effect. (Complainant's Ex. 4).

The multi-center agreement expired on June 2, 1975. The Union appealed to the Federal Services Impasses Panel. Two of the impasse items referred to the Federal Services Impasses Panel were the "scope of the grievance/arbitration procedure" and "reinstatement of the expired agreement while the Panel considered the impasse." (Tr.200; Respondent's Ex. 4).

On June 2, 1975 the Union President wrote the Director, Personnel Division, IRS, deploring the Agency's unilateral establishment of certain "employee rights", and requested a meeting "to negotiate an agreement applicable to employees for the period necessary to complete the Impasse procedure." (Complainant's Ex. 7). Thereafter, the parties met on June 4, 1975, at which meeting the Union reiterated its request to negotiate any changes in working conditions during impasse. Respondent informed the Union that it would not negotiate over working conditions during impasse and the meeting ended. (Tr. 58-61; 203-205).

After June 2, 1975 the Agency took the position that all grievances which were covered under the articles of the former multi-center agreement must be filed under the grievance provisions of the agreement which were designated to remain in force; that these particular provisions were the ones conferring rights or benefits to individual unit employees in the areas of personnel policies, practices, and matters affecting working conditions; and that such grievances would not be entertained under the agency grievance procedure (Joint Ex. 8), except for the grievance of a disciplinary action in which the employee could opt for either the multi-center agreement grievance procedure or the agency grievance procedure. The Union took the position that the grievance procedure unilaterally arrived at by the Agency was not binding; that the entire multi-center agreement had expired; and that all grievances to be filed subsequent to the expiration of the multi-center agreement must be filed and processed under the agency grievance procedure. (Complainant's Ex. 10; Complainant's Ex. 11; Tr. 69-70, 71-76, 114, 181-182, 203, 241).

During the period June 5, 1975 to June 18, 1975, fourteen grievances were filed by employees under the agency grievance procedure pursuant to the recommendation of the Union. These grievances generally involved work distribution and the criteria used in establishing furlough and recall evaluations. (Joint Ex. 11A-11L; Tr. 114; 169; 195). The grievances were subject to the negotiated grievance procedure.

Although answers were given to two of the grievances, the agency refused to process the grievances pursuant to the agency grievance procedure and returned the grievances to the Union, explaining that the grievances should be filed and processed under the terms of the multi-center agreement which were still in effect pursuant to the Commissioner's letter of May 29, 1975. (Tr. 125, 241, 184, 247; Complainant's Ex. 13; Tr. 180; Respondent's Ex. 2,3).

In accordance with the requirements of 29 C.F.R., Section 203.2, the Complainant filed pre-complaint charges on June 19, July 8, July 16 and July 24, 1975 against the Respondent, alleging unfair labor practices under Sections 19(a)(1) and (6). The Complainant charged variously that the Respondent failed to process grievances pursuant to the agency procedure, "indicated that NTEU must file a grievance pursuant to a unilaterally established grievance procedure," and failed to meet with a NTEU representative concerning certain grievances. (Joint Exhibits 1-4).

The parties subsequently held discussions in an attempt to informally resolve the matter. The matters raised and discussed were limited to the matters raised in the informal charge letters. (Tr. 237-238).

On July 18, 1975 the parties signed a new multi-center agreement, effective October 18, 1975, and agreed to reinstate the previous multi-center agreement pending the effective date of the new agreement. (Joint Ex. 10).

On September 2, 1975 the Respondent sent the Complainant a final decision on the charges, which denied any violations of the Executive Order and pointed out the Respondent's view of the issues raised by the charges, as follows:

> The central question raised by your unfair labor practice charges is whether the negotiated grievance procedure contained in the Multi-Center Agreement, dated April 13, 1973, continued to be available to bargaining unit employees after the June 2, 1975 termination of that Agreement. A second question, related to the first but independent of it, is whether a refusal to accept grievances under the agency grievance procedure would be an unfair labor practice under such circumstances. (Joint Ex. 5).

On October 16, 1975 the original complaint in the instant case was filed. After setting forth facts allegedly constituting the unfair labor practice, the Complainant stated:

> The unilateral declaration of a procedure to be used to process a grievance constitutes a violation of Section 19(a)(1) and 19(a)(6); the failure of the Internal Revenue Service to process grievances pursuant to the agency grievance procedure, the only valid procedure in effect after the expiration of the MCA, constitutes a violation of Section 19(a)(1)

> and 19(a)(6); the failure of the Internal Revenue Service to process grievances pursuant to the agency grievance procedure constitutes an attempt by the IRS to demean NTEU in the eyes of employees in violation of Section 19(a)(1); and insistence by the Internal Revenue Service that the grievances must be processed pursuant to a unilaterally established procedure was an attempt to render NTEU impotent in the eyes of employees constituting a violation of Section 19(a)(1).

In another Complaint Against Agency, dated November 3, 1975, docketed as a separate proceeding with Docket No. 22-6506(CA), the NTEU and NTEU Chapter 099, among others, charged the IRS and Brookhaven Service Center among others, with violations of Section 19(a)(1) and (6) of the Executive Order by virtue of the following actions: unilaterally altering and amending existing personnel policies by reinstating selected provisions of a collective bargaining agreement which was to expire by its own terms; dealing directly with employees in the bargaining unit by the issuance of a May 29, 1975 directive to employees the language of which violates the neutrality required by the Order and attempts to subvert the Union as the exclusive representative by appealing to employees to look to the agency rather then the Union for rights; by refusing on June 4, 1974 to negotiate concerning the changes in personnel policies announced on May 28, 1975; and by conducting surveillance activities of the Union at its meetings.

The Regional Administrator for the Philadelphia, Pennsylvania Region issued a Notice of Hearing on Complaint, and a hearing was held in Docket No. 22-6506(CA) on May 4, 1976, in Washington, D.C. before Associate Chief Administrative Law Judge Francis E. Dowd. Judge Dowd's recommended decision and order was issued September 3, 1976.

On February 3, 1976, the Complainant filed an amended complaint in the instant case. As noted above the amended complaint was identical in all respects to the original complaint with the exception of the additional charge or allegation that:

> The communication by Commissioner Alexander regarding the changed grievance procedure constituted bargaining directly with unit employees in violation of Section 19(a)(1) and 19(a)(6) of the Order.

This amended charge was in all essential respects identical to a charge contained in Docket No. 22-6506(CA). However, the amended complaint did not reflect that any other procedure had been invoked involving the the subject matter of the complaint. (Asst. Sec. Ex. 1D).

Discussion, Conclusions, and Recommendations

A. Procedural Issues

29 C.F.R. Section 203.2(a) sets forth the action which a party desiring to file an unfair labor practice complaint must take prior to filing a formal complaint. Under Section 203.2(a)(1) a written charge alleging an unfair labor practice must be filed with the party being charged. And, pursuant to Section 203.2(a)(3), the charge must:

> contain a clear statement of the facts constituting the unfair labor practice, including the time and place of occurrence of the alleged unfair labor practice.

If the parties are unable to settle the charge the charging party may file a complaint, "limited to the matters raised in the charge" (Section 203.2(b)(1)).

The four charge letters in this case are limited to asserted violations of Section 19(a)(1) and (6) of the Order arising out of the Respondent's "unilaterally established grievance procedure" and refusal "to process grievances filed pursuant to the agency grievance procedure." (Joint Exhibits 1-4). These charge letters were insufficient to put the Agency on notice that it was being charged with direct bargaining with employees in violation of Section 19(a)(1) and/or 19(a)(6) arising out of the issuance of Commissioner Alexander's May 29, 1975 memorandum, as set forth in the amended complaint. Similarly, these charges did not raise or put the Agency on notice of other alleged violations raised by Complainant at the hearing, concerning the Agency's alleged refusal to negotiate on June 4, 1975 concerning interim personnel procedures to be used while there was no contract (Tr. 47-52), and alleged unilateral changes made by Henry B. Seufert on June 9, 1975 concerning union meeting space, administrative time, specific times for grievance meetings, and Union access to Brookhaven premises and facilities. (Complainant's Ex. 10; Tr. 149-162). Therefore, it is concluded and recommended that Complainant's belated attempts to prove alleged facts and raise issues which go beyond the scope of the charges be dismissed, and that the evidence offered in support of such issues be considered merely as background information in connection with relevant events. To hold otherwise would tend to

render meaningless the prescribed process of informal resolution of alleged unfair labor practices. Cf. Headquarters, U.S. Army Material Command, U.S. Department of the Army, Assistant Secretary Case No. 22-5900(CA), FLRC No. 75A-114 (March 22, 1976); United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, N.Y., A/SLMR No. 557, FLRC No. 75-A-106 (January 13, 1976), Report No. 95; Directorate of Maintenance, Production Branch, Warner Robbins Air Material Area, Robins Air Force Base, A/SLMR No. 374.

It is also concluded that the additional charge set out in Complainant's February 13, 1976 amended complaint, alleging that Commissioner Alexander's May 29, 1975 memorandum "constituted bargaining directly with unit employees in violation of Section 19(a)(1) and 19(a)(6) of the Order," should also be dismissed on the ground that it is identical to one of the issues explicitly raised and litigated in Case No. 22-6506(CA) involving these same parties.

The Complainant may not simultaneously litigate the same issue, arising out of the same set of facts, in two different unfair labor practice proceedings before the same forum. Such a practice encourages unnecessary and vexatious litigation, which would not effectuate the purposes of the Executive Order. The Complainant made a binding election to litigate the subject issue in Case No. 22-6506(CA), and the issue will be authoritatively resolved therein. 1/ To allow the Complainant to again raise and litigate the issue would be to endorse splitting of a cause of action. Further, it is contrary to basic legal concepts of res judicata and collateral estoppel. 2/

B. The Alleged Unilateral Change

The Assistant Secretary held in U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, that a

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1/ The Assistant Secretary's regulations and Section 19(d) of the Order are designed to screen out matters which have already been raised in other proceedings. 29 CFR § 203.3(a)(4).

2/ The Assistant Secretary applied the principle of collateral estoppel in the Aberdeen Proving Ground Command case, A/SLMR No. 286 (1973).

Respondent violated Sections 19(a)(1) and (6) of the Order by unilaterally instituting a change in terms and conditions of employment, after impasse had been reached, without providing the Complainant reasonable notice of its intended action so as to provide the Complainant with an opportunity to invoke the services of the Federal Services Impasse Panel. The Assistant Secretary also stated in that case:

> [S]hould one of the parties involved in an impasse exercise the option available under Section 17 of the Order and request the services of the Panel, I believe that it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in terms and conditions of employment can be effectuated.

In this case, upon being advised that the Complainant would file its appeal with the Federal Services Impasses Panel on June 2, 1975, the Respondent announced a new procedure for processing grievances to be effective the same day that the appeal was filed. Prior to the change, the negotiated procedure in the expired multi-center agreement was still operative. This was a five step procedure culminating with binding arbitration. In the May 28, 1975 letter the Respondent unilaterally altered the negotiated procedure by making changes in the grievance procedure, including abolishing the arbitration provision. Two of the items referred to the Federal Services Impasses Panel were "the scope of the grievance/arbitration procedure" and "reinstatement of the expired agreement while the panel considered the impasse." Since the Complainant invoked the services of the Panel, the Respondent was obligated, in the absence of an overriding exigency, to maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in terms or conditions of employment could be effectuated. In light of the Assistant Secretary's reasoning in Army Corps of Engineers, Respondent's failure to do so was violative of Sections 19(a)(1) and (6) of the Executive Order.

Respondent argues that its decision to discontinue the arbitration clause is consistent with private sector law. Respondent relies upon the decision of the NLRB in Hilton-Davis Chemical Company, 185 NLRB No. 58, 75 LRRM 1036 (1970), and the decision of the Second Circuit Court of Appeals in Proctor and Gamble Independent Union v. Proctor and Gamble Mfg. Co., 312 F.2d 181 (2nd Cir. 1962). In the Hilton-Davis

case the Board recognized that in the private sector the right to strike is a quid pro quo for the right to arbitrate. Each party has agreed to "voluntarily and mutually ... surrender the use of their respective economic weapons in favor of third party determination of unresolved issues." 75 LRRM at 1038. Thus, when the contract expires the parties return to their pre-contract status and each requires its arsenal of economic weapons, freeing the unions to strike in order to bring about resolution of disputes.

The private sector rationale is clearly not applicable to the federal labor relations program. Since federal employees lack the right to strike the core ingredient of the private sector theory does not exist in the federal sector. When a federal sector agreement expires employees have virtually no economic power to utilize in their effort to renegotiate an improved agreement. Thus, the situation in the federal sector is inapposite to the private sector.

The difference between the federal and private sector is highlighted by the Assistant Secretary's decision in Army Corps of Engineers, supra. He specifically noted that "it will effectuate the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo" while the Panel machinery is in motion. Thus, these differences make it vitally important that the status quo, including arbitration, be maintained. This limitation on management flexibility is part of a quid pro quo, in recognition of the no-strike requirement on unions.

C. The Alleged Refusal To Process Grievances Pursuant To The Agency Grievance Procedure

The Complainant contends that the Respondent also violated Sections 19(a)(1) and (6) of the Executive Order by failing to process grievances pursuant to the agency grievance procedure after the expiration of the multi-center agreement.

The Assistant Secretary has consistently found that, absent a showing of anti-union animus, allegations of violations of unilaterally established agency grievance procedures, even if proven, do not constitute violations of Section 19(a) of the Order. In this regard, the Assistant Secretary, in National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 670 (1976), stated:

> [W]hile interference with the filing or processing of grievances under a negotiated agreement has been found to be violative of the Order, interference with grievances being processed under an agency grievance

procedure, absent evidence of anti-union motivation is not deemed violative of the Order, as an agency grievance procedure is not established as a result of any rights accorded to individual employees or labor organizations by the Order. (at p.2, footnotes omitted).

The Complainant has not borne its burden of proving by a preponderance of the evidence that the Respondent's refusal to process the subject grievances pursuant to the agency grievance procedure was inspired or motivated by any anti-union animus. To the contrary, the probative evidence dictates the conclusion that the Respondent's position was undertaken in good faith and in reliance on what it believed to be a valid legal position. Accordingly, there is no basis for finding violations of Section 19(a)(1) and/or 19(a)(6) of the Executive Order on the basis of a failure to process the grievances in question pursuant to the agency grievance procedure, and it is recommended that the complaint in this respect be dismissed.

Recommendations

Having found that Respondent has engaged in certain conduct which is violative of Sections 19(a)(1) and (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 the Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, shall:

1. Cease and desist from:

(a) unilaterally changing the procedure for processing employee grievances, or any other term or condition of employment which is the subject of collective bargaining negotiations, in the absence of an overriding exigency, when a collective bargaining agreement has expired, an impasse in negotiations has been reached, and the National Treasury Employees Union and Chapter No. 099, NTEU, or any other exclusive representative, has invoked the services of the Federal Service Impasses Panel, until such time as the processes of the Panel has run its course.

(b) In any like or related manner interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) maintain the status quo, in the absence of an overriding exigency, with regard to the procedure for processing employee grievances, or any other term or condition of employment which is the subject of collective bargaining negotiations, when a collective bargaining agreement has expired, an impasse in negotiations has been reached, and the National Treasury Employees Union and Chapter No. 099, NTEU, or any other exclusive representative, has invoked the services of the Federal Service Impasses Panel, until such time as the processes of the Panel has run its course.

(b) post at the facilities of the Internal Revenue Service, Brookhaven Service Center, 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 Commissioner 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 Commissioner 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 herein.

GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 17, 1976
Washington, D.C.

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, in the absence of an overriding exigency, unilaterally change the procedure for processing employee grievances, or any other term or condition of employment which is the subject of collective bargaining negotiations, when a collective bargaining agreement has expired, an impasse in negotiations has been reached, and the National Treasury Employees Union and Chapter No. 099, NTEU, or any other exclusive representative, has invoked the services of the Federal Service Impasses Panel, until such time as the processes of the Panel has run its course.

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, in the absence of an overriding exigency, maintain the status quo with regard to the procedure for processing employee grievances, or any other term or condition of employment which is the subject of collective bargaining negotiations, when a collective bargaining agreement has expired, an impasse in negotiations has been reached, and the National Treasury Employees Union and Chapter No. 099, NTEU, or any other exclusive representative, has invoked the services of the Federal Service Impasses Panel, until such time as the processes of the Panel has run its course.

_____
(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: 26 Federal Plaza, Room 1751, New York, New York, 10007.

June 29, 1977

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

SOCIAL SECURITY ADMINISTRATION,
DISTRICT OFFICE,
MUNCIE, INDIANA
A/SLMR No. 860

This case involved an unfair labor practice complaint filed by Local 1799, National Federation of Federal Employees (Complainant) alleging essentially that the Respondent had violated Section 19(a)(1) and (6) of the Order by rescinding the policy of granting employees 15 minutes excused leave on payday for the purpose of cashing or banking salary checks, without affording the Complainant, the exclusive representative, the opportunity to consult, confer, or negotiate as required by the Order.

The Administrative Law Judge concluded that the Respondent's conduct was not violative of the Order. In this regard, he found, contrary to the Respondent's contention, that the Complainant had not waived its right to negotiate on the leave policy by virtue of its contract proposals in 1972. However, he concluded that even though the meeting requested by the Respondent for February 27, 1976, to discuss the termination of the leave policy was on short notice and without specificity as to the subject matter, the Complainant's refusal to attend the meeting raised grave doubts as to whether the Respondent had violated its bargaining obligation on this subject when it rescinded the 15 minutes excused absence policy on February 27, 1976, effective March 1, 1976. He further found that even if a violation had occurred at this point, the Respondent's efforts thereafter to get the Complainant to consider alternative procedures which would allow them to accomplish their common objective in a lawful fashion completely belied any claim that the Respondent refused to meet and confer in good faith as required by the Order. In this regard, he noted that the Respondent had reinstated the leave policy and concluded that, in view of its subsequent conduct which cured or dispelled the violation, the Federal Labor Relations Council's rationale in Vandenberg Air Force Base, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California, FLRC No. 74A-77, concerning a technical and de minimis violation of the Order was applicable in the instant case. Thus, he concluded that as it was, in fact, the Complainant which adopted an adamant attitude, sought not to engage in meaningful negotiations over this important matter, and sought only as its primary objective the vindication of its rights under the Order, the willingness of the Respondent to meet on the problem was sufficient to cure any violation which had occurred. Therefore, he found that the Respondent had not violated Section 19(a)(1) and (6) of the Order, and recommended dismissal of the complaint in its entirety.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and ordered that the complaint be dismissed.

A/SLMR No. 860

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
DISTRICT OFFICE,
MUNCIE, INDIANA

Respondent

and Case No. 50-13159(CA)

LOCAL 1799, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On April 7, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13159(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
June 29, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

Social Security Administration,
District Office, Muncie, Indiana
Respondent

and

Local 1799, National Federation
of Federal Employees
Complainant

Case No. 50-13159(CA)

Wilson G. Schuerholz, Esq.
Baltimore, Maryland
For the Respondent

Abraham Orlofsky, Esq.
Chicago, Illinois
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed June 15, 1976, by Local 1799, National Federation of Federal Employees, (hereinafter called Complainant Union) against Social Security Administration, District Office, Muncie, Indiana (hereinafter called Respondent Activity), the Regional Administrator of Labor-Management Services for the Chicago Region issued a Notice of Hearing on Complaint on September 15, 1976. The complaint alleged that the Respondent Activity violated Section 19(a)(1) and (6) of Executive Order 11491, as amended. The gravamen of the allegations was that the Respondent Activity unilaterally changed a policy of granting employees 15 minutes excused leave on payday for the purpose of cashing or banking salary checks. It is asserted that management changed this practice

without affording the Complainant Union, as the exclusive representative, the opportunity to consult, confer, or negotiate as required by the Executive Order.

A hearing was held on November 16, 1976, in Indianapolis, Indiana. All parties were represented by counsel and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were submitted by counsel and have been duly considered.

On the entire record in this matter, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

The Complainant Union is the exclusive representative of "all non supervisory permanent GS employees" of the District Office of the Social Security Administration in Muncie, Indiana. There has been a negotiated agreement in effect between the parties since September 22, 1972. The current agreement expired on September 22, 1976, and the parties were engaged in negotiations for a new agreement at the time of the hearing.

On August 24, 1971, prior to the negotiations and execution of the 1972 agreement, Russell Collins, manager of the District Office, issued a policy memorandum granting employees "an additional 15 minutes at their lunch breaks on salary pay-days for the purpose of banking or cashing their checks." The memorandum contained the following language:

> 2. This privilege is effective with the pay-day of August 31, 1971, and succeeding salary pay-days until further notice. 1/

The decision to grant the additional 15 minutes was entirely a management decision made for the convienence of the employees, and it was not discussed with the representatives of the Union prior to issuance.

During negotiations preceeding the execution of the 1972 agreement, the union representatives sought to incorporate the excused leave policy as a specific provision in the agreement.

1/ A copy of the memorandum was placed in the District Office Policy Manual maintained by the secretary of the District Manager.

They initially wanted to extend it, however, to 30 minutes. Management resisted this proposal on the ground that it needed the flexibility of having the practice as an office policy rather than in the negotiated agreement. After reducing their demands from 30 minutes to the already authorized 15 minutes, the union representatives dropped this proposal during the negotiations, and it was never incorporated into the final agreement.

The 15 minute excused leave practice was followed until February 1976. Sometime prior to February, the Area Director, Collins' superior, visited the District Office. He told Collins the practice was not in accordance with rulings of the Comptroller General and it violated the regulations set forth the in the Federal Personnel Manual. He made it clear that Collins was placing himself in jeoprady by allowing the practice to continue and advised him to rescind it.

It had been the custom for management and union officials to meet on the last Friday of the month to discuss matters concerning labor relations. This practice was very informal, and the parties would not meet if there were no pressing issues to discuss. On occasion they would have a formal agenda and other times they merely brought up topics which were of concern at that moment. 2/

2/ The practice followed by the management and union representatives was not in strict compliance with the provisions contained in the negotiated agreement. Article 6 of that agreement dealt with matters appropriate for consultation. Section 6.2 provided as follows:

> MEETINGS: either party desiring or having a requirement to consult with the other, shall give timely notice to the other party. Such notice shall include a statement of the subject matter to be discussed. The parties agree to meet regularly, normally on the last Friday of each month from 2:30 p.m. to 4:30 p.m.

On February 27, 1976, at approximately 2:30 p.m. Collins sent word through the former union president to the vice president, Ferg, that he wanted to meet with him at 3:00 p.m. in his office to discuss an emergency matter and a matter of mutual concern. 3/ Collins and several management officials waited for the union representatives for approximately 30 minutes. When they failed to show, Collins called Ferg, who stated that the union officials would not meet with management. He stated they were not given a written agenda and did not have enough advance notice. 4/

The next day, which was a Saturday, a small group of employees were working overtime and Collins was in the office supervising them. He decided he could not delay the decision to rescind the excused leave policy and had a memorandum typed discontinuing the practice effective March 1, 1976. This memorandum was circulated among the small number of employees working that day and posted for the benefit of the full staff when they returned on Monday.

The Complainant Union filed an unfair labor practice charge with the Respondent Activity almost immediately after becoming aware of this action. On March 10, management officials and union representatives met to discuss the matter. The union representatives insisted that the policy be reinstated and that management (Collins) make an apology to the entire staff. Management proposed several alternatives. One was the possibility of extending the official work day by 15 minutes to allow for the additional time during the lunch hour. Another involved having the employees take

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3/ The "emergency matter" had to do with the presence of an unauthorized person in the building sometime previously. The matter of "mutual concern" involved the 15 minute excused leave practice.

4/ Collins' undisputed testimony indicates that this was the first time union officials had ever refused to meet with management on any matter since recognition was accorded in 1971. He also testified that on occasions there was little or no advance notice given, and on other occasions the party requesting the meeting gave notice well in advance.

compensatory time for the extra 15 minutes. A third, which was mentioned as a possibility but of doubtful feasibility, was to charge the additional 15 minutes to leave time. This presented a problem as the Respondent Activity did not allow annual leave in 15 minute increments. During the discussion the parties failed to reach any agreement, as the union officials insisted that the former practice be resumed.

The parties met again on April 8 to discuss the problem. The Complainant Union continued to adhere to its original demand. Finally, Collins agreed to reinstate the 15 minutes as a demonstration of "good faith". He also agreed to meet again with the union representatives to explore alternative procedures for allowing the extra 15 minutes on pay-days. He sent a letter to the vice president of the Union that same day stating the policy was "back in effect as of this date." He suggested that the parties meet at 10:00 a.m., April 16, 1976, to "consult and resolve our differences over the 15 minutes extra time allowed on salary pay-days". (Respondent's Exhibit No. 2). The Union's vice president responded initially to the letter by declining to meet on the suggested date. After a conference with Collins, he retracted this refusal and agreed to the meeting.

At the meeting on April 16, management stated that something had to be done because the granting of the excused leave was not lawful, and the Area Director was exerting pressure on the District Manager to rescind it, or face possible disciplinary action. While the union officials expressed a concern over the District Manager's dilemma, they insisted that the 15 minute excused leave practice be continued. Management again offered possible alternatives to the union representatives to no avail, as they insisted on continuation of the past policy because "all of the employees wanted the 15 minutes." The union representatives asked Collins if he were prepared to negotiate this demand and he responded that it was not negotiable. He concluded the meeting by telling the union representatives that management had their input and there had been consultation. He stated that he would render a written decision within 10 days.

On April 26, 1976, Collins sent a letter to the union president stating that his "decision is to stop the privilege and practice, effective May 1st, 1976." He stated that the decision "was based on all the facts,

opinions and statements made concerning the additional 15 minutes of excused time on pay-days." He also indicated that since his superiors were aware of the practice, it made him "vulnerable and subject to possible disciplinary action by those of higher authority." (Respondent's Exhibit No. 3).

Concluding Findings

The first issue to be addressed here is whether the change in the excused leave policy on February 27, 1976, was a unilateral act on the part of management in violation of its duty to consult and confer (negotiate) under the Executive Order. The Respondent Activity asserts that the Complainant Union "waived" its right to negotiate on the excused leave policy because it had advanced a proposal regarding this subject matter during negotiations in 1972, and subsequently abandoned it before the negotiations were concluded.

In my judgment, this defense lacks merit as it has been established by case law that a waiver of a right assured by the Executive Order must be clear and unmistakable. U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indianapolis, Indiana, A/SLMR No. 651; Naval Ordinance Station, Louisville, Kentucky, A/SLMR No. 400; Kennedy Space Center, Florida, A/SLMR No. 223. The mere fact that the Union dropped this bargaining demand during the 1972 negotiations does not imply a waiver of its right to subsequently negotiate a change in this working condition, unless there is clear and unmistakable evidence that such was the intent of the parties. There is no such evidence in this record. Therefore, I find that the "waiver defense" must be rejected.

However, the circumstances of this case are such that there is serious question as to whether the Respondent Activity violated its obligations under the Executive Order. The facts show that management sought to have a meeting with the union officials on February 27, but was unsuccessful because the union representatives declined to attend. It is true that management was not specific about the items it wished to discuss when it requested the meeting. It is also true that the short notice did not comport with the requirements of the negotiated agreement. Examination of the practice followed by both management and union representatives, however, indicates that it was not unusual to call a meeting in this fashion. Further, the parties did not always adhere to

the provisions set forth in the negotiated agreement regarding their labor-management meetings. On the basis of the refusal of the union representatives to meet with management to discuss the issue of rescinding the excused leave policy, grave doubts are raised as to whether management violated its bargaining obligation when the memorandum rescinding the policy was issued the following day.

But even if a violation occurred at this point, the subsequent meetings between the union officials and management on this issue completely belie any claim that the Activity refused to consult and confer in good faith as required by the Executive Order. The parties met on three occasions and management made every effort to get the Union to consider alternative procedures which would allow them to accomplish their common objective in a lawful fashion. To this end, management rescinded its action of February 28 as a jesture of good faith, and sought to "clear the air" so that the parties could continue negotiations on the subject matter. 5/

While the period between the unlawful conduct, if it were in fact unlawful, and the subsequent conduct which cured or dispelled the violation was not as brief as that which took place in the Vandenberg Air Force Base case 6/, the Council's rationale in that decision has clear application here. In that case the Council was considering a technical violation which it found to be de minimis because it was immediately cured by subsequent conduct on the part of the offending party. The Council stated that the purposes of the Order are not served when:

5/ Although management described this process as "consultation" it is clear that the parties here were engaged in negotiations over the change in the excused leave policy. Therefore, the "consult and confer" requirements of the Executive Order were being fulfilled completely by the parties even though they described their conduct as constituting something less.

6/ Vandenberg Air Force Base, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California, FLRC No. 74A-77, Report No. 79 (August 25, 1975).

> ...the parties use the sanctions provided therein as the first, and not the last, resort for the settlement of their disputes. Cooperative labor relations are not established or maintained when a labor organization or the management of an agency establishes as its first priority, not the negotiations of a collective bargaining agreement, but the vendication of its position in an unfair labor practice proceeding. (Emphasis supplied).

The facts in the instant case lend themselves completely to the rationale set forth in the Vandenberg decision. The Respondent Activity did everything in its power to create a setting wherein the parties would use the negotiating process to resolve the dispute over the 15 minute extended leave policy. It was the labor organization which adopted an adamant attitude and sought not to engage in meaningful negotiations over this important matter. Rather, its primary objective was vindication of its rights under the Order. According, I find that the subsequent willingness of management to meet with the Union and discuss the problem was sufficient to cure any violation which may have occurred, and that management did in fact consult and confer, within the meaning and contemplation of the Executive Order.

In view of the foregoing, I find and conclude that the Respondent Activity did not violate Section 19(a)(1) and (6) of the Executive Order and that the complainant herein must be dismissed in its entirety.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, I find that Social Security Administration, District Office, Muncie, Indiana did not engage in conduct which violated Section 19(a)(1) and (6) of Executive Order 11491, as amended. Accordingly is hereby recommended that the complaint in this case be dismissed in its entirety.

Gordon J. Myatt

GORDON J. MYATT
Administrative Law Judge

Dated: 7 APR 1977
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 HEALTH, EDUCATION
AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS,
SAN JUAN, PUERTO RICO
A/SLMR No. 861

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3534 (Complainant) alleging, in effect, that the Respondent violated Section 19(a)(1) and (2) of the Order by changing Violeta Crespo's evaluation from a rating of "Outstanding" to a rating of "Satisfactory" because of her union membership, position, and activities.

The evidence disclosed that the Respondent's Administrative Law Judge In Charge (ALJIC), who reviewed and signed the evaluations of the Respondent's employees before submitting them to the Central Office in New York, concurred in and forwarded approximately 20 evaluations for the period involved, among which were four "Outstanding" ratings. One of the "Outstanding" ratings was that of Violeta Crespo who had been active in the Complainant's organizing campaign and was a union steward. Thereafter, as a result of questioning by the Activity's Central Office, all four "Outstanding" ratings were changed to "Satisfactory", with Violeta Crespo's being changed as a result of the ALJIC's changing one of the specific items of her evaluation. The Administrative Law Judge found that the Complainant had failed to sustain its burden of proof in support of the allegation that Violeta Crespo, or any other union member, was discriminated against because they had engaged in activity protected by the Order, and he recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 861

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS,
SAN JUAN, PUERTO RICO

Respondent

and

Case No. 37-01728(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3534

Complainant

DECISION AND ORDER

On March 8, 1977, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision 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 Recommended Decision. 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 Recommended Decision and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

1/ The name of an employee involved in the complaint was inadvertently spelled "Violet" Crespo instead of "Violeta" Crespo in the Administrative Law Judge's Recommended Decision. Such inadvertence is hereby corrected.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 37-01728(CA) be, and it hereby is, dismissed.

Washington, D. C.
June 30, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, BUREAU OF HEARINGS AND APPEALS, SAN JUAN, PUERTO RICO
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3534,
Complainant

Case No. 37-01728(CA

ERRATA

The case number on the Recommended Decision in the captioned matter issued on March 8, 1977 [Case No. 37-01723(CA)] is hereby amended to read Case No. 37-01728(CA).

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: March 11, 1977
Washington, D.C.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, BUREAU OF HEARINGS AND APPEALS, SAN JUAN, PUERTO RICO
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3534,
Complainant

Case No. 37-01728(CA)

GEORGE L. WEASLER, ESQ.
607 Condomino Condado
P.O. Box 9898
Santurce, Puerto Rico 00908
For the Complainant

WILLIAM F. CONFALONE, ESQ.
Labor Relations Officer
Dept. of HEW, Region 2
Federal Building
26 Federal Plaza
New York, New York
For the Respondent

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereinafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations a Notice of Hearing on Complaint issued on October 13, 1976 with reference to alleged violations of Sections 19(a)(1) and (2) of the Order. The complaint, filed by

American Federation of Government Employees, AFL-CIO, Local 3535 (hereinafter referred to as the Union or Complainant), essentially alleged that Violet Crespo and other members of the Union were discriminated against by Department of Health, Education and Welfare, Social Security Administration, Bureau of Hearings and Appeals, San Juan, Puerto Rico (hereinafter referred to as the Activity or Respondent), because of membership in and activity's on behalf of the Union. The alleged discrimination concerns the Activity's downgrading various employee performance appraisals.

At the hearing held on November 4 and 5, 1976 1/ in San Juan, Puerto Rico, the parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. A brief was received from Respondent and carefully considered.

Upon the entire record in this matter and from my evaluation of the evidence and observation of the witnesses and their demeanor, I make the following:

Findings and Conclusions

On July 12, 1974 the Union was certified as the exclusive representative of various professional and nonprofessional employees of the Activity. At that time Violet Crespo was

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1/ Pursuant to Respondent's unopposed request, the transcript in this matter is hereby corrected as follows:

I. Transcript of November 4, 1976

Page	1 - 16	Line	24	"Mr. Witness" should be Mr. Shapiro"
"	1 - 45	"	7	"Raf" should be Ralph (this error repeated throughout the transcript.)
"	1 - 53	"	7	between "this" and "throughout" should be "outstanding"
"	1 - 159	"	25	"Agnuza" should be "Mayaguez"

II. Transcript of November 5, 1976

Page	2 - 4	Line	6	"unsanitized" should be "sanitized"
"	2 - 31	"	13	"Dell (?)" should be "Dellanoy"
"	2 - 52	"	5	"new" should be "union"
"	2 - 58	"	24	between "did" and "make" should be the word "not"

very active on behalf of the Union in its drive to organize the employees and since October 1975 has served as the Union's elected shop steward.

In April 1976 Ms. Crespo along with approximately twenty other employees received from the Activity an annual performance appraisal for the period April 1, 1975 to March 31, 1976. Four unit employees, including Ms. Crespo, were rated "outstanding" by their immediate supervisors. The Activity's Administrative Law Judge In Charge, Solomon Goldman, reviewed and concurred in the ratings and on or about April 15, 1976, forwarded all the ratings to the Activity's Central Office in New York City. Approximately two weeks later a Program Operation Officer at the Central Office telephoned Judge Goldman and asked if Judge Goldman felt he could "justify" the four outstanding ratings "throughout the Agency". Judge Goldman concluded he could not an proceeded to reduce to "satisfactory" the ratings of two employees whom he had rated himself. Judge Goldman approached another Administrative Law Judge who rated an employee as "outstanding" and as a result, the Judge lowered the rating of his subordinate to "satisfactory".

With regard to Violet Crespo, Judge Goldman met with her rater, Judge Ana Rodriguez, and attempted to persuade her to lower Ms. Crespo's "outstanding" rating to satisfactory by rating her other than outstanding in the category of "getting along with others". Judge Goldman mentioned a number of incidents that he felt supported a lower rating but Judge Rodriguez was unimpressed and refused to revise her appraisal of Ms. Crespo. Sometime thereafter, Judge Goldman talked to Ms. Crespo about lowering her rating in the "getting along with others" category indicating he had received a call from New York Central Officer on the matter. Judge Goldman informed Ms. Crespo that he was relying on a past office matter involving what Judge Goldman considered Ms. Crespo antagonizing another employee to support his conclusion that the rating should be lowered. Ms. Crespo disagreed with Judge Goldman's assessment of the situation and was quite sensitive that she was being given a lower rating in this particular category. She suggested that any one of the other six categories be lower but Judge Goldman refused.

By letter dated May 24, 1976 Judge Goldman notified the Activity's Central Office of his decision to adjust Ms. Crespo's evaluation, reciting three incidents which he felt supported his action. On June 20 Ms. Crespo was notified that her performance appraisal had been lowered.

Ms. Crespo insisted that she be given Judge Goldman's justification for the change and was eager to receive the document since she was soon to be hospitalized. Accordingly, after she again requested the information on June 23, Judge Goldman at 6:00 p.m. on that same day during a contract negotiation session, handed Ms. Crespo a copy of the May 24 letter which he previously sent to Central Office, supra. On July 26, 1976 Ms. Crespo, on behalf of the Union, filed the unfair labor practice charge which gave rise to these proceedings.

In my view Complainant has failed to carry its burden of proving by a preponderance of the evidence that Ms. Crespo or any other Union member was discriminated against because of membership in or activities on behalf of the Union. It is clear that Ms. Crespo had engaged in activity protected by the Order and Respondent knew of such conduct. She was active in the Union's successful effort to organize the Activity; she engaged in efforts on behalf of employees involving Central Office and local representatives of the Activity regarding the allocating new typewriters to employees; she participated in contract negotiations with the Activity on behalf of the Union. However, there is no evidence that the Activity harbored hostility towards the Union in general or Ms. Crespo in particular. The explanation given by the Activity as to how Ms. Crespo's evaluation was lowered is sufficiently plausible so that a finding of improper motivation cannot be inferred. Indeed, even if the Activity's actions in this regard were considered arbitrary, under the circumstances herein such would not in itself constitute a violation of the Order. In addition, there was no showing that the Activity's lowering of Ms. Crespo's evaluation constituted disparate treatment of Ms. Crespo.

Further, I find and conclude that no violation of the Order occurred when on June 23 at a negotiation session Judge Goldman gave Ms. Crespo the information which Judge Goldman relied on in reaching his decision. Ms. Crespo requested that the information promptly since she was shortly scheduled to be hospitalized. 2/ Moreover, there is no

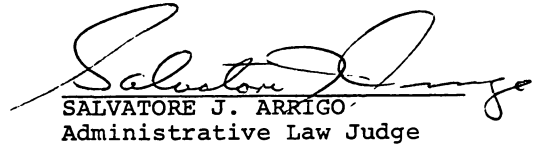
2/ I note that it was also during negotiations that Ms. Crespo was notified she was receiving a promotion to a job she had applied for sometime after April 29, 1976.

evidence that anything was said or done which might have given some indication that the Activity had an improper purpose in presenting the information to Ms. Crespo at that time.

Accordingly, in all the circumstances herein, I find and conclude that Complainant has failed to prove by a preponderance of the evidence that the Activity violated the Order as alleged. 3/

Recommendation

I recommend the complaint herein be dismissed in its entirety.



SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 8 MAR 1977
Washington, D.C.

3/ Department of Defense, Air National Guard, 14th Fighter Group, Texas Air National Guard, Austin, Texas, A/SLMR No. 667; U.S. Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No. 445.

A/SLMR No. 862

July 18, 1977

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF
THE TREASURY, INTERNAL REVENUE
SERVICE, DETROIT DATA CENTER,
DETROIT, MICHIGAN

Respondent

and

Case No. 52-06798(CA)

NATIONAL TREASURY EMPLOYEES UNION,
WASHINGTON, D. C.

Complainant

ERRATA

The date of the above entitled Decision and Order and attached Summary was inadvertantly set forth on your copy as June 18, 1977, instead of July 18, 1977. Such inadvertance is hereby corrected and all appeal and review rights shall run from July 18, 1977.

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 TREASURY, INTERNAL REVENUE
SERVICE, DETROIT DATA CENTER,
DETROIT, MICHIGAN
A/SLMR No. 862

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) of the Order by interrogating Ms. Caroline Golden, a steward and executive vice president of Chapter 78, NTEU, during the course of a promotional interview when she was asked whether her union business took her away from her work.

Based on credited testimony, the Administrative Law Judge found that the Respondent's conduct was violative of Section 19(a)(1) of the Order, as under the particular circumstances, the inquiry was coercive in nature. In this regard, he noted that the subject of her union activities was first raised by Ms. Golden during the initial phase of the promotional interview as an example of her interest in working with people, then dropped and was not raised again until the chairman of the interview panel asked her whether her union business took her away from her work. He concluded that, in this context, the inquiry was coercive in nature as it logically led Ms. Golden to conclude that her union representational duties would tend to undermine her prospects for promotion. Therefore, he concluded that the inquiry operated to interfere with her right to be a union member, the right to participate in the management of a labor organization, and the right to act as a labor organization representative and was thus violative of Section 19(a)(1) of the Order.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

A/SLMR No. 862

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF
THE TREASURY, INTERNAL REVENUE
SERVICE, DETROIT DATA CENTER,
DETROIT, MICHIGAN

Respondent

and Case No. 52-06798(CA)

NATIONAL TREASURY EMPLOYEES UNION,
WASHINGTON, D. C.

Complainant

DECISION AND ORDER

On April 13, 1977, Administrative Law Judge Louis Scalzo 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 cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Report and Recommendation. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Report and Recommendation and the Complainant filed an answering brief to the Respondent'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 Recommendation and the entire record in this case, including the exceptions filed by the Respondent and the answering brief to the Respondent's exceptions filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of the Treasury, Internal Revenue Service, Detroit Data Center, Detroit, Michigan, shall:

1. Cease and desist from:

(a) Interrogating its employees as to the relationship between their work performance and their activities on behalf of, or their affiliation with, Chapter 78, National Treasury Employees Union, or any other labor organization.

(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 the United States Department of the Treasury, Internal Revenue Service, Detroit Data Center, Detroit, Michigan, 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, Detroit Data 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 said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
July 18, 1977

F. X. Burkhardt

Francis X. Burkhardt, 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 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 interrogate our employees as to the relationship between their work performance and their activities on behalf of, or their affiliation with, Chapter 78, National Treasury Employees Union, or any other labor organization.

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 any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
United States Department of the Treasury Internal Revenue Service Detroit Data Center Detroit, Michigan	
Respondent	
and	Case No. 52-06798 (CA)
National Treasury Employees Union 1730 K Street, N. W., Suite 1101 Washington, D. C. 20006	
Complainant	

Errata Sheet Relating to
Recommended Decision and Order
Dated April 13, 1977

Correction: Page 5

Add the phrase, "Her reaction led her to confer with officials" following the second paragraph.

LOUIS SCALZO
Administrative Law Judge

Dated: April 15, 1977
Washington, D. C.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
United States Department of the Treasury Internal Revenue Service Detroit Data Center Detroit, Michigan		
Respondent		
and	:	Case No. 52-06798 (CA)
National Treasury Employees Union 1730 K Street, N. W., Suite 1101 Washington, D. C. 20006		
Complainant		

David E. Mills, Regional Counsel,
David J. Markman, Staff Assistant,
and Kenneth Dale, Attorney, Office
of the Regional Counsel, Internal
Revenue Service (Central Region)
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Cincinnati, Ohio 45201

For the Respondent

Hayward C. Reed, Esq.
National Treasury Employees Union
Suite 1101, 1730 K Street, N.W.
Washington, D.C. 20006

For the Complainant

Before: LOUIS SCALZO
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This proceeding was initiated upon the filing of an unfair labor practice complaint on August 12, 1976, by the National Treasury Employees Union (hereinafter referred to as the Complainant) against the Detroit Data Center, Internal Revenue Service, United States Department of the Treasury (hereinafter referred to as the Respondent). The complaint alleged that the Respondent violated Sections 19(a)(1) and (2) of Executive Order 11491, as amended, (hereinafter referred to as the Order), as a result of the interrogation of Ms. Caroline Golden, a steward and executive vice president of Chapter 78, National Treasury Employees Union, and an employee of the Respondent. It was alleged that on February 4, 1976, during the course of a promotional interview for a computer programmer trainee position, she was asked whether her Union business took her away from her work.

On December 3, 1976, R.C. DeMarco, Regional Administrator, Labor-Management Services Administration, Chicago Region, approved the Complainant's withdrawal of the Section 19(a)(2) allegation and issued a Notice of Hearing based on the alleged violation of Section 19(a)(1) of the Order. Pursuant thereto, a hearing was held in Detroit, Michigan on March 1, 1977. Both parties were represented by counsel at the hearing, and were afforded full opportunity to call and examine witnesses, adduce evidence, and file briefs.

The Respondent denies that the interrogation occurred, and argues that the Complainant has not met its burden of proof. Respondent also asserts that the question, even if asked, would not constitute a violation of Section 19(a)(1). Upon the entire record and my observation of witnesses and their demeanor, I make the following findings, conclusions and recommendations to the Assistant Secretary.

Findings of Fact

During a period beginning in the latter part of January 1976, and lasting about a month, approximately two hundred applicants were interviewed at the Detroit Data Center for the purpose of filling eighteen to twenty computer programmer trainee positions. These interviews, about fifteen to thirty minutes in length, were conducted by a series of three panels, each of which was staffed by three supervisors.

Ms. Golden's interview was one of eight or nine conducted by such a panel on February 4, 1976. She was not selected for the position. The panel which interviewed her included Grover Pinkerton, Edward Buggell and Alan Schreier. Ms. Golden testified that Grover Pinkerton posed the question indicative of a possible conflict between work assignments and Union activity during the latter portion of the interview.

The testimony of the three panel members was inconclusive with respect to the question of whether or not the inquiry was posed, as each could not recall the specific questions asked Ms. Golden, and each acknowledged that the objectionable question could have been asked. Since the panel interviewed about seventy applicants, it was not possible for the panel members to recall with particularity, details relating to each interview. However, Ms. Golden appeared to be a credible witness in all respects and I find no reason to doubt her testimony.

It clearly appeared that the subject of Union activity was introduced in the first instance by Ms. Golden when the panel inquired generally about her interests, and her ability to relate to people. 1/ In response she volunteered that she was a union steward, and that she liked dealing with people and their problems. Both Mr. Buggell and Mr. Schreier corroborated Ms. Golden in this regard, as they recalled the subject may have been broached by Ms. Golden in response to a general inquiry entirely unrelated to Ms. Golden's union activity.

As noted all three panel members had no recollection of the question objected to herein, and judging their demeanor and response to interrogation, I have no reason to doubt their testimony. It must be concluded that they attached no significance to the inquiry from the standpoint of evaluating Ms. Golden's suitability for the computer programmer trainee position.

1/ During a post-hearing deposition of Mr. Alan Schreier, counsel for the Complainant objected to the admission of evidence of general questions posed by the panel during the panel interviews. Since the questions referred to were identified as those addressed to Ms. Golden as well as other applicants there would be no basis for the exclusion of such evidence.

Neither Mr. Pinkerton, nor Mr. Buggell were aware of Ms. Golden's union activity prior to the interview. Mr. Schreier acknowledged that he was aware of her union affiliation prior to the interview, however, no special significance can be attached to Mr. Schreier's knowledge. There was no discussion of her Union affiliation by the panel during the interview or in the rating process conducted by the panel. None of the panel members were involved in the selections made to fill the positions and the record reflects no evidence that members of the panel discussed Ms. Golden with the official charged with the responsibility of determining the successful applicants following a two-step rating process.

Each applicant was rated on the basis of a composite score obtained from performance evaluations, awards, experience, training received, and the oral interview. Ms. Golden's final rating is not reflected in the record, nor were those received by others interviewed.

The results of panel interviews were turned over to the personnel department for further rating of factors reflected in personnel folders. Although it appeared that Mr. Pinkerton along with two others participated in this second step of the rating process, there is no evidence that he actually rated Ms. Golden's personnel file folder after the interview. 2/ There was no evidence of any discussion of Ms. Golden's Union status during the final rating assigned to factors reflected in personnel folders, and Mr. Pinkerton denied that the topic was ever raised.

2/ Mr. Pinkerton acknowledged that he may have rated Ms. Golden's personnel file, but that he could not recall. Ms. Golden's testimony established that information concerning her Union position was reflected in her file folder and that she had such information included therein. Mr. Pinkerton denied seeing her personnel file prior to the interview. There is no reason to doubt his credibility in this regard.

Further support for the finding that Ms. Golden's Union status played no role in the rating process is reflected by the fact that she was assigned above average ratings of "4" by all panel members in categories of interest relating to communication skills and interpersonal skills. 3/ The evidence discloses that Ms. Golden's discussion of Union activity arose in connection with these elements of the interview. (Joint Exhibits 1-3). Moreover, the panel's evaluation of Ms. Golden characterized her as being very sensitive to others and very interested in creating a harmonious work environment. (Assistant Secretary Exhibit 5). These evaluative factors coupled with what appeared to be a clear showing that no significance could have been attributed to the question by the panel, and the fact that Ms. Golden first broached the subject on her own behalf as a topic of discussion, leads to the inescapable conclusion that the interrogation did not prejudice career opportunities presented to her during or after the promotional interview. That is, there has been no showing that the inquiry deprived her of a fair opportunity to compete for promotion. 4/

It is clear from the record developed that, although innocuous from the standpoint of the rating process utilized to determine successful applicants, the inquiry did give her the impression that management may have felt she was spending too much of her time on Union business, and that her Union activities would tend to interfere with her prospects for promotion. She was upset by the question and felt she would not be selected because of her Union affiliation.

3/ The rating scale assigned the following values: 5-excellent, 4-above average, 3-average, 2-below average, 1-poor.

4/ It should be noted that the Complainant does not claim that Ms. Golden was discriminated against in regard to promotion because of the question posed by Mr. Pinkerton. The withdrawal of the Section 19(a)(2) allegation operated to remove this issue from the case.

of the Complainant Union immediately after the February 4, 1976 interview. This in turn led to the filing of a formal charge on April 7, 1976. In this regard the record reflected that responsibility for the preparation of unfair labor practice charges rested with the national office of the National Treasury Employees Union.

Discussion and Conclusions

The language of Section 19(a)(1) of the Order is designed to prevent employers from interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them. Section 1(a) of the Order provides:

> Section 1. Policy. (a) 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. 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 that the right to engage in union activities, would be seriously jeopardized if employees are interrogated about the relationship between union activity and work

performance. The doctrine has become well entrenched in the private sector, that, absent some legitimate purpose, an employer must not interrogate his employees regarding their union activities.

In such instances, interrogation constitutes interference with the rights of employees to feel free in joining and assisting labor organizations. The Assistant Secretary has, in Vandenberg Air Force Base, 4329 Aerospace Support Group, A/SLMR No. 383, concluded that likewise in the federal sector a supervisor's interrogation of employees with respect to their union activities may be violative of Section 19(a)(1) of the Order. See also Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 477; Internal Revenue Service, Wilmington, Delaware District, A/SLMR No. 516; Federal Energy Administration, Region IV, Atlanta, Georgia, A/SLMR No. 541; Department of the Army, United States Army Transportation Center and Fort Eustis, Virginia, A/SLMR No. 681 (dictum); and Department of the Navy, Mare Island Naval Shipyard, A/SLMR No. 775.

In this case the subject was first raised by the employee involved during the initial phase of the promotional interview. The topic was then dropped entirely, and not raised again until Mr. Pinkerton inquired whether Ms. Golden's Union business took her away from her work. In this context the coercive nature of the inquiry becomes apparent. It was logical for Ms. Golden to conclude that the pursuit of Union representational work would tend to undermine her prospects for promotion. This leads to the conclusion that the inquiry operated to interfere with her right to be a union member, the right to participate in the management of a labor organization, and the right to act as a labor organization representative. I therefore find and conclude that the inquiry constituted interference, restraint or coercion under Section 19(a)(1) of the Order.

Counsel for the Complainant argues that the Respondent should be ordered to rerun the promotional interview because the taint of the Section 19(a)(1) violation was so severe as to make this remedy necessary. Department of the Navy, Mare Island Naval Shipyard, A/SLMR No. 775 is cited as

authority for this remedy. In the cited case the complainant alleged that the respondent activity had violated Sections 19(a)(1) and (2) of the Order by interrogating an employee about his activities as a union steward during a job promotion interview and by failing to promote him because of his union activities. However, in A/SLMR No. 775 the pattern of questioning concerning union activity during the promotional interview was extensive, and became the dominant theme of the interview. Although no evidence of discrimination within the meaning of Section 19(a)(2) was found, the Administrative Law Judge held that the conduct violated the selection process as a means of merit promotion. Because of this factor he recommended that candidates for the promotion be interviewed again in an atmosphere free of any reference to union membership or activities. It is clear from the facts adduced in this case that the interview was not so tainted. There is no indication of prejudice here, and I find no basis for recommending such a remedy.

Recommendation

Having found that the Respondent has engaged in certain conduct which is violative 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.

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 United States Department of the Treasury, Internal Revenue Service, Detroit Data Center, Detroit, Michigan, shall:

1. Cease and desist from:

(a) Interrogating its employees as to the relationship between their union activities and their work performance.

(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 the United States Department of the Treasury, Internal Revenue Service, Detroit Data Center, Detroit, Michigan, 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 an appropriate management official and shall be posted and maintained by him for sixty consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Said official shall take reasonable steps to insure that said 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 days from the date of this Order, as to what steps have been taken to comply herewith.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: April 13, 1977
Washington, DC

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 interrogate our employees as to the relationship between their work performance and their activities or affiliation with the National Treasury Employees Union, or any other labor organization.

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: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

July 19, 1977

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

DIVISION OF MILITARY AND NAVAL
AFFAIRS, STATE OF NEW YORK,
NEW YORK AIR NATIONAL GUARD
A/SLMR No. 863

This case involved an unfair labor practice complaint filed by the H. E. Brooks Memorial Chapter, Association of Civilian Technicians (ACT) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to bargain in good faith concerning a plan for implementing a reduction-in-force (RIF) at the Suffolk County Air National Guard Base, Westhampton Beach, Long Island, New York.

The civilian technician employees at the Suffolk Base were represented by the ACT as a part of the state-wide unit for which it held exclusive recognition. The New York State Council of the ACT and the Respondent entered into a negotiated agreement on September 15, 1975, and it was approved by the National Guard Bureau (NGB) on October 3, 1975. The negotiated agreement, which noted that it was subject to currently applicable statutes and regulations issued by the NGB, contained a provision on RIFs which stated that "factors (not to be construed as all inclusive) to be considered in developing reduction-in-force plans are: (a) Technician service; (b) qualifications, to include experience and skill; (c) performance ratings; and (d) filling vacancies prior to reduction-in-force." After being informed by the Respondent in January 1976, of the necessity for RIFs, agreements between the ACT and the Respondent concerning RIF procedures at bases at Niagara Falls and Syracuse, New York, were concluded. At Suffolk, the parties were able to agree with respect to all the elements of the RIF procedure except for the ACT's proposals which would have had the effect of making seniority the primary criterion for ranking employees and which, among other things, would have negated the NGB's regulatory requirement that military evaluations be given equal weight with civilian evaluations in ranking employees. The Respondent took the position that the implementation of the RIF pursuant to the NGB's regulatory requirements concerning RIFs was not inconsistent with the language of the negotiated agreement.

The Administrative Law Judge concluded that the NGB's regulatory requirements concerning RIFs were not inconsistent with the specific provisions of the parties' negotiated agreement and that, as the negotiated agreement provided that it was subject to regulations of the NGB applicable at the time it was entered into and the NGB's regulations concerning RIFs were in effect at the time of the signing of the agreement and had not been waived by the terms of the negotiated agreement, the Respondent did not violate Section 19(a)(1) and (6) of the Order by refusing to negotiate concerning the application of the NGB's regulations concerning RIFs under the circumstances herein. The Administrative Law Judge distinguished this case from the decision in Colorado Air National Guard, Buckley Air National Guard Base, Aurora, Colorado, A/SLMR No. 758, as in that case the Activity attempted to impose unilaterally the NGB's regulations concerning RIFs despite the fact that the parties' negotiated agreement therein contained specific RIF procedures which were different from the NGB's regulations and the NGB had approved such an agreement, in effect waiving the Activity's right to rely on the agency regulations.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and he ordered that the complaint be dismissed in its entirety.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DIVISION OF MILITARY AND NAVAL
AFFAIRS, STATE OF NEW YORK,
NEW YORK AIR NATIONAL GUARD

Respondent

and Case No. 30-06932(CA)

H. E. BROOKS MEMORIAL CHAPTER,
ASSOCIATION OF CIVILIAN TECHNICIANS

Complainant

DECISION AND ORDER

On April 1, 1977, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings 1/, conclusions and recommendation.

1/ In footnote 3 on page 8 of the Recommended Decision and Order, the case cited therein is referred to as "A/SLMR No. 756," instead of "A/SLMR No. 758." This inadvertance is hereby corrected.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-06932(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 19, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
DIVISION OF MILITARY AND NAVAL AFFAIRS STATE OF NEW YORK NEW YORK AIR NATIONAL GUARD	:	
Respondent	:	
	:	Case No. 30-06932(CA)
and	:	
H.E. BROOKS MEMORIAL CHAPTER ASSOCIATION OF CIVILIAN TECHNICIANS	:	
Complainant	:	

Noel J. Cipriano, Esquire
Division of Military and Naval Affairs
Public Security Building
State Office Campus
Albany, New York 12226
On Behalf of Respondent

John T. Hunter
Executive Vice-President
Association of Civilian Technicians
150 West 14th Street
Deer Park, New York 11729
On Behalf of Complainant

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under the provisions of Executive Order 11491, as amended (hereinafter called the Order). On May 18, 1976 H.E. Brooks Memorial Chapter, Association of Civilian

Technician, herein called H.E. Brooks Chapter of A.C.T., filed a complaint alleging that Division of Military and Naval Affairs, State of New York (hereinafter called the Respondent and the Activity) violated Sections 19(a)(1) and (6) by failing to negotiate and bargain in good faith concerning a plan for implementing a reduction in force with respect to the Suffolk County Air National Guard Base located in Westhampton Beach, Long Island.

Pursuant to a Notice of Hearing on Complaint issued on December 1, 1976 by Department of Labor New York Regional Administrator a hearing in the subject matter was held before the undersigned in Westhampton, New York. Both parties were represented at the hearing and were afforded full opportunity to be heard; to call, examine and cross-examine witnesses; and to introduce evidence bearing on the issues involved herein. Both parties were advised of their rights to argue orally and both filed briefs which have been duly considered.

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. The New York State Counsel of the Association of Civilian Technicians (hereinafter called the Union and ACT) has at all times material been the collective bargaining representative for a Unit composed of all New York Army and Air National Guard Technicians.

2. A collective bargaining agreement between the Chief of Staff of the Activity and ACT (hereinafter called the Agreement) was entered into on September 15, 1975. The Agreement was approved by the National Guard Bureau (hereinafter called NGB) on October 3, 1975.

3. The Preamble to the agreement states that it is "subject to currently applicable statutes and regulations issued by the National Guard Bureau...." Article 13 of the Agreement is entitled "Reduction-in-Force" and Section 5 of this Article provides:

"Factors (not to be construed as all inclusive) to be considered in developing reduction-in-force plans are:

a. Technician service.

b. Qualifications, to include experience and skill.

c. Performance ratings.

d. Filling vacancies prior to reduction-in-force."

4. The National Guard Bureau (NGB) administers the National Guard of the United States by virtue of delegated authority from the Department of Defense and by Statute and Department of Defense Regulation. The NGB issued Technical Personnel Phamphlet 910 (TPP 910) on March 1, 1973, which sets forth a "program designed to assist the State in the proper and orderly transition of technicians in the event of a reduction-in-force (RIF)...." TPP 910 (Chapter 5-11) provides for the establishment of a retention register in RIF situations and the criteria to be used in placement on the register. A format for such a retention register is also included in TPP 910.

5. The Activity was advised of a possible RIF in October 1975 and tried to avoid such an occurrence. Apparently in January 1976 the Activity recognized that a RIF could not be avoided and by letter dated January 29, 1976 notified the State Chairman of ACT of the impending RIF and its implementation at three affected military bases. The letter stated, in part,:

"3. The agreement between DMNA and ACT, Inc. requires consultation in RIF procedures. Such consultation would normally be with the State Chairman. However, in view of the geographic locations of the bases involved and the complexities of each case, it is suggested that such consultation be with an Act representative at each base rather than with the State Chairman. If you concur, the representatives designated by you would have full authority for the employee organization and such action would be considered as meeting the requirements of the agreement."

6. ACT named basically different representatives for the three meetings concerning the proposed RIF at the three different installations. Meetings were held between the ACT representatives and the Activity concerning first the Niagara Falls Installation and then the Syracuse

Installation. Agreements were reach with respect to the implementation of the RIF at each of these installations and in each case TPP 910 was to be applied.

7. The representatives of ACT and the Activity met on February 25, 1976 to discuss the RIF at the Suffolk installation. The Union and Activity representatives submitted a number of proposals and then bargained for the entire day. The parties reached tentative agreement and basically all of the Union's proposals were adopted except one. The one that was not agreed upon was the Union's Proposal Number 6 which provided:

"6. Establish a retention register by tenure group, compiled as follows;

A. Technician Service (seniority).... Length of time employee has been employed by the NYANG for excepted employees and adjusted and accredited service for competitive employees.

B. Qualifications, to include experience and skill. (Score 1 to 5 years added).

C. Performance rating .... An employee's current official performance rating on the date of issuance of a general RIF notice. (Score 5 yrs Outstanding
3 yrs Excellent
1 yr Satisfactory."

The Activity representatives refused to accept Union proposal No. 6 because they contended they had to apply TPP 910 in setting up the retention register. The Union in urging proposal No. 6 contended that they wanted seniority to be the main criteria in setting up a retention register. The Union apparently tied this to Article 13 Section 5 of the contract. The Activity took the position that it had to apply the criteria set forth in TPP 910 and pointed out that that all four criteria set out in Article 13 Section 5 were included in the Supervisor's report required by TPP 910 in setting up the retention register. The parties then signed a document which was entitled "Proposed Reduction-in-Force Plan" which set forth those terms agreed upon and specifically set forth ACT Proposal Number 6 which had not been agreed upon. The Activity agreed it would seek further guidance and consultation from its headquarters in Albany and would "get back" to the Union

representatives. 1/

8. By mailgrams of February 28, 1976 the Union and its Suffolk representative contended that the Activity, by refusing to agree to Proposal Number 6, was violating Artilce 13 Section 5 of the contract. ACT demanded that the Activity rectify this situation.

9. On or about March 1, 1976 in the morning, an Activity representative telephoned Union representative Waters to see if the Union had changed its position with respect to Proposal Number 6. Apparently the Union advised the Activity that it had not changed its position.

10. On or about March 1, 1976 the Activity issued its general RIF notice letters with respect to the Suffolk installation.

11. On March 4, 1976 the Activity sent a letter to the Union advising it that the RIF would be instituted at the Suffolk base and that the agreed "Proposed Reduction-in-Force Plan" that had been signed on February 25 would be implemented along with the requirements of TPP 910.

12. On March 6 Union representative Waters sent the Activity a mailgram requesting that they go back to the negotiating table "for unresolved items based on the way we proposed it."

13. By letter dated March 12, 1976 the Activity replied to the Union's February 28, 1976 mailgram in which it advised the Union that the use of TPP 910 is mandatory and that within this framework Section 5 Article 13 is being observed in the RIF at the Suffolk installation.

14. The Union sent a letter dated March 16, 1976 to the NGB requesting that, with respect to the Suffolk Installation RIF, an exception be granted from the retention register provisions of TPP 910. By letter dated April 30, 1976 the NGB advised the Union that it would not grant an

1/ Although there is some confusion as to what was precisely said it is clear that the Activity representatives were going to seek guidance on the entire RIF agreement and Union's Proposal Number 6 and was going to communicate with the Union further once such guidance had been secured.

exception to the TPP 910 retention register provisions in order to permit it to bargain about them on a local level.

15. On March 23, 1976 the Activity issued the specific RIF notices to those specific employees affected by the RIF at the Suffolk Installation.

16. By letter of May 29, 1975 the NGB turned down a request by the Activity, made at the urging of ACT, that they be granted an exception to certain aspects of the TPP 910 requirements pertaining to the retention register. The Union had received a copy of this communication.

Conclusions of Law

The Union contends first that because the Activity first learned of the possible RIF in October of 1975 it did not timely notify the Union. However, this contention must be rejected. The record establishes that although the Activity first learned of the possibility of a RIF in October 1975, it then tried to take action to see if such a RIF could be avoided. When in January 1976 the Activity learned that a RIF was inevitable it promptly notified ACT by letter dated January 29, 1976 and set in motion procedures to bargain about the procedures for implementing the RIF and its impact. Such notification was sufficiently prompt to give the Union sufficient time to meet and confer with the Activity and therefore satisfied the Activity's obligation.

The Union contends that the Activity violated Sections 19(a)(1) and (6) of the Order during the February 25 meeting and thereafter by refusing to negotiate concerning ACT's Proposal Number 6 because the Activity contended it had to apply TPP 910's provisions with respect to the retention register. In effect the Activity was stating that the applicational TPP 910 was non-negoitable as was Union Proposal Number 6, which was inconsistent with TPP 910. 2/

The Agreement of September 15, 1975 provided that it was, inter alia, "subject to currently applicable....

2/ There is no dispute that TPP 910 and proposal No. 6 are inconsistent.

regulations" issued by the NGB. At that time TPP 910 had already been issued by NGB. NGB then approved the Agreement, with no notation that it any way was inconsistent with TPP 910. It is concluded that Article 13 Section 5, which sets forth criteria which are not all inclusive nor given specific weights for use in developing a reduction-in-force plan, is not necessarily inconsistent with TPP 910. The criteria set forth in the Agreement, as well as others, could be taken into account in the various provisions for setting up the retention register in conformity with TPP 910. The Union contends that its Proposal Number 6 which was presented at the February 25 meeting was merely a restatement of Article 13 Section 5 of the Agreement. This contention is rejected. Proposal Number 6 sets forth all the criteria that will be used in setting a retention register with very specific weights and procedures for evaluating employees. Proposal Number 6 is quite different from Article 13 Section 5 which deals with some general criteria, which are not weighted nor all inclusive. Proposal Number 6 is inconsistent with TPP 910. For example although within the TPP 910 procedures for setting up a retention register some weight could be given to seniority, it could not be given the overwhelming weight given it in Proposal Number 6.

During the February 25 meeting the Activity advised ACT that for these very reasons it could not accept Proposal Number 6 and had to follow NGB rules and apply TPP 910. Thus the Activity was, in effect, deciding that the application of the TPP 910 retention register procedures were non-negotiable.

In the circumstances of this case it is concluded that I cannot find that the Activity violated Sections 19(a)(1) and (6) baded on its refusal to negotiate concerning the application of TPP 910 in RIF situations.

It is clear that NGB is in effect the "agency headquarters" for the State National Guards and it is the organization that in this very case approved the Agreement in October 1975. This Agreement stated that it was subject to the regulations of NGB and, in fact, ACT had sought unsuccessfully in a different RIF situation in May 1975, before the Agreement had been entered into, to have NGB waive the TPP 910 requirements. Thus it is concluded that NGB is "agency headquarters" within the meaning Sections

11 and 15 of the Order. 3/

The subject case is distinguishable from the Colorado Air National Guard Case, supra, because in that case the Colorado Air National Guard had entered into a collective bargaining agreement with ACT which specifically provided for the application of certain RIF procedures and regulations that were clearly different from TPP 910. Thus it was held that when, during a RIF, the Colorado Air National Guard unilaterlaly applied the TPP 910 procedures rather than the collective bargaining agreement procedures, the Colorado Air National Guard violated Sections 19(a)(1) and (6) of the Order. 4/ It should be noted that the Assistant Secretary in the Colorado Air National Guard Case, supra, specifically discussed TPP 910 as an "agency" policy or regulation.

In the instant case the Agreement between the parties specifically recognized that it was subject to regulations issued by the NGB and TPP 910 had, at that time already been issued. Since TPP 910 and Article 13 of the Agreement were not necessarily inconsistent, it is concluded that by approving the Agreement NGB was not waiving the application of TPP 910 in RIF situations. Thus the instant case raises a different problem than the Colorado Air National Guard Case, supra. In that case the issue raised is whether Sections 19(a)(1) and (6) of the Order was violated by the unilateral imposition of TPP 910, an agency regulation, when the parties had agreed, as part of their collective bargaining ag eement, upon waiving TPP 910 and upon new and different RIF procedures.

In the subject case the issue presented is whether the Activity violated Sections 19(a)(1) and (6) of the Order when there had not been a waiver of the application of the of the agency regulation, TPP 910, and the Activity refused to negotiate about the application of the TPP 910 RIF

3/ In this regard "agency headquarters," "agency policies and regulations" are distinguished from "appropriate authorities" within the meaning of Section 12(a) of the Order. See Colorado Air National Guard, Buckley Air National Guard Base, A/LSMR No. 756 (hereinafter referred to as the Colorado Air National and Guard Case).

4/ In these circumstances it was concluded that when NGB approved the collective bargaining agreement it waived, "its policy or regulation" set forth in TPP 910 and that it was not an outside "appropriate authority" to justify changing an existing contract.

procedures in anticipation of an imminent RIF.

Section 11(a) of the Order provides that the parties must meet and confer with respect to personnel policies and practices and matters affecting working conditions so far as they may be appropriate under "published agency policies and regulations for which a compelling need exists.... and which are issued at the agency headquarter level."

When an Activity refuses to negotiate on a certain subject because the Activity deems it non-negotiable because of an existing regulation there are procedures set forth in Section 11(c) of the Order for seeking a determination whether the matter is negotiable which the labor organization must pursue. However, Section 11 (d) of the Order provides that when there is an unfair labor practice case based on "an alleged unilateral change" the negotiability issue can be decided as part of the unfair labor practice procedure.

It is concluded however that Section 11(d) of the Order is not applicable to the instant case and therefore I conclude that I am without authority, under the Order, to make a finding with respect to the question of whether the Activity had to bargain about the application of the TPP 910 procedures. It is concluded that there was no "alleged unilateral change" in the instant case; rather TPP 910 had been in existence since 1973, had been applied by the parties in the past, 5/ and was impliedly recognized by the parties in the preamble to the Agreement. Thus this is not a situation where the Activity is unilaterally applying a new regulation, but rather one in which it is refusing to negotiate about changing an existing regulation. This is not the situation contemplated by Section 11(d) of the Order. Rather Section 11(d) of the Order gives the parties a method for challenging a unilateral change without having to go through two procedures. In the instant case ACT had ample time and opportunity before the subject RIF to seek to bargain about the application of TPP 910 and, if the Activity refused to bargain, to utilize the procedures provided in Section 11(c) of the Order. This would have been the more orderly way of handling this matter rather than waiting for a RIF to be imminent and then to seek to bargain about the application of an existing agency

5/ Note that ACT sought waiver of the TPP 910 procedures in May 1975.

regulation and to have negotiability questions determined in an unfair practice proceeding. 6/

Thus I conclude that I must dismiss the allegation that the Activity violated Sections 19(a)(1) and (6) of the Order based on its refusal to negotiate concerning the application of TPP 910 because I am without jurisdiction to make a determination whether the application of TPP 910 was negotiable and where there was any "compelling need" within the meaning of Section 11(a) of the Order to privilege the removal of this subject matter from collective bargaining. 7/

Finally the Activity had advised ACT, at the close of the February 25 meeting, that it would check and get back to the Union concerning whether it could waive the TPP 910 requirements. The Activity did notify the Union in its letters of March 4, 1976 and March 12, 1976 that it was bound to use the TPP 910 procedures. 8/ Thus it is concluded that the Activity did advise the Union of its final position.

6/ If this were permitted parties might never utilize the more orderly procedures for testing negotiability where an agency's regulations are involved.

7/ If it were concluded that Section 11(d) of the Order empowered me to rule on the negotiability issue in the instant unfair labor practice case, I would conclude that the Activity violated Sections 19(a)(1) and (6) of the Order by refusing to negotiate concerning the RIF procedure. The Activity did not establish at the hearing that such a refusal was privileged because of any "compelling need" for uniform application of TPP 910 nationwide within the requirements of Section 11(a) of the Order. The Activity put in no evidence to establish such "compelling need." In these circumstances I would necessarily have to conclude that there was no justification for the Activity's refusal to negotiate concerning the Union's Proposal Number 6.

8/ The fact that this notification was sent after the general RIF notification was sent to employees, although perhaps unfortunate, does not constitute a violation of the Order since ACT still had ample time to request any further negotiation before the specific RIF notifications were sent.

The Union by its mailgram dated March 6, 1976 renewed its request to negotiate but did so "on the way we proposed," presumably still insisting on its proposal number 6. The Activity had already made it quite clear that it could not negotiate concerning proposal number 6. Thus it is concluded the Activity's failure to meet and further discuss the Union proposal did not violate the Order. Finally after the March 12 letter from the Activity in which it was made quite clear that TPP 910 would be applied the Union requested no further meeting to discuss any other aspects of the RIF.

In light of all of the foregoing it is concluded that he record in the subect case does not establish that the Respondent engaged in any conduct which constituted a violation of Sections 19(a)(1) and (6) of the Order.

Recommendation

On the basis of the foregoing Findings of Fact and Conclusions of Law, I hereby recommend to the Assistant Secretary that the subject complaint be dismissed in its entirety.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: April 1, 1977
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

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3486, AFL-CIO
A/SLMR No. 864

This case involved an unfair labor practice complaint filed by the 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense (Complainant) alleging that the American Federation of Government Employees, Local 3486, AFL-CIO, (Respondent) violated Section 19(b)(4) of the Order by actively encouraging and condoning a work stoppage and by failing to take affirmative steps to prevent or stop the prohibited activity.

The Administrative Law Judge found that bad weather conditions forced the rescheduling of a segment of an Operational Readiness Inspection (ORI) from Sunday afternoon to the following Monday, which was normally a day off for unit employees. In reaction to that change, the President of the Respondent advised the Vice-President and a steward that they should present unit employees with several options. He stated that they could take emergency annual leave, emergency sick leave, or they could simply stay off from work without reporting in. He also stated that they should "do the government a favor and come to work," but whatever they did, the Union would support them. The steward was advised to hold a meeting with unit employees and relay to them the options outlined by the Respondent's President. At the meeting, the steward related the options and informed unit employees that whatever option they selected, the Union would back them up. The next day, Monday, the Union Vice-President, the steward, and another employee did not report to work or call in. When they returned on Tuesday, they informed their supervisor that they had not reported in or called in because they did not recognize the change in the workweek.

The Administrative Law Judge concluded, that the Respondent's conduct violated Section 19(b)(4) of the Order in that it condoned and encouraged employees to withhold their services and failed to fulfill its affirmative duty to prevent such conduct.

Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the matter, including the Respondent's exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations, and issued an appropriate remedial order.

A/SLMR No. 864

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3486, AFL-CIO

Respondent

and

Case No. 32-4694(CO)

177th FIGHTER INTERCEPTOR GROUP, AIR NATIONAL GUARD, NEW JERSEY DEPARTMENT OF DEFENSE

Complainant

DECISION AND ORDER

On March 31, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the American Federation of Government Employees, Local 3486, AFL-CIO, shall:

1. Cease and desist from:

(a) Encouraging or engaging in a work stoppage against the 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense, or any other agency of the Government of the United States, or assisting or participating in such activity.

(b) Condoning any such activity by the failure to take affirmative action to prevent or stop it.

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

(a) Post at its local business office, at its normal meeting places, and at all other places where notices to members and to employees of the 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense are customarily posted, including space on bulletin boards made available to the American Federation of Government Employees, Local 3486, AFL-CIO, by agreement or otherwise by the 177th Interceptor Group, Air National Guard, New Jersey Department of Defense, 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 American Federation of Government Employees, Local 3486, AFL-CIO, and shall be posted for a period of 60 consecutive days in conspicuous places, including all places where notices to its members and to employees of the 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense are customarily posted. Reasonable steps shall be taken by the American Federation of Government Employees, Local 3486, AFL-CIO, to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Mail a copy of said notice to each of its members at his last known home address.

(c) Furnish sufficient copies of said notice within 14 days of the date of this decision to the 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense for posting in conspicuous places where it customarily posts information to its employees. The 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense shall maintain such notices for a period of 60 consecutive days from the date of posting.

(d) Pursuant to Section 203.27 of the Regulations notify the Assistant Secretary of Labor for Labor-Management Relations in writing

within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
July 19, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL MEMBERS AND TO

ALL EMPLOYEES

OF THE 177th FIGHTER INTERCEPTOR GROUP, AIR NATIONAL GUARD

NEW JERSEY DEPARTMENT OF DEFENSE

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 all employees of the 177th Fighter Interceptor Group, Air National Guard New Jersey Department of Defense that:

WE WILL NOT encourage or engage in a work stoppage against the 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense, or any other agency of the Government of the United States, or assist or participate in such activity.

WE WILL NOT condone any of the above-mentioned conduct and WE WILL take affirmative action to prevent or stop it, in the event it reoccurs.

American Federation of Government Employees, Local 3486, AFL-CIO

Dated:_____ By:_____

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 Regional Administrator 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.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
	:	
177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense Complainant	:	
and	:	
	:	Case No. 32-4694(CO)
American Federation of Government Employees, Local 3486, AFL-CIO Respondent	:	
and	:	
	:	
Regional Administrator, Labor-Management Services Administration, United States Department of Labor Party	:	

Colonel John G. Johnson
Trenton, New Jersey
For the Complainant

Joseph F. Girlando, National Representative,
American Federation of Government Employees
Orange, New Jersey
For the Respondent

Francis V. LaRuffa
Regional Solicitor of Labor by
Jay S. Berke, Esq.
New York, New York
For the Regional Administrator

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed July 1, 1976, and an amended complaint filed July 8, 1976, by 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense (hereinafter called Complainant) the Regional Administrator for Labor-Management Services for the New York Region issued a Notice of Hearing on complaint on August 26, 1976, The complaint alleged that American Federation of Government Employees, Local 3486, AFL-CIO, (hereinafter called Respondent Union) violated Section 19(b)(4) of Executive Order 11491, as amended, in that the labor organization called or engaged in a work stoppage, or condoned such activity by failing to take affirmative action to prevent or stop the prohibited activity. The alleged unlawful conduct is asserted to have occurred on April 12, 1976, at the National Avaiation Facility Experimental Center (NAFEC) in Pomona, New Jersey, where the Complainant operated a base as a part of the Aerospace Defense Command.

A hearing was held in this matter on October 27, 1976, in Pomona, New Jersey. 1/ All parties were represented by counsel and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. As a party-in-interest, the Regional Administrator for Labor-Management Services was represented by the Office of the Regional Solicitor of Labor. Briefs were submitted by counsel and have been duly considered in arriving at the decision in this case. 2/

1/ Although the rules require an expedited procedure for alleged violations of Section 19(b)(4) because of the gravity of the asserted unlawful conduct, this procedure does not apply in the instant case as the alleged unlawful conduct had ceased. (Title 29, C.F.R. §203.7).

2/ The time for filing briefs was set for November 30, 1976, and was extended until December 15, 1976, because of the failure of the official reporter to provide copies of the transcript to the parties. The time was further extended until January 31, 1977, for the same reason.

Findings of Fact

A. Background Facts

The Complainant Activity is a military unit in the Air National Guard, whose mission is to train and equip personnel to identify, intercept, and destroy (if ordered) aircraft or missiles coming into the United States. As such, the Complainant Activity is an operational unit of the Aerospace Defense Command (ADCOM). The unit is staffed by both military personnel and civilian employees; the latter are classified as Air Technicians and are represented by the Respondent Union.

Although the Air Technicians have Wage Grade or General Schedule (GS) status as civilians, they also must be members of the Air National Guard and hold military rank. They are required to perform military duties one weekend (Saturday and Sunday) per month, or at least 15 active duty days in the course of a year. When the civilian employees are in military status it is described as Unit Trading Assembly (UTA). The work they perform, however, is normally the same work they perform as civilian employees.

The normal workweek at the Complainant Activity is Tuesday through Saturday from 8:30 a.m. to 5:00 p.m. This does not apply when the employees are in UTA status; they then work as civilians from Monday through Friday and perform their military obligation on the weekend.

B. The Alleged Unlawful Conduct

The unit worked Monday through Friday the week of April 5, 1976, as it was scheduled for UTA status the following weekend. On April 6, 1976, Colonel Hannon, the Base Commander, received a notification there would be an Operational Readiness Inspection (ORI) the latter part of that week. This was an inspection conducted by the Inspector General's Office of ADCOM to test all capabilities of the unit to perform its mission satisfactorily. This type of inspection was a "no notice" inspection, which meant that the unit received notification 72 hours in advance of the arrival of the inspection team. The procedures required the inspected unit to be put through various stages of alert,

called DEFCOF, 3/ and to perform certain exercises to test its readiness and performance.

The advance unit of the inspection team arrived at the installation on Thursday, April 8. The main contingent landed the following day, and the unit was put through a number of exercises in different DEFCOF stages. On Sunday, April 11, the unit was required to engage in a "flush" exercise that had a status of DEFCOF-1 to determine the survivability of the unit's aircraft in wartime conditions. This particular exercise involved all of the aircraft of the Complainant Activity, including support aircraft. Due to a restriction imposed by NAFEC authorities who operated the installation where the unit was based, no flying is permitted on Sunday mornings. This was to avoid disturbing church services conducted in the nearby communities. When informed of the restriction, the head of the inspection team scheduled the "flush" exercise for early Sunday afternoon.

At the time the aircraft were being readied for launch, the weather conditions changed and crosswinds exceeding 20 knots per hour were sweeping across the runway. The inspection team commander received information that the weather front would prevail for the balance of the day and pass through the area that evening. He then rescheduled the "flush" exercise for the following day, which normally would have been a non-work day for the unit.

When the decision was made to reschedule the exercise, the Base Commander attempted to contact Donald Auer, vice president of the Union and a technician attached to the Aerospace Ground Equipment Shop. 4/ He was unable to reach Auer who was performing duties on the flight line.

3/ DEFCOF consists of several gradations of alertness governing the stages of readiness and the types of response the unit must undertake. For example, DEFCOF-3 through 5 is a warning that some event might occur, but the unit is not required to act. DEFCOF-2 requires the unit to secure and guard its base. DEFCOF-1 places the unit on a war footing and in combat status.

4/ Auer was a powered support systems mechanic and held the military rank of sergeant.

He then attempted to contact Sergeant Pascale, secretary of the Union, but he was also out on the flight line. The Base Commander finally contacted a union steward from the Avionics Shop and notifed him of the change in the workweek and the reason for it. He instructed this individual to inform the other union officials. Because of the inspection, the employees had started an early shift that morning and were scheduled to leave early in the afternoon. Fearing they would leave before being notified of rescheduled workweek, Hannon had the change announced on the public address system. He also notified his supervisors and instructed them to relay the message verbally to the employees.

Sergeant Rutherford, a section chief in the AGE shop went to the flight line in a vehicle to find the union officials to personally notify them of the change. He spoke with Auer who was sitting in a parked vehicle along side a vehicle in which Louis Cascione, steward for the AGE shop, and another employee, Schinestuhl, were sitting. He informed all of them of the change in the work schedule.

When Auer and Cascione returned to the AGE shop, they each contacted Richard Apothaker, the president of the union, at his home. 5/ In his conversations with Auer and Cascione, Apothaker advised that the employees had several options available to them. He stated they could take emergency annual leave, emergency sick leave or they could simply stay off from work without reporting in. He also stated that the employees should "do the government a favor and come to work", but whatever decision they made, the Union would support them.

Auer and Cascione discussed the matter among themselves and decided that Cascione, as shop steward, should hold a meeting with the employees in the shop after work and relay to them the positions outlined by Apothaker. After the work-day the AEG technicians met with Cascione in the shop and sought to get from him the union's official position on the change in the workweek. Cascione repeated the options outlined by Apothaker and told the employees "that they should do the government a favor" but whatever they did, the Union would back them up. 6/

5/ Apothaker was formerly a civilian technician attached to the unit. He was no longer employed in this capacity and was not on the base.

6/ Auer was not present at the shop meeting. He left the base early, but suggested to Cascione that he conduct the meeting in response to questions from the shop employees.

The following day when the "flush" exercise was held, Auer, Cascione and Schinestuhl did not report to work nor did they call in. In addition to these three employees, two other air technicians, Conti and Lauria, were also absent from work. The latter two employees, however, had been given permission by Rutherford to go on annual leave when it was rumored the unit might have to work on Monday. On Tuesday, April 13, when Auer, Cascione and Schinestuhl returned to work, they informed Rutherford that they had not called in because they did not recognize the change in the workweek. Each indicated that if they had called in requesting some type of emergency leave, it would had been tacit recognition that there had been an official change in the workweek schedule. As a result of the failure to report to work on April 12, the three men were marked absent without leave (AWOL).

Concluding Findings

The Respondent Union argues that the Complainant Activity and the Regional Administrator have failed to establish that a work stoppage occurred or that the Respondent Union condoned such unlawful activity, if it did in fact happen. In my judgement, the record does not support the Respondent Union's argument, and I find that a violation of Section 19(b)(4) has indeed been committed.

There is no need to dwell here on the right, or the absence of the right, of management to reschedule the work-week in order to complete the exercises required by the ORI. The regulations of the Air National Guard delegate to the Base Commander the authority to change the basic workweek if the unit's mission requirements make such a change necessary. The circumstances here clearly establish that the ORI was not completed, and a rescheduling of the coming workweek was an absolute necessity. But even if this authority had not been delegated, a change in the workweek would have been mandated because of the intervention of the adverse weather conditions on Sunday. If the officials of the Respondent Union felt that the rescheduling violated the terms of any labor agreement in force or provisions of the Executive Order, they should have followed the procedures available to them under the Executive Order rather than resorting to self-help.

The above is premised on my finding that the Respondent Union did condone a withholding of services by members of the unit and failed to take any affirmative steps to prevent this conduct; which is the basic issue here. When Auer and Cascione contacted the union president by telephone it was evident that the union officials were attempting to adopt a "neutral position", while at the same time shifting the burden of the basic decision to the employees, i.e., whether to report or not report to work the following day. In outlining the various options they thought were available to the employees, the union officials condoned, and indeed encouraged, unlawful employee conduct by informing the employees that whatever action they decided to take, the Union would support them. The mere fact that the union officials stated that the employees "should do the government a favor and come to work" does not vitiate what I find to be unlawful encouragement to engage in a work stoppage.

The language of Section 19(b)(4) is clear and unambiguous. It provides that a labor organization shall not:

> (4) call or engage in a strike, work stoppage, or slow down; picket an agency in a labor-management dispute; or condone in such activity by failing to take affirmative action to prevent or stop it.

The Report and Recommendations of the Study Committee, on this point, which were adopted in toto when the Executive Order was issued in 1969 and have not been changed by subsequent amendments, contain the following language which sets forth the purpose of this provision of the Order:

> "The section should make clear that a recognized labor organization may not condone a strike or prohibit picketing by any member or group or of members within its organization which it represents under the order. Officials of the organization have a duty, in view of the procedures provided for peaceful and orderly resolutions of disputes and differences between employees and management, to exercise all organizational authority available to them to prevent or stop any such action by the organization or any of its locals, affiliates, or members."

While the report deals with picketing and strikes, the language of that section in the Executive Order clearly includes work stoppages as part of the class of proscribed activity.

Accordingly, I find that the Respondent Union was under an affirmative duty to advise its members that they should report to work the following day, even if the Respondent Union intended subsequently to contest the rescheduling under the procedures provided by the Executive Order. By failing to do so, and by providing the employees with the option of remaining away from work with union sanction and support, I find that the Respondent Union condoned a withholding of services and failed to meet the obligations imposed by Section 19(b)(4). Because of the limited duration of the work stoppage or withholding of services, and because of the minuscule number of employees involved, I do not believe that it would serve the interest of justice to invoke further sanctions under Section 2(e)(2) of the Executive Order against the Respondent Union. 7/

Having found that the Respondent Union engaged in activity which violated Section 19(b)(4), I shall recommend that the Assistant Secretary adopt the following Recommended Order designed to effectuate the policies of the Executive Order 11491, as amended.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that American Federation of Government Employees, Local 3486, AFL-CIO, shall:

1. Cease and desist from:

   (a) encouraging or engaging in a work stoppage against 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense, or any other agency of the Government of the United States, in a labor-management dispute, or assisting or participating in such activity.

   (b) condoning such activity by the failure to take affirmative action to prevent or stop it.

2. Take the following affirmative action in order to effectuate the purposes and provisions of the Executive Order:

7/ Cf. Professional Air Traffic Controllers Organization, Inc., A/SLMR No. 10.

(a) Post at its local business office and in normal places where meetings with members occur copies of the attached notice, marked "Appendix", signed by the president of American Federation of Government Employees, Local 3486, AFL-CIO. Said copies of the notices shall be posted for a period of 60 consecutive days in conspicious places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that said notices are not altered, defaced, or covered by other materials.

(b) Mail a copy of said notice to each of its members at his last known home address.

(c) Furnish sufficient copies of notice to 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense for posting by it, if willing, at places where it customarily posts information for members of the Fighter Group Unit.

(d) Pursuant to Section 203.27 of the Regulations notify the Assistant Secretary of Labor for Labor-Management Relations in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Gordon J. Myatt

GORDON J. MYATT
Administrative Law Judge

Dated: March 31, 1977
Washington, D.C.

APPENDIX

N O T I C E T O A L L M E M B E R S A N D 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 members and all employees that:

WE WILL NOT encourage or engage in a work stoppage against the 177th Fighter Interceptor Group, Air National Guard, New Jersey Department of Defense, or any other agency of the Government of the United States, in a labor-management dispute, or assist or participate in such activity.

WE WILL NOT condone any of the above-mentioned conduct and WE WILL take affirmative action to prevent or stop it, in the event it reoccurs.

American Federation of Government
Employees, Local 3486, AFL-CIO

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 Regional Administrator 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

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

MARINE CORPS EXCHANGE 8-2,
MARINE CORPS AIR STATION,
EL TORO, CALIFORNIA
A/SLMR No. 865

This case arose as a result of an unfair labor practice complaint filed by the National Association of Government Employees, Local R 12-185 (NAGE) alleging, in substance, that the Respondent violated Section 19(a)(1) and (2) of the Order by its actions against an employee, including interference with her right to join a labor organization and termination of her employment because of her union membership.

The Administrative Law Judge concluded that the termination of the employee's employment was not in violation of Section 19(a)(2) of the Order as it was not related to her union activities. However, the Administrative Law Judge found that the manager of snack bars 2 and 3, whom he found to be a supervisor, violated Section 19(a)(1) by stating to the employee involved not only her own hostile views of unionism but also by alleging that the Food Service Manager would not like the employee joining the union and would find a way to get rid of the employee if she did go ahead and join the union.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and he ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

MARINE CORPS EXCHANGE 8-2,
MARINE CORPS AIR STATION,
EL TORO, CALIFORNIA

Respondent

and Case No. 72-6060

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R 12-185

Complainant

DECISION AND ORDER

On April 18, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor

1/ With regard to the remedy, in my view, it would not effectuate the purposes of the Order in the circumstances of this case to limit the posting of the remedial notice as recommended by the Administrative Law Judge.

for Labor-Management Relations hereby orders that the Marine Corps Exchange 8-2, Marine Corps Air Station, El Toro, California, shall:

1. Cease and desist from:

Interfering with, restraining, or coercing any employee in the exercise of his right to join a labor organization.

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

(a) Post at its 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 Exchange Officer 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 Exchange Officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 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) of the Order be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 20, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 any employee in the exercise of his right to join a labor organization.

_____
Marine Corps Exchange 8-2

Dated:_____ By:_____
Exchange Officer

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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 9061, Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

MARINE CORPS EXCHANGE 8-2
MARINE CORPS AIR STATION
EL TORO, CALIFORNIA
Respondent

and

Case No. 72-6060

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES LOCAL R 12-185
Complainant

Anthony Serritello, Esq.
Robert F. Griem, Esq.
National Association of Government Employees
3300 West Olive Avenue, Suite A
Burbank, California 91505
For the Complainant

James C. Causey, Esq.
Department of the Navy
880 Front Street, Room 4-S-21
San Diego, California 92188

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491 as amended, alleging violations of Sections 19(a)(1) and (2) of the Executive Order. The violations were alleged to consist of discriminating against and terminating the employment of Olga Hayes because of her union membership and with her right, freely and without fear of reprisal, to join a labor organization.

Facts

The Complainant is the certified exclusive representative of a unit of about 400 of the Respondent's employees. It was certified July 31, 1975 after an election earlier that month. The Respondent conducts 17 operations including three snack bars one of which is on the golf course and another at the air tower. Leo M. McCrary is the Food Service Manager with over 100 employees under him. The snack bars employ about four employees each some of them part-time. Helen M. Warren is the manager of the snack bars at the golf course and air tower. As such she works at both snack bars furnishing food service and directing the other employees at those snack bars. She keeps their time cards and prepares bi-weekly work schedules for the other employees. The work schedules she prepares are generally approved by McCrary or his Assistant Manager of Food Service, Lilly C. Little. Warren is a salaried employee who works such hours as she finds necessary. She works five, six, and recently sometimes seven days per week as the situation permits. She does not have authority to hire, suspend, discharge, promote, reward, or discipline the employees she directs.

Snack bar 2, the one on the golf course, generally has about four or five employees, some full-time and some part-time, in addition to Warren. In December 1973 Olga Hayes was employed by the Respondent to work part-time at that snack bar as a "busboy". Later that category of employee was eliminated and all employees at the snack bars were classified as food service workers. They were hourly employees and each performed all aspects of the operation.

When first employed Hayes worked six days per week for about 38 hours. The golf course was open six days per week and was closed on Mondays. The employees at the snack bars worked five, six, or seven days as the needs called for.

In June 1974 Hayes was absent from work for three weeks because of sickness. On her return she said she could not work six days and asked to be put on a full-time five-day week, and her request was granted.

In September or October 1975 Hayes became a member of the Complainant. She executed a dues-deduction authorization effective with her wages for the pay period ending October 11, 1975. Warren is an outspoken person given to strong language and, at times, speaking in a loud voice. Hayes was fimilar with these characteristics of Warren. When Warren learned of

Hayes having executed a dues-deduction authorization she attempted to persuade Hayes not to join the union in a loud voice and her customary strong language. The evidence is in sharp conflict on this point. Hayes testified that Warren made such attempt, and Warren denied it. English is not Hayes' native tongue and she has difficulty communicating in that language. In addition she was not entirely credible on all points. But on this point I credit her testimony for two reasons: first, because the particular conversation was corroborated by her husband, who was present and has no difficulty with the English language and second, because a former employee testified that during the union election campaign Warren engaged in anti-union conduct. Warren also said that McCrary would not like Hayes' joining the union. 1/

In October of 1975 it was decided to have the golf course open seven days per week and Major Van Hoose, the Exchange Officer, directed McCrary to make arrangements for the snack bar to be open seven days. McCrary asked Warren to arrange such a schedule. When Warren reported back that she could do it with two additional employees on a five-day week for all, McCrary instructed her to work out a seven day schedule utilizing only the present employees. Warren did so by scheduling all employees in that snack bar to work six days per week. Hayes refused to work on that schedule and she and Warren went to see McCrary. Hayes asked for a union representative to be present but none was available. It was a Saturday and the parties agreed to meet again on Monday with a union steward present.

The following Monday Hayes and Warren went to Mr. McCrary's office to meet with him and the union steward but the steward had already been there, had seen the schedule, had told McCrary he thought the schedule appropriate, and that he would so advise Hayes. Hayes then went to see Van Hoose, the Exchange Officer. He told Hayes he would try to work out something, but he never did.

1/ I do not credit the testimony that Warren urged the employees she managed not to join the union because of its inferior insurance program. On this point I find Warren urged only that if they joined the union they continue to carry the Exchange insurance. The Exchange insurance had comprehensive hospital and medical coverage with the Exchange sharing the cost of the voluntary insurance, while the insurance furnished by the union was paid for entirely by the union but insured against only accidental death or dismemberment.

Hayes became ill in November and went on sick leave. When her sick leave was used up she was asked when she would return. She was unable to do so and said she would return when her doctor permitted it. On December 17, 1975 Van Hoose addressed a memorandum to Hayes. Because she had used all her sick leave and was unable to give a date for her return, her employment was terminated for disability effective December 30, 1975 in accordance with Marine Corps regulations. The memorandum stated that at such time as she should be released by her doctor the Exchange would consider her re-employment consistent with her physical capacity and the staffing requirements of the Exchange. In January she reported she was ready to return. Several part-time jobs were offered to her but she rejected them.

McCrary does not have the authority to terminate any employee's employment; only Van Hoose has that authority. There was no probative evidence that McCrary harbors an anti-union animus, and no evidence at all that Van Hoose bears such an animus.

Discussion and Conclusion

The termination of Hayes' employment was not in violation of Section 19(a)(2) of the Executive Order because it was not discriminatory or related to her union activities. So far as the record shows Hayes' union "activities" consisted solely of becoming a member. The termination was made by Van Hoose and the record does not indicate that he even knew she was a member or that he had any union animus. He said he was terminating her employment for disability in accordance with Marine regulations because she was disabled, had used up her sick leave, and was unable to give a date for her return to work. There is no evidence or even contention that the regulations did not so provide. He said also that when she should be released by her doctor for work the Exchange would be glad to consider her re-employment consistent with her physical ability and staffing requirements. She was in fact offered several jobs but rejected them because they were part-time. There was no evidence full-time jobs were available. The record cannot support a conclusion that Hayes' employment was terminated because of her union membership or was otherwise discriminatory.

That leaves the alleged violation of Section 19(a)(1) in Warren trying to persuade Hayes not to become a member of the Complainant in late September or early October 1975.

Warren was a supervisor, although a minor one. That conclusion is not prevented by the fact that in July 1975, for the purposes of the election that resulted in the Complainant's certification, the parties agreed that Warren was a member of the unit as a "food service worker" 2/ and therefore not a supervisor. The evidence shows that she met one of the criteria of being a supervisor specified in Section 2(c) of the Executive Order in that she had the authority responsibly to direct the other employees in the snack bar. The criteria of determining supervisory status are specified in Section 2(a) in the disjunctive, and the fact that Warren did not meet any of the other criteria of supervisory status is irrelevant; an individual who possesses the authority to perform a single function described in Section 2(c) is a supervisor. United States Naval Weapons Center, China Lake, California and Local No. F-32, I.A.F.F., FLRC No. 72A-11(1973).

The foregoing conclusion is not free from doubt. Warren, instead of being classified as a supervisor, could almost as equally persuasively be considered non-supervisory "lead man". But the fact that she was not only at least a "lead man" but also prepared the bi-weekly work schedules which were almost always routinely approved decidedly tips the scales.

While a simple attempt by a supervisor to persuade an employee he supervises not to become a member of the certified union might not of itself constitute interference with the employee's right to join a labor organization in violation of Section 19(a)(1), 3/ here we have more. In addition to stating her own hostile views of unionism, Warren said that McCrary, the Food Service Manager, would not like Hayes' joining the union. This crossed the line of Warren's possibly permissible expression of her own views, and implied a possible reprisal by higher authority and had a tendency to constitute interference with Hayes' right, assured by Section 1(a) of the Executive Order, freely and without fear of penalty or reprisal, to join a labor organization or to refrain from such activity. The fact that Hayes was not in fact intimidated is irrelevant.

2/ Exh. R.1.

3/ See Social Security Administration, Wilkes-Barre Operations Branch, HEW, A/SLMR No. 729 (1976).

The Remedy

An agency or activity or facility, whichever is the area of the recognized unit, is of course responsible for the improper conduct of its supervisors. Normally, when an employer commits an unfair labor practice, it is ordered to cease and desist from such activity and to post notices that it will not do so again.

But here the violation was only marginally a violation, and was committed by one only marginally a supervisor of about eight employees some of whom were part-time, and was committed against only one such person who is no longer, for unrelated reasons, an employee. To require the Respondent to announce throughout its numerous facilities to its 400 civilian employees in the unit represented by Complainant that it has sinned and will sin no more would be overkill. A remedy more suitably tailored to the facts of this case would require the posting to be done only in snack bars 2 and 3, the only places where Warren had any authority at all. 4/ Accordingly, I will recommend that the Assistant Secretary issue the Order attached hereto as Appendix A.

RECOMMENDATION

Insofar as the complaint alleges a violation of Section 19(a)(2) of Executive Order 11491, as amended, it should be dismissed. With respect to its alleged violation of Section 19(a)(1), I recommend that the Assistant Secretary issue the Order attached hereto as Appendix A.

MILTON KRAMER
Administrative Law Judge

Dated: April 18, 1977
Washington, D.C.

4/ See Director, Office of Labor-Management Standards Enforcement, U.S. Department of Labor and Local 1841, A.F.G.E. AFL-CIO, A/SLMR No. 686.

APPENDIX A

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Marine Corps Exchange 8-2, Marine Corps Air Station, El Toro, California, shall:

1. Cease and desist from interfering with, restraining, or coercing any employee in the exercise of his right, freely and without fear of reprisal, express or implied, to join a labor organization.

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

(a) Post in snack bars 2 and 3 copies of the attached notice marked "Attachment" 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 Exchange officer and shall be posted and maintained by him for 60 consecutive days thereafter in places where notices to employees in snack bars 2 and 3 are customarily posted. The Exchange officer shall take reasonable steps to insure that such notices are not altered, defaced, or covered by other material.

(b) Pursuant to Section 203.27 of the Regulations notify the Assistant Secretary of Labor for Labor-Management Relations, in writing, within 30 days from the date of this order 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) of the Order, is dismissed.

ATTACHMENT

NOTICE TO 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 notife our employees that:

WE WILL NOT interfere with, restrain, or coerce any employee in the exercise of his right, freely and without fear of reprisal, to join a labor organization.

Marine Corps Exchange 8-2

by _____
Exchange Officer

Date: _____

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

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 9061, Federal Building, 450 Golden Gate Avenue, San Francisco, California 94102.

July 21, 1977

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

PENNSYLVANIA AIR NATIONAL GUARD
A/SLMR No. 866

This case involved an unfair labor practice complaint filed by the Association of Civilian Technicians (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order. In this regard, the Complainant alleged that by the issuance on February 15, 1976, of Base Regulation 35-1, entitled "Dress and Personal Appearance of ANG Personnel," and a directive entitled "Technician Work Day," the Respondent unilaterally changed working terms and conditions in derogation of its obligation under Section 11(a) of the Order to meet and confer in good faith with the Complainant. The Respondent contended that the directives in question were merely a reaffirmation of existing policies. The Complainant disputed the Respondent's contentions, but argued in the alternative that, even if the directives constituted a reaffirmation of existing policy, such action, concerning subjects which were at that time subjects of bargaining negotiations and/or subjects before the Federal Service Impasses Panel, constituted violations of Section 19(a)(1) and (6) of the Order.

In his Recommended Decision and Order, the Administrative Law Judge found that Base Regulation 35-1 provided, among other things, for a change in the manner of wearing the utility uniform from the previous Base policy, and that such provision is a subject for bargaining pursuant to the provisions of Section 11(a) of the Order. Under these circumstances, the Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order when it issued Base Regulation 35-1 without first notifying the Complainant, and bargaining in good faith concerning this provision. However, with regard to the other matters contained in Base Regulation 35-1, and the directive entitled "Technician Work Day," the Administrative Law Judge found that they constituted a restatement of already existing policies, and that such restatement did not evidence a refusal to bargain on such subjects.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions. The Assistant Secretary also ordered that the complaint, insofar as it alleged additional violations of Section 19(a)(1) and (6) of the Order found not to be violative, be dismissed.

A/SLMR No. 866

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA AIR NATIONAL GUARD

Respondent

and

Case No. 20-5582(CA)

ASSOCIATION OF CIVILIAN TECHNICIANS (ACT)

Complainant

DECISION AND ORDER

On February 7, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

Thus, in agreement with the Administrative Law Judge, I find that the Respondent's issuance of Base Regulation 35-1 on February 15, 1976, which, among other things, changed the manner of wearing the utility uniform by unit employees, a subject matter for bargaining under the provisions of Section 11(a) of the Order, constituted a unilateral change in working conditions in violation of Section 19(a)(1) and (6) of the Order. 1/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Pennsylvania Air National Guard should:

1/ Cf. AFGE, National Immigration and Naturalization Services Council, FLRC No. 76A-26.

1. Cease and desist from:

(a) Instituting a change in policy with respect to the manner of wearing the utility uniform by employees of the Pennsylvania Air National Guard without notifying the Association of Civilian Technicians, the exclusive representative of its employees, and affording such representative the opportunity to meet and confer on the decision to effectuate such a change.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Notify the Association of Civilian Technicians of any intended change in policy with respect to the manner of wearing the utility uniform by unit employees of the Pennsylvania Air National Guard and, upon request, meet and confer in good faith on such intended change.

(b) Post at the facility of the Pennsylvania Air National Guard at the Greater Pittsburgh Airport, Caraopolis, 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 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.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 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) of the Order be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 21, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 institute a change in policy with respect to the manner of wearing the utility uniform by employees of the Pennsylvania Air National Guard without notifying the Association of Civilian Technicians, the exclusive representative of our employees, and affording the Association of Civilian Technicians the opportunity to meet and confer on the decision to effectuate such a change.

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 Association of Civilian Technicians of any intended change in policy with respect to the manner of wearing the utility uniform by unit employees of the Pennsylvania Air National Guard and, upon request, meet and confer in good faith on such intended change.

_____
(Agency or Activity)

Dated: _____ By _____
Commanding Officer

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 for Labor Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Rm. 14120 Gateway Bldg., 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

PENNSYLVANIA AIR NATIONAL GUARD :
Respondent :

and : Case No. 20-5582(CA)

ASSOCIATION OF CIVILIAN TECHNICIANS :
Complainant :

Leonard Spear, Esquire
Meranze, Katz, Spear & Wilderman
Twelfth Floor
Lewis Tower Building
N.E. Corner 15th & Locust Streets
Philadelphia, Pennsylvania 19102
For the Complainant

Major George M. Orndoff
Pennsylvania National Guard
Department of Military Affairs
Annville, Pennsylvania 17003
Trial Counsel

Colonel Hugh S. Niles
Personnel Officer
Department of Military Affairs
Adjutant General's Office
Commonwealth of Pennsylvania
Annville, Pennsylvania 17003
On Brief for
Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "order"). It was initiated by a charge filed on, or about, March 2, 1976, and a complaint

filed on April 22, 1976. The complaint alleged a violation of Sections 19(a)(1), (2), (5) and (6) of the Order; however, by letter dated September 7, 1976, Complainant requested withdrawal of the allegations concerning Sections 19(a)(2) and (5) of the Order; the Regional Administrator by letter dated September 9, 1976, granted the request to withdraw the Section 19(a)(2) and (5) allegations; and on September 20, 1976, a Notice of Hearing issued on the 19(a)(1) and (6) allegations; and, pursuant thereto, a hearing was duly held before the undersigned in Pittsburgh, Pennsylvania on November 9, 1976.

The two principal areas of dispute are: First, whether there was a policy change with respect to the manner of wearing the utility uniform (fatigues); and, Second, whether, in any event, even the reaffirmation of existing policy concerning the manner of wearing the utility uniform and non-allowance of official time for changing from and to civilian attire is an unfair labor practice when the same subject matters were before the Federal Service Impasses Panel and/or were in negotiation. 1/

1/ Pennsylvania State Council, Association of Civilian Technicians, Inc. (State Council), represents wage grade and general schedule employees in a statewide bargaining unit incorporating both Army and Air components of the Pennsylvania National Guard (Guard). Negotiations for an initial agreement began on February 1, 1974, between the Guard and the State Council; substantial progress was made by the parties in negotiations, but an impasse was reached and the State Council filed a request with the Federal Service Impasses Panel which resulted in a Panel Report and Recommendation for Settlement, dated November 6, 1975 (Case No. 75 FSIP 7); and, pursuant to notice of hearing, oral agrument on January 26, 1976; and on February 27, 1976, a Decision and Order that, inter alia,

> "The parties shall include in their agreement a provision to the effect that the Union [State Council] may at any time within 180 days from the effective date of the agreement notify the Employer [Guard] of its desire to engage in negotiations on the subjects of ... (2) military uniforms; [which included the State Council's demand for official time for changing from and to civilian attire] and that the parties will commence negotiation within a reasonable period of time after receipt of such notice. ..." (Comp. Exh. 5).

The genesis of the present case was a draft Base Regulation dated January 12, 1976, entitled "Dress and Personal Appearance of ANG Personnel" and a draft memorandum, also dated January 12, 1976, entitled "Technician Work Day" both of which were transmitted to the Chief Steward, Pittsburgh Chapter, Association of Civilian Technicians (ACT) by memorandum dated January 16, 1976, for comment and/or concurrence (Comp. Exh. 1). Chief Steward Krepitch responded by memorandum dated January 22, 1976, in which he stated, in essence, that:

1. We cannot concur with the issuance of such directives.

2. All matters of policy and directives must be established through the State Council of ACT and with the Adjutant General of Pennsylvania.

3. As the matters involved are before the Impass Panel, issuance of a directive would be improper.

4. ACT is strongly opposed to no allowable time during work hours for changing into civilian attire.

Base Regulation 35-1, entitled "Dress and Personal Appearance of ANG Personnel", issued February 15, 1976 (Comp. Exh. 1) and the memorandum re "Technician Work Day" issued February 15, 1976 (Comp. Exh. 3).

All parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses 2/ and to introduce evidence bearing on the issues involved and briefs were timely filed by the parties which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor,

---

2/ The Acting Regional Administrator, Mr. Joseph T. Senge, pursuant to Section 206.7 of the Regulations, approved Complainant's request of October 18, 1976, for the appearance of only seven witnesses. He stated,

> "I am denying your request for the appearance of Thomas J. Owsinki, inasmuch as he is the current state chairman of the union, and thus would be in a representative capacity at the hearing". (Continued)

I make the following findings of fact and conclusions and recommendation:

PRELIMINARY STATEMENT

This case does not involve negotiations of the Guard and ACT and, of course, does not involve negotiability in any respect. The Guard's position concerning negotiability, or more correctly the non-negotiability, of certain demands of the State Council is fully understood. Whether the Guard's position is correct or incorrect must be reserved for determination at an appropriate time and in an appropriate proceeding and cannot, and will not, be considered in this proceeding.

FINDINGS OF FACT

1. On January 16, 1976, Mr. George Oleck, Air National Guard Aero Space Ground Equipment Mechanic at Greater Pittsburgh Airport, who as then State Chairman of ACT, in the

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Footnote 2 continued from p. 3.

> "You may, of course, renew your requests for these witnesses before the Administrative Law Judge."

State Chairman Owsinski appeared voluntarily; however, Complainant renewed its request as to Mr. Owsinski. Complainant, in an effort to avoid the Acting Regional Administrator's statement concerning Mr. Owsinski's "representative capacity" had Mr. Owsinski sit in the audience until called as a witness.

The Assistant Secretary, in Bellingham Flight Service Station, Federal Aviation Administration, N. W. Region Department of Transportation, Bellingham, Washington, A/SLMR No. 597 (1975), has stated:

> "... in my view, the purposes of the Order would be better served if the parties adhere to the implicit mandate of Section 206.7 of Regulations that prior approval of a 'Request for Appearance of Witnesses' be obtained before any employee is granted such official time and expenses as are described in Section 206.7(g) of the Assistant Secretary's Regulations." (Emphasis in original).

Under the circumstances, as Mr. Owsinski appeared at the hearing voluntarily and testified voluntarily, it would be inappropriate to entertain Complainant's request and, accordingly Complainant's motion is denied.

absence of Michael Krepitch, then President and Chief Steward of the local Chapter of ACT, was called to the Office of Brigadier General Phillipy, Air Commander of the Air Technician Detachment at Greater Pittsburgh Airport, and was given the draft Base Regulations re "Dress and Personal Appearance of ANG Personnel" and the draft memorandum re "Technician Work Day" each of which was dated January 12, 1976, and which was attached to a letter dated January 16, 1976, addressed to T Sgt. Michael Krepitch, Chief Steward, Pgh Chapter ACT (Comp. Exh. 1). Mr. Oleck delivered the material to Mr. Krepitch the following day when Mr. Krepitch came to work.

2. General Phillipy stated in his letter to Sgt. Krepitch, in part, as follows:

> "1. Attached for your comments and/or concurrence are drafts of the following proposed directives.
>
> "a. Letter, Hg. Base Det/BCC, 12 Jan 76, Subject: Technician Workday
>
> "b. Base Regulation 35-1 Dress and Personal Appearance
>
> "2. Your comments will be given full consideration, however it is essential that you understand that no new policies are being established. These are being issued to supplement and clarify procedures that are presently in being in various directives of higher headquarters and compliance is mandatory for all personnel.
>
> "3. I am earnesly [sic] requesting the full support of you as the Chief Steward in these matters as well as all members of the Unit. An unsatisfactory condition presently exists in work habits and dress and personal appearance. The recent 9th Air Force I.G. report expands on the latter subject indicating the unsatisfactory status ...
>
> "4. Your reply would be appreciated by not later than 23 January 1976. Non receipt of any reply will indicate complete concurrence and directives will be issued as written." (Comp. Exh. 1).

3. Draft Base Regulation 35-1 stated that "This regulation implements the provisions of AFR 35-10 and is published to insure uniformity in the wearing of the military uniform by all Air National Guard personnel including technicians while performing duty in their technician status." The draft regulations further provided:

> "1. Policy: The dress and personal appearance of ANG personnel assigned to units of this base will comply with AFR 35-10 as implemented and/or reiterated by this directive.
>
> "2. Technician Personnel: Technicians in the excepted service ... will wear the military uniform appropriate to their military grade (Chapter 2, TPP 904). Such personnel will comply with AFR 35-10 while wearing the uniform in their technician status (Chapter 7, AFR 35-10).
>
> "3. Uniform Combinations:
>
> "a. Male Service Uniform: ... (1. through 4 and "Note" re headgear)
>
> "b. Wear of uniforms by Female Personnel: Because of the relatively small number of assigned female personnel, it is not deemed necessary to discuss the various uniform combinations which they may wear. They should consult Chapter 4, AFR 35-10 for full particulars.
>
> "c. Utility Uniform: The Utility uniform (fatigues) may be worn at all times by those personnel whose assigned duties require such wear. This includes roll calls except when another specific uniform is designated. When wearing the utility uniform, the shirt will always be worn tucked inside the trousers. (Emphasis on Exhibit.] When the weather so dictates the shirt may be removed and the T-shirt worn as an outer garment in work areas. Except when safety would be compromised, the utility cap will be worn whenever an individual is outdoors.

"4. Dress and Appearance. Each Air National Guardsman, whether in a military or technician status must maintain a high standard of dress and personal appearance. The standard, which is explained fully in AFR 35-10, is comprised of four elements - neatness, cleanliness, safety, and military image.

* * * *

"5. Uniform violations. Experience over past years has indicated a tendency for various violations of uniform regulations. This must be guarded against and corrected where required. In this category are such instances as:

a. Improper and mixed combinations.
b. Ill-fitting uniforms.
c. Sleeves rolled up on fatigue blouses.
d. Colored T-shirts.
e. Long sleeve underwear showing with short sleeve shirts or utility blouses.
f. Uniforms not buttoned.
g. Name tags, name tapes, insignia and/or chevrons not worn.
h. Hats not worn outdoors.
i. Wearing inner garment liners as outer garments.

. . ." (Comp. Exh. 1)

5. Draft memorandum re "Technician Work Day", recited that the tendency of air technician personnel to arrive late has been increasing and, if allowed to go unchecked, could increase even more in the cold winter days ahead and stated, in part,

"1. ... Except for the most extenuating circumstances it is each individual's responsibility to be in his section, in proper uniform, at the time his duty schedule begins. If he is on a 0730 to 1600 schedule this means 0730 not 0731 or later. Similarly if his schedule ends at 1600 he will be in his work area at 1600 and not in his privately owned vehicle or at an

exit door. As previously pointed out personnel may be excused at a reasonable time to wash up. However there can be no allowable time during working hours for changing from civilian attire into and out of military uniform. Supervisors at all levels will be held responsible for enforcement of these normal and proper working procedures."

"2. It is recognized there are occasional extenuating circumstances ... that may cause late arrivals. Therefore, except for these occasional extenuating periods, an individual who is more than 10 minutes late in arriving for duty will be charged 1 hour leave. However if an individual is frequently or habitually late for work, he will be charged 1 hours leave for periods of less than 10 minutes.

"3. This is not a new policy but is merely a restatement of standard operating procedures. In consonance with this para 3-6n, ANGM 177-204 is quoted for your information and guidance.

'Tardiness. The technician's supervisor may excuse tardiness or unavoidable absences from duty periods of less than 1 hour if the technician has adequate reasons. When absences or tardiness are chronic or not excused, such absences will be charged to annual leave or leave without pay in multiples of 1 hour."

. . ." (Comp. Exh. 1).

6. Mr. Oleck testified that on January 16, 1976, he informed General Phillipy that there were numerous changes made by the two draft documents, one of the biggest being "changing uniforms after quitting time." He further stated that as long as he had been a technician at Pittsburgh, over 35 years, "we always had time to clean up, change uniforms, and leave at quitting time"; although it does not appear that Mr. Oleck personally changed uniforms on duty time. Indeed, Mr. Oleck testified that the Regulations, when issued on February 15, 1976, directly affected him by requiring that he wear his

fatigue shirt tucked inside the trousers. Mr. Oleck stated that he also had a discussion with General Phillipy on January 2, 1976, about people leaving the work area before quitting time and that he had told General Phillipy at that time,

> "I agreed this was a problem and it was a management problem and I definitely felt that they had a legitimate complaint but it was a supervisory responsibility to control those people." (Tr. 19).

Mr. Oleck admitted that there were prior regulations but asserted that they had not been strictly enforced. In essence, he summed up his position as "we are slowly being more and more oriented towards complete military and not a civilian status which we are"; that "the whole uniform issue, as for as other things, is at an impass with our negotiators."; and that he recommended to General Phillipy that "we leave everthing as is ... until we work it out at the negotiating table."

7. Chief steward Kreptich responded in writing on behalf of ACT, by letter dated January 22, 1976 (Comp. Exh. 4) and, in substance, stated:

> 1. We maintain that these are changes in work conditions and cannot concur with the issuance of such directives.
>
> 2. The subject matter covered by the directives is an issue in negotiation before the Impass Panel.
>
> 3. We see no reference in TPP 904 or 907 to AFR 35-10 and therefore object to any reference to AFR 35-10.
>
> 4. We are strongly opposed to no allowable time during work hours to change into civilian attire and "we would like to see an appropriate amount of time for employees to change into their clean clothes."
>
> All stewards have been briefed as to the seriousness of late arrivals and early departures. "They also have been instructed,

> in no uncertain terms, that they are responsible to adjust the situation, since supervisory control is lacking." (Comp. Exh. 4).

Sgt. Krepitch testified that he reported to work in uniform and left work in his uniform; but that it had always been optional to wear the shirt tail in or out. Sgt. Krepitch further testified that prior to February 15, 1976, when there was anything out of line about the uniform (e.g., missing button or not buttoned) we were told to correct the situation and it was dropped; but that after the Base Regulation became effective on February 15, 1976, there was an immediate letter of disciplinary action submitted on an individual.

7. General Phillipy testified that he neither met with the Chief Steward nor responded to his letter of January 22, 1976, because "I didn't think it required a response." Sgt. Krepitch stated that although he expected some kind of response, he did not ask for a meeting; and that, indeed, he had passed the proposed directives up to the State Council and "It was completely out of my hands. ... It's at the Federal Impasses Panel. I have no right to sit down and discuss these matters."

8. Messrs. McMullen and McCance testified that for 15 and 10 years respectively prior to February 15, 1976, they had been permitted to change attire on duty time as part of their clean up but that after February 15, while allowed time for clean up, they were no longer permitted to change clothes. Messrs. Oleck, Kreptich, Combs, and Hoyle testified that after February 15, 1976, their prior practices were altered in various ways, principally as related to having to wear their shirt tails tucked in, having to wear a cap when out doors, etc., about which Messrs. McMullen and McCance also complained, but they did not assert any change as to themselves with respect to changing uniforms. Actually the restrictions vis-a-vis the wearing of the uniform complained of by the technicians encompassed most, if not all, of the examples of uniform violations set forth in Paragraph 5 of Base Regulation 35-1. Mr. Combs also testified that in previous winters he had been given permission to wear civilian-type gloves and insulated shoes and had been denied such permission after February 15, 1976. Mr. Hoyle testified that the had been formally reprimanded for a

uniform violation (sleeves rolled up) after February 15, 1976, and that he was told that if he did not follow all the provisions of Base Regulations 35-1 he would not be re-enlisted.

9. Following receipt of Chief Steward Krepitch's reply dated January 22, 1976, in which ACT asserted that both proposed directives constituted a change in work conditions, General Phillipy on January 31, 1976, requested the advice of the Technician Personnel Officer, Colonel Hugh S. Niles, as to whether either proposed directive constituted any "change in working conditions" (Res. Exh. 11) and Colonel Niles replied by indorsement dated February 3, 1976. As to proposed Base Regulation 35-1, Colonel Niles noted that AFM 35-10 was now AFR 35-10 and concluded that the proposed implementing instruction would not constitute a change in working conditions "providing it does not go beyond the guidelines of the regulation." (Res. Exh. 11). As to the proposed "Technician Work Day" directive, Colonel Niles stated that the State Council had submitted a proposal for official (duty) time at the beginning and close of work day for the purpose of changing into and out of uniform; that the National Guard Bureau had advised that a similar proposal from another state had been determined non-negotiable; that National Guard Bureau regulations mandate the wearing of the military uniform by Technicians during duty hours and, consequently, there can be no allowable time during working hours for changing from civilian attire; and that a copy of this Determination had been furnished to the Union negotiators. Accordingly, Colonel Niles concluded that "... your proposed base policy is consistent with NGB regulations. Any change of working conditions which your Technician Workday letter makes, would be to bring your base policy into compliance with National Guard Bureau Regulations." (Res. Exh. 11).

Accordingly, the directives as submitted on January 16, 1976, were issued on February 15, 1976, without change, except as to date and Base Regulation 35-1 deleted the reference in Par. 2 to ("Chapter 2, TPP 904)" and the word "should" in Par. 3b. line 3 was changed to "will".

10. Except for the sentence, "However there can be no allowable time during working hours for changing from civilian attire into and out of military uniform" in the "Technician Work Day" directive, it is perfectly clear

that the remainder represented no change of policy or practice whatever. Indeed, Paragraph 2 of the January 12, 1976, draft and directive of February 15, 1976, appeared, verbatim, as Paragraph 6C. of the like directive of General Phillipy dated February 3, 1971 (Res. Exh. 10) which the record shows was the consistent base policy. The 1971 directive stated in part:

> "6. In the interest of standardization and clarification for all personnel, the base policy for observing scheduled working hours is reiterated as follows:
>
> "a. Since we are being paid for eight hours of work it is expected that we as individuals are available for duty as scheduled by the supervisors for the entire eight hour period less those times designated as authorized break periods.
>
> "b. Each section will be operational for the entire period as scheduled. If the section is scheduled for the 0730-1600 work period, all its personnel will be available for duty throughout the period less those periods of properly authorized absences by the supervisors. To be more specific, at 1559 the section will still be fully operational and all personnel available in the section at that time." (Res. Exh. 10). (Emphasis supplied.)

The "Technician Work Day" directive stated that, "As previously pointed out personnel may be excused at a reasonable time to wash up" which, although not stated in the 1971 directive, was consistent with the qualification "less those periods of properly authorized absences by the supervisors" of the 1971 directive. General Phillipy and Colonels Rosenberg and Glas each testified that there had never been any authorization permitting the changing of attire on duty time. Reasonable time for wash-up was allowable by supervisors both before and after February 15, 1976, and from all the testimony and evidence I find that the consistent policy of the base had been to permit supervisors to authorize technicians reasonable time for wash-up on duty time and that there was never any policy permitting the changing of attire on duty time. The record shows without contradiction that duty time for wash-up was wholly limited to technicians involved in dirty work.

Technicians, such as Messrs. McMullen and McCance, when allowed time to wash-up, obviously used a portion of the time allowed to change clothes prior to February 15, 1976, notwithstanding that no time had been allowed for changing clothes; and after February 15, 1976, were not allowed to change clothes on duty time whether or not they could do so in the time allowed for wash-up. Use of time allowed for wash-up to change clothes was never authorized, such practice was an abuse of the authorization granted, and the refusal to permit the changing of clothing during time allowed for wash-up was not a change of policy.

11. Since at least 1964, Regulations have required that technicians wear the appropriate uniform in the performance of their normal technician duties (ANGR 40-01, AGOPA Sup 1, September 21, 1964, Res. Exh. 2). See, also, Technician Information Letter 5-69, December 4, 1969 (Res. Exh. 3); Technician Personnel Pamphlet 904, May 25, 1972, Section 2-4 (Res. Exh. 4) TPP 904 Supplement 1, April 1, 1973 (Res. Exh. 5). Reference was made in ANGR 40-01, AGOPA Supp 1 and in Technician Information Letter 5-69 to AFM 35-10 and the latter also referred to AR 670-5. TPP 904 and Supplement 1 thereto referred to NGR 690-2/ANGR 40-01. Wing Regulation 35-2, December 13, 1972, signed by General Phillipy, (Res. Exh. 1) also specifically provided that, "AIR NATIONAL GUARD TECHNICIANS in the excepted service will wear the military uniform appropriate to their federally recognized grade when performing technicain duties.", referred to AFM 35-10, and further stated, in part, that:

> "4. DRESS AND APPEARANCE. Each member of the Air National Guard must be well groomed and insure that his personal appearance reflects credit upon himself and the Air National Guard at all times. Each will meet the following requirements:
>
> "a. APPEARANCE OF UNIFORMS. When the uniform is worn, it will be clean, neat, correct in design and specifications and in good condition. Uniforms will be kept buttoned and shoes must be shined and in good repair.
>
> "b. PERSONAL APPEARANCE ... MEN, see paragraph 1-12 and Attachment 2, AFM 35-10.

> "c. PERSONAL APPEARANCE .. WOMEN, see paragraph 1-13, AFM 35-10.
>
> "5. UNIFORM DISCIPLINE
>
> "a. ... The standards of uniform and personal appearance contained in AFM 35-10 will be strictly observed.
>
> . . ." (Res. Exh. 1).

Neither party offered AFM 35-10 (now AFR 35-10). The various Regulations, etc., set forth above leave no doubt that Base Regulation 35-1 was, for the most part, a restatement of existing policy. The one point of difference was the requirement in Base Regulation 35-1 that the shirt of the utility uniform be worn tucked inside the trousers. The testimony shows without contradiction that prior to formulation of Base Regulation 35-1 Technicians had been free to wear the fatigue shirt loose, i.e., not tucked inside the trousers; and Complainant asserted, which assertion was not denied or challenged by Respondent, that Air Force Regulations make the manner of wearing of the utility shirt (loose or tucked in the trousers) optional with each Base Commander. Accordingly, I find that Base Regulation 35-1 did change the long established Base policy with respect to the manner of wearing the utility uniform. Despite testimony that Base Regulation 35-1 changed prior policy with respect to the wearing of the utility cap, Base Regulation 35-1 expressly conditioned this requirement on "Except when safety would be compromised" and I find no basis whatever to believe that any change in policy was represented by the requirement that the utility cap be worn outdoors, except when safety would be compromised, as such requirement was no more than a restatement of the long established requirement that the appropriate military uniform be worn when performing technician duties.

12. Colonel Rosenberg, Chief of Support Services and management advisor on labor management relations, testified that there had been a number of adverse actions pertaining to uniforms and related matters prior to issuance of the February 15, 1976, directives and that there had been none since issuance of the February 15, 1976, directives. In 1972, a technician had been terminated because of uniform (hair cut) violation and in 1971, two technicians had been given leave without pay for uniform (hair cut) violations.

The February 15, 1976, directives made no change in the enforcement of existing Base Policy with respect to uniform violations or violations of the Work Day.

13. There are references in Base Regulation 35-1 to grooming standards and Complainant objected to the failure to spell out, rather than by reference to AF Regulations, standards for wear of uniforms by females; but, as these matters were not litigated, no further consideration to them will be given.

CONCLUSIONS

1. Change in Manner of Wearing Utility Uniform. Prior to the issuance of Base Regulation 35-1, the Base policy at Pittsburgh had been to permit the shirt of the utility uniform to be worn loose. The draft Regulation plainly announced that, "when wearing the utility uniform, the shirt will always be worn tucked inside the trousers" and the phrase, as shown, was underscored for emphasis. Respondent asserted that Base Regulation 35-1 constituted no change in existing policy but, if it did, declined to say whether it asserted that such change was pursuant to the reserved rights of management. No provision of Section 11(b) or 12(a) of the Order removed the change in Base policy with respect to the manner of wearing the utility uniform from the obligation to negotiate pursuant to Section 11(a) of the Order. Respondent gave notice of the proposed Regulation to the State Chairman of the State Council and Chief Steward Krepitch testified that he passed the draft Regulation up to the State Council 3/ and the Chief Negotiator for the State Council, Mr. Owsinski, testified that he advised Messrs. Oleck and Krepitch to draft and forward immediately a letter to General Phillipy indicating that this matter was negotiable at the state level and not at the local level. Sgt. Krepitch did so by his letter dated January 22, 1976, in which he stated, in part, as follows:

> "... any directive ... by any base commander, at this time is approximately four years too late. As

3/ Mr. Krepitch stated to the "State Council Chairman", but this was then Mr. Oleck. It is apparent that he referred to Mr. Thomas J. Owsinski, then Chief Negotiator for the State Council; later, also, State Chairman.

> established by the State Council of ACT and with the Adjutant General of Pennsylvania, all matters of policy and directives are proposed, negotiated and promulgated at that level. Furthermore, as being one of the issues that has sent the proposed contract back to the Impass Panel, Department of Labor, twice, we feel at this time, that no one short of the Federal Labor Department has the power and/or authority to pass judgment on this issue." (Comp. Exh. 4).

While "military uniforms", i.e., the unions' demand that no bargaining unit technicians be required to wear the military uniform while performing civilian technician duties, unquestionably had been a demand in contract negotiations at the State level, it is equally certain that the proposed change in Base policy at Pittsburgh had not been an issue either in negotiation or before the Federal Service Impasses Panel. 4/ Despite notice of the proposed Base Regulation, Complainant never requested bargaining on the proposed Base Regulation. Indeed, while asserting that "these are changes in work conditions", Complainant did not specify any portion of proposed Base Regulation 35-1 which constituted a change in existing Base policy; nevertheless, I have found that Base Regulation 35-1 did constitute a change in Base policy with respect to the manner of wearing the utility shirt "tucked inside the trousers". As this represented a change in Base policy and such proposed requirement was a negotiable item within the meaning of Section 11(a) of the Order, Respondent was obligated to notify Complainant prior to making its final determination or decision to make this change in policy and, upon request, to meet and confer in good faith with Complainant. Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656 (1976). In his letter of January 16, 1976, to Chief Steward Krepitch, General Phillipy stated, in part:

> "1. Attached for your comments ... are drafts of ... proposed directives ...
>
> "2. Your comments will be given full consideration ..."
>
> . . .

4/ The Panel Report and Recommendations for Settlement, Case No. 75 FSIP 7, was issued November 6, 1975. The Decision (Continued)

"4. Your reply would be appreciated by not later than 23 January 1976. Non receipt of any reply will indicate complete concurrence and directives will be issued as written." (Comp. Exh. 1).

Chief Steward Krepitch did reply by letter dated January 22, 1976; General Phillipy made no reply and gave Complainant no notice of his final decision to change the manner of wearing the utility uniform, but issued Base Regulation 35-1 on February 15, 1976. Sgt. Oleck, then State Chairman of ACT, testified that he first received Base Regulation 35-1, as issued, on February 25, 1976, from his supervisor, although technicians had been informed in a supervisors' meeting a few days earlier that new policies were coming out. Because Respondent had solicited the comments of Complainant; had stated that such comments, if any, would be given full consideration; and had further stated, by clear implication, that "directives will be issued as written" only in the absence of reply, Respondent was obligated to notify Complainant prior to making its final decision and, upon request, to meet and confer in good faith with Complainant. Respondent's issuance of Base Regulation 35-1 on February 15, 1976, deprived Complainant of any opportunity to request negotiations after Respondent's final decision to change the manner of wearing the utility uniform and prior to such change in policy being placed in effect. Delivery of a copy of Base Regulation 35-1 after it had been issued and made effective was notification of a fait accompli and did not provide Complainant with any opportunity to engage in meaningful negotiations prior to a change in Base policy with respect to the wearing of wearing the utility uniform. Accordingly, Respondent's unilateral conduct in this regard was in derogation of its obligation to meet and confer in good faith and such conduct thereby violated Section 19(a)(1) and (6) of the Order. Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, supra.

Complainant had notice on January 16, 1976, of the proposed change in Base policy with regard to the manner of wearing the utility uniform, had ample opportunity to request that Respondent meet and confer prior to the change in policy being made effective on February 15, 1976, but despite such

Footnote continued from p. 16.

and Order in Case No. 75 FSIP 7 states that the Panel was advised on December 1, 1975, that despite further settlement efforts, the dispute remained unresolved and pursuant to notice oral argument was held on January 26, 1976.

notice Complainant did not at any time after January 16, 1976, seek to meet and confer with respect thereto. Certainly, the record does not indicate any unwillingness on the part of Respondent to meet and confer had Complainant indicated a desire to do so. To the contrary, the record shows an affirmative policy on the part of General Phillipy to meet and confer, as he did on January 16, 1976, when he delivered the proposed draft documents to Mr. Oleck. Notwithstanding the violation of Section 19(a)(1) and (6) above, I am constrained to conclude, pursuant to the decisions of the Assistant Secretary in Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, supra,; Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, A/SLMR No. 771 (1976), even though these decisions involved impact bargaining, that Respondent's implementation of Base Regulation 35-1 on February 15, 1976, did not violate Section 19(a)(1) and (6) of the Order. In the circumstances of this case, such result may be particularly apt inasmuch as, absent notice prior to its final decision, as mandated by Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, supra, implementation of Base Regulation 35-1 would not have violated Section 19(a)(1) or (6) because of Complainant's failure to request to negotiate with regard thereto after ample notice of the proposed change in policy. U.S. Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (1973); U.S. Department of Transportation, Federal Highway Administration, Office of Federal Highway Projects, Vancouver, Washington, A/SLMR No. 612 (1976); Alabama National Guard, A/SLMR No. 660 (1976).

2. Technician Work Day. This proposed directive, given to Complainant in draft on January 16, 1976, with proposed Base Regulation 35-1, was a restatement and reaffirmation of existing Base policy and practice. Prior policy had authorized the granting of reasonable time, where appropriate, to wash-up. No authorization had ever been given to change clothing on duty time and the refusal, in this proposed directive, to allow time during working hours for changing from civilian attire into and out of military uniform was not a change of existing policy. Nor can abuse of the authorization granted, namely to wash-up, by isolated individuals constitute an exception to a long established policy which would require Respondent to meet and confer inasmuch as the proposed directive was merely a restatement of existing Base policy. Accordingly, as the "Technician Work Day" directive was a reaffirmation of an existing policy and practice, Respondent was under no duty to bargain with respect thereto prior to its implementation. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 736 (1976).

3. Reaffirmation of Base Policy During Negotiations. The two actions complained of concerned the Air National Guard at Pittsburgh. In issuing Base Regulation 35-1 and the "Technician Work Day" directive, General Phillipy did not act for, nor purport to act for, the Adjutant General or for the Pennsylvania National Guard. Except in the manner of wearing the utility shirt, each was a restatement and reaffirmation of existing Base policy and practice. Complainant asserts that the issuance of such documents,5/ which concern issues involved in Statewide negotiations, is a violation of 19(a)(6) of the Order. It was conceded by Sgt. Krepitch that Base Regulation 35-1 and the "Technician Work Day" directive applied only to the Pittsburgh operation. Under the circumstances, issuance of a proposed policy by a Base commander is not, in and of itself, a violation of the Order. It is conceivable that such action could constitute a refusal to bargain at the State level if such action demonstrated an intent to refuse to bargain at the State level; but there was nothing contained in General Phillipy's letter of January 16, 1976, in his proposed drafts, or in the testimony which inferred that he was acting other than in his capacity as Base Commander, nor was there any basis on which, or from which, it can possibly be inferred that issuance of Base Regulation 35-1 or the "Technician Work Day" directive at Pittsburgh demonstrated an intent by the Adjutant General to refuse to bargain.

As to the change in policy respecting the manner of wearing the utility uniform, Complainant had a right to bargain, upon request, which it did not exercise. In all other respects, the proposals in question were merely a reaffirmation of existing Base policy and practice as to which Respondent was under no duty to bargain. Existing policy and practice are not affected by the pendency of negotiations, notwithstanding that demands to change such policy and practice are involved in those negotiations. Unless and until changed, existing policy and practice remain fully effective.

Colonel Niles, at General Phillipy's request, stated as to proposed Base Regulation 35-1, that it would not

5/ Again, it must be emphasized that the issue, and only issue, before me (Ass't. Sec. Exh. 1) is the action by General Phillipy on, or about February 15, 1976. Issuance of the March 22, 1976, Supplement to National Guard Bureau Technician Personnel Manual (Respondent's Exhibit 7 for identification) was not an issue in this proceeding and the proffered Exhibit was rejected.

constitute a change in working conditions, "provided it does not go beyond the guidelines of the regulation"; and as to the Technician Work Day" directive, that it was "consistent with NGB regulations" and that "Any change of working conditions which your Technician Workday letter makes, would be to bring your base policy into compliance with National Guard Bureau Regulations." Nothing contained in his indorsement could possibly support an inference that the Adjutant General would refuse to bargain in good faith pursuant to the Decision and Order of the Federal Service Impasses Panel subsequently issued on February 27, 1976. As Complainant recognized, Colonel Niles' position had been consistent, namely, that the matter of uniforms, etc., was controlled by regulations of higher authority and had previously been determined to be "non-negotiable". The Federal Service Impasses Panel recognized this position but pointed out that the Council renders decisions on the negotiability of specific proposals and that nothing forecloses the Pennsylvania National Guard from questioning the negotiability of any specific proposal submitted in the course of negotiations.

Accordingly, neither the proposal nor the implementation of the Base Regulation and directive was precluded by the pendency of contract negotiations.

RECOMMENDATION

Having found that Respondent 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 following order designed to effectuate the purposes of Executive Order 11491. In all other respects, I recommend the allegations of 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 Pennsylvania Air National Guard shall:

1. Cease and desist from:

(a) Instituting a change in policy with respect to the manner of wearing the utility uniform of civilian technicians represented by the Association of Civilian Technicians and employed by the Pennsylvania Air National Guard, without notifying the Association of Civilian Technicians and

affording such representative the opportunity to meet and confer on the decision to effectuate such a change.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

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

(a) Notify Association of Civilian Technicians of any intended change in policy with respect to the manner of wearing the utility uniform by unit employees of the Pennsylvania Air National Guard and, upon request, meet and confer in good faith on such intended change.

(b) Post at the facility of the Pennsylvania Air National Guard at the Greater Pittsburgh Airport, Caraopolis 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 Commanding Officer and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicious 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 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 7, 1977
Washington, D.C.

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 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 change in policy with respect to the manner of wearing the utility uniform by employees of the Pennsylvania Air National Guard exclusively represented by the Association of Civilian Technicians and affording the Association of Civilian Technicians the opportunity to meet and confer on the decision to effectuate such change.

WE WILL notify the Association of Civilian Technicians of any intended change in policy with respect to the manner fo wearing the utility uniform by unit employees of the Pennsylvania Air National Guard and, upon request, meet and confer in good faith on such intended change.

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 _____
Commanding Officer

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.

Appendix (cont'd)

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

July 21, 1977

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

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO
A/SLMR No. 867

This case involved an unfair labor practice complaint filed by the Department of the Navy, Norfolk Naval Shipyard alleging that the Respondent, Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, violated Section 19(b)(4) of the Order by picketing the Norfolk Naval Shipyard on November 8 and November 9, 1976. The Respondent admitted that it had engaged in the picketing as alleged, but contended that the picketing was informational in nature and, as such, was not proscribed by Section 19(b)(4) of the Order. It also contended that the evidence as to the crucial and sensitive nature of the Norfolk Naval Shipyard was speculative and did not support a ban on all peaceful informational picketing.

In his Recommended Decision and Order, the Administrative Law Judge found that the picketing engaged in by the Respondent was informational and peaceful and did not interfere with the operation of the Norfolk Naval Shipyard. He also found that the record contained insufficient evidence to support a finding that the picketing reasonably threatened to interfere with the operation of the Norfolk Naval Shipyard. Thus, he concluded that the record failed to establish that the Respondent's picketing of the Norfolk Naval Shipyard violated Section 19(b)(4) of the Order.

Under the particular circumstances of the instant case, the Assistant Secretary concurred in the findings of the Administrative Law Judge with respect to the nature and effect of the picketing on the Complainant's operation. With regard to the Administrative Law Judge's finding that the picketing was informational, the Assistant Secretary stated that, in his view, permissible informational picketing in Federal sector labor-management disputes is that which is directed at the general public, including organized labor groups, and which does not interfere or reasonably threaten to interfere with the operation of the affected Government agency. He also found that the evidence failed to establish that the Complainant's functions were so crucial and sensitive to justify an absolute ban against all labor-management dispute picketing at the Norfolk Naval Shipyard. Thus, in accordance with the guidelines set forth by the Federal Labor Relations Council in FLRC No. 76P-4, the Assistant Secretary concluded that the Respondent's picketing fell within the permissible limits under Section 19(b)(4) of the Order. Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 867

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO

Respondent

and

Case No. 22-07591(CO)

DEPARTMENT OF THE NAVY,
NORFOLK NAVAL SHIPYARD

Complainant

DECISION AND ORDER

On January 12, 1977, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision and Order 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 and the Petitioner 1/ filed exceptions and supporting briefs with respect to the Administrative Law Judge's Recommended Decision and Order, and the Respondent filed an answering brief in response to said exceptions and supporting briefs.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting briefs filed by the Complainant and the Petitioner and the answering brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation, except as modified herein.

The instant complaint, filed by the Department of the Navy, Norfolk Naval Shipyard (Complainant) alleged that the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Respondent) violated Section 19(b)(4) of Executive Order 11491, as amended, by improperly sponsoring and directing picketing of the Complainant at access gates to the Norfolk Naval Shipyard.

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

1/ Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor.

The record reveals that the Respondent peacefully picketed the Complainant 2/ on November 8, 1976, from approximately 3:30 p.m. to approximately 4:30 p.m. at eight access gates, and on November 9, 1976, from approximately 6:45 a.m. to approximately 7:35 a.m. at four access gates 3/ for the purpose of informing its members of the problems it was having with negotiations for a new collective bargaining agreement. The record also reveals that the picketing at each gate varied at times from 2 to 18 pickets, and that the picket signs related to the existing labor-management dispute. 4/ The record evidence establishes that the picketing was peaceful and caused no interference with the operation of the Complainant or deliveries.

The Administrative Law Judge found that the record clearly established that the picketing conducted by the Respondent was "informational" and did not interfere with the operation of the Shipyard. Further, he found that the record contained insufficient evidence to support a finding that the picketing reasonably threatened to interfere with the operation of the Shipyard. Thus, applying the standards and criteria as set forth by the Federal Labor Relations Council (Council) in its Statement On Major Policy Issue, FLRC No. 76P-4, he concluded that the Respondent's picketing was not violative of Section 19(b)(4) of the Order.

At the hearing, the Respondent admitted that its officers and agents had engaged in said picketing, and that it was responsible for such picketing. In this regard, the Complainant contends in its exceptions that such picketing was not the constitutionally permissible type of picketing known as "informational" picketing as that term is customarily defined in relevant decisions of the courts and the National Labor Relations Board. In addition, the Complainant and the Petitioner, in their exceptions, contend that the Administrative Law Judge failed to consider, in his Recommended Decision and Order, the issue of whether an absolute ban on all labor-management dispute picketing at the Norfolk Naval Shipyard is warranted based on the crucial and sensitive nature of the Complainant's operation and mission.

2/ The evidence establishes that the mission of the Complainant is to provide logistic support for assigned ships and service craft; to perform authorized work in connection with construction, conversion, overhaul, repair, alteration, drydocking, and outfitting of ships and craft, as assigned; to perform manufacturing, research, development, and test work, as assigned; and to provide services and material to other activities and units, as directed.

3/ The evidence establishes that Gate 15 (Green Street), which was picketed both days, is designated as a "pass gate" where nonemployees and commercial traffic obtain passes to enter the Shipyard. The Complainant's employees also use Gate 15 and the seven other gates involved herein to enter and exit the Shipyard.

4/ The 12 legends which were displayed on the picket signs are set forth in the attached Administrative Law Judge's Recommended Decision and Order.

With respect to the Administrative Law Judge's finding that the picketing in question was "informational," in my view, permissible informational picketing in Federal sector labor-management disputes is that which is directed at the general public, including members of organized labor groups, and which does not interfere or reasonably threaten to interfere with the operation of the affected Government agency. Under the particular circumstances of the instant case and in accordance with the guidelines set forth in the Council's Statement On Major Policy Issue, FLRC No. 76P-4, I find that the Respondent's informational picketing falls within the Council's definition of "permissible picketing" under Section 19(b)(4) of the Order. Thus, the evidence establishes that the number of pickets was not excessive; the picketing was for the purpose of informing the Respondent's members of its labor-management dispute with the Complainant; the conduct of the pickets was peaceful; and the picketing was limited to relatively short periods on each day it occurred and did not interfere with the operation of the Complainant or deliveries. Nor do I find in the record sufficient evidence to support a finding that the picketing reasonably threatened to interfere with the operation of the Complainant or deliveries. Further, I find that the evidence fails to establish that the Complainant's functions are so crucial and sensitive that picketing would per se be so injurious and disruptive as to justify an absolute ban against all labor-management dispute picketing at the Norfolk Naval Shipyard.

Accordingly, I shall order that the complaint herein be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-07591(CO) be, and hereby is, dismissed.

Dated, Washington, D.C.
July 21, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
TIDEWATER VIRGINIA FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO	
Respondent	
and	
DEPARTMENT OF THE NAVY NORFOLK NAVAL SHIPYARD	Case No. 22-07591(CO)
Complainant	
and	
ASSISTANT REGIONAL ADMINISTRATOR LABOR MANAGEMENT SERVICES ADMINISTRATION PHILADELPHIA REGION U.S. DEPARTMENT OF LABOR	
Petitioner	

Robert F. Haley, III, Esquire
Joannou and Haley
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Professional Building
Portsmouth, Virginia 23704
For Respondent

Stuart M. Foss, Esquire
Department of Navy
1735 N. Lynn Street
Arlington, Virginia 22209
For Complainant

Marshall H. Harris, Regional Solicitor
Michael F. Daugherty, Esquire
Region III
3535 Market Street, Room 14480
Gateway Building
Philadelphia, Pennsylvania 19104
For Petitioner

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This matter comes before me upon a Notice of Hearing on Complaint issued on November 17, 1976 by the Regional Administrator for the Labor-Management Services Administration. The complaint filed by the Department of the Navy, Norfolk Naval Shipyard, hereinafter called the Activity, on November 10, 1976 alleges that the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, (hereinafter called the Respondent or the Union) illegally picketed the Activity's shipyard in Norfolk Virginia in violation of Section 19(b)(4) of Executive Order 11491, as amended, hereinafter called the Order.

A hearing was held before the undersigned in Norfolk Virginia. All parties were represented by counsel and were given full opportunity to present, examine and cross-examine witnesses and to present evidence and arguments in support of their respective positions. All parties had an opportunity to argue orally and submit briefs. The briefs have been duly considered.

Upon the basis of the entire record herein, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusion of law and recommendation.

Findings of Fact

1. The Activity is the largest of eight shipyards operated by the Naval Sea System Command and has as its principal mission the overhauling, repairing, altering and outfitting nuclear and non-nuclear vessels of the Navy's Atlantic fleet, including aircraft carriers, missle cruisers, destroyers and submarines. In performing its duties the Activity employees about 10,000 civilian workers in various trades, skills and crafts and also utilizes private sector contractors and employees borrowed from other naval shipyards. Goods and materials are delivered to the Activity by both its own equipment and by private trucking firms. 1/

1/ Many of the private sector contractors and trucking firms are unionized.

2. The vast majority of the Activity's civilian employees have been organized for collective bargaining purposes into a number of separate units represented by about six different labor organizations.

3. The Respondent is a labor organization recognized by the Norfolk Naval Shipyard, Portsmouth, Virginia, as the exclusive collective bargaining representative for the wage grade employees in a production unit and for the planners, estimators, progressmen and schedulers (PEPS) unit.

4. In August of 1975 the Activity and Union started negotiations for a new collective bargaining agreement among the wage grade production unit. 2/

5. Negotiations over the production unit collective bargaining agreement continued for about 15 months. 3/

6. The Union sponsored participation in and was responsible for picketing at or near the Norfolk Naval Shipyard, Portsmouth, Virginia, on November 8, 1976, and on November 9, 1976.

7. The picketing occurred in the context of a labor-management dispute, concerning the negotiation of the collective bargaining agreement.

8. From approximately 3:30 p.m. until approximately 4:30 p.m. on November 8, 1976, pickets appeared outside the Norfolk Naval Shipyard, Portsmouth, Virginia, at some eight gates.

9. From approximately 6:45 a.m. until approximately 7:35 a.m. on November 9, 1976, pickets appeared outside the Norfolk Naval Shipyard, Portsmouth, Virginia, at some four gates.

10. The picket signs related to the labor-management dispute and was for the purpose of informing the public and union members of the problems that the Union contended it was having with the negotiations for a new contract.

2/ As part of the bargaining ground rules the parties agreed that the only release of official information regarding the progress of negotiations would be through Respondent's Newsletter.

3/ Apparently there were about 97 negotiation meetings prior to November 8, 1976.

11. The picketing at each of the gates was composed variously of about 4 to 15 pickets.

12. The picket signs bore the following legends:

"Shipyard Unfair, Metal Trades"

"We want a contract, not a bunch of Bull S...!! MTC, AFL-CIO"

"17 Local Unions Want a Contract, Metal Trades"

"NNSY Not Bargaining in Good Faith, MTC, AFL-CIO"

"97 Meetings, Still No Contract, Metal Trades Council, AFL-CIO"

"12 Months, No Contract, Metal Trades Council, AFL-CIO"

"Ten Thousand Dollars and Still No!!! Contract, MTC, AFL-CIO"

"We Want a Contract, P.E.P.S. Unit, Metal Trades"

"M.T.C. Wants A Contract"

"We Want A Contract, Not Cheap Talk!!!, MTC, AFL-CIO"

"We Want Fair Negotiations, MTC"

"Shipyard Need's New Chief Spokesperson"

13. The picketing was peaceful at all times and caused no interference with or disruption of the operations and work going on at the Norfolk Naval Shipyard. In addition, the picketing blocked none of the entrance/exit gates and caused no disruption of ingress and egress of federal workers, private commercial contract workers or truck drivers or their vehicles.

14. All picketing was conducted off of Government property and by pickets who engaged in the picketing on their own time.

15. The private sector contractors routinely come and go

every day at this Shipyard.

16. The private sector trucking firms and their employees have trucks and workers coming and going every day into and out of the Norfolk Naval Shipyard.

Conclusions of Law

Section 19(b)(4) of the Order was rather fully discussed and analyzed in the respective decisions issued in Internal Revenue Service v. National Treasury Employees Union, Case No. 22-5976(CO), July 7, 1975; A/SLMR No. 536, July 29, 1975; FLRC No. 75A-96, March 3, 1976.

Despite questions raised as to how broadly Section 19(b)(4) of the Order should be interpreted and as to its Constitutionality, the Assistant Secretary and the Federal Labor Relations Council were quite clear and explicit that the prohibitions contained in Section 19(b)(4) of the Order are absolute and prohibit all picketing by a labor organization in a labor-management dispute.

On September 22, 1976 Judge Gearhard Gesell of the United States District Court for the District of Columbia issued a decision in the IRS case, supra wherein he vacated the Order of the Assistant Secretary and on precise facts of that case was too broad and violative of the First Amendments. Judge Gesell declined to declare Section 19(b)(4) of the Order unconstitutional pointing out, inter alia, that even some peaceful informational picketing could be appropriately totally banned where the governmental function involved was so sensitive that any picketing would be so injurious and disruptive as to justify such an absolute ban. National Treasury Employees Union v. Paul J. Fasser, Jr., et al, Civil Action No. 76-408 (D.D.C. 1976). Judge Gesell went further and suggested that the Federal Labor Relations Council develop facts as to the precise Government interest to be protected and as to the possible differentiation between different types of picketing.

The Federal Labor Relations Council (hereinafter called the Council) in accordance with the suggestion of Judge Gesell, issued a Statement On Major Policy Issue, FLRC No. 76P-4, (January 5, 1977) wherein it set forth its position

with respect to the interpretation and application of Section 19(b)(4) of the Order. The Council decided not to use rule making but to "accomplish the delineation of picketing which is permissible or nonpermissible under Section 19(b)(4) on a case-by-case basis, utilizing the adjudicatory procedures established in sections 4(c)(1) and 6 of the Order." The Council concluded that "If picketing of an agency by a labor organization in a labor-management dispute does not actually interfer or reasonably threaten to interfer with the operation of the affected Government agency that picketing will be found permissible under Section 19(b)(4) of the Order." The Council stated further that its standards in reviewing decisions of the Assistant Secretary, as to whether Section 19(b)(4) had been violated in specific cases, is "whether, under the particular circumstances of the case, the picketing interfered with or reasonably threatened to interfer with the operation of the Government agency involved, in violation of Section 19(b)(4) of the Order."

The record in the instant case clearly establishes that the picketing in question was informational and peaceful and did not in any way interfer with the operations of the Norfolk Naval Shipyard. The record contains insufficient evidence to support a finding that the picketing "reasonably threatened to interfer with the operation" of the Norfolk Naval Shipyard.

Thus, applying the standards and criteria as set forth by the Council, in its recent Statement On Major Policy Issue, FLRC No. 76P-4, I am constrained to conclude that the record in the subject case fails to establish that the Union's picketing of the Norfolk Naval Shipyard on November 8 and 9, 1976 violated Section 19(b)(4) of the Order.

Recommended Order

It is recommended that the Assistant Secretary dismiss the subject Complaint.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: January 12, 1977
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

NAVAL AIR REWORK FACILITY,
MARINE CORPS AIR STATION,
CHERRY POINT, NORTH CAROLINA
A/SLMR No. 868

This case involved an unfair labor practice complaint filed by Local Lodge 2297, International Association of Machinists and Aerospace Workers, AFL-CIO, (IAM) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by the action of its supervisor who allegedly made derogatory remarks about unions in general and the IAM in particular, and told an employee that his promotional opportunities were limited by his union membership. The IAM further alleged that such activities were the basis for the employee being denied a promotion.

The Administrative Law Judge concluded that the allegedly coercive statements the employee attributed to the supervisor were not, in fact, made. He further found that the IAM had not established that the selection of another employee for the promotion sought by the employee involved was tainted by considerations of the employee's union sympathies and activities. The Administrative Law Judge therefore recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, 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.

A/SLMR No. 868

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL AIR REWORK FACILITY,
MARINE CORPS AIR STATION,
CHERRY POINT, NORTH CAROLINA

Respondent

and Case No. 40-6975(CA)

LOCAL LODGE 2297,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Complainant

DECISION AND ORDER

On April 7, 1977, Administrative Law Judge John H. Fenton issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-6975(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
July 21, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

NAVAL AIR REWORK FACILITY MARINE CORPS AIR STATION CHERRY POINT, NORTH CAROLINA Respondent	:	
and	:	Case No. 40-6975(CA)
LOCAL LODGE 2297 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO Complainant	:	

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Management
Department of the Navy
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For the Respondent

HAL BARRETT
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Washington, D. C. 20036

and

TERRY A. WETHINGTON
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For the Complainant

Before: JOHN H. FENTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491. The complaint as amended on May 12, 1976, alleged that the Activity violated Sections 19(a)(1) of the Order by disparaging Local Lodge 2297, by informing employee John A. McFayden that his prospects for a promotion were adversely affected by his union membership and activities and by promising him a promotion if he refrained from such activities. It further alleged that the Activity denied Mr. McFayden a promotion to Metals Inspector WG-10 because of such activities.

A hearing was held at New Bern, North Carolina on July 14, 1976. All parties were afforded the opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to file briefs. Upon the basis of the entire record, including my observation of the witnesses, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Complainant's entire case rests on the testimony of Mr. McFayden, who was at material times a WG-8 Metals Inspector B. He attributed a number of coercive and anti-union remarks to his immediate supervisor, Mr. Fred Price, as follows:

McFayden asserted that in January of 1975, during a hot argument over whether the Union deserved credit for a cost-of-living increase, Price in the presence of four other employees, said that the Union was "not worth a damn." Price denied making any such statement. Another metals inspector, Jack O'Rourke, testified that he, in fact, made that statement, intending to contrast the IAM unfavorably to the AFGE. Both he and metals inspector James Daugherty testified credibly that they never heard Price make remarks disparaging of the Union. I find that the statement was made by O'Rourke.

McFayden said that on October 14, 1975, Price gave him two copies of the Reader's Digest and told him to read an article in each one about unions, saying that he would learn that union leaders were often Communists or Mafia members. McFayden claimed that Price's proselytizing effort consumed about one hour. One article was admitted into evidence, and hardly supports McFayden's view. It is critical of AFL-CIO

president George Meany's alleged failure to successfully combat the Soviet Union's effort to capture free trade unions, but in no sense does it portray him as sympathetic to such a design. Price denied discussing the matter. I am persuaded that any discussion which may have taken place did not rise to the level of being coercive or disclose an active Union-animus on Price's part. His recollection of the article about George Meany's reaction to the Soviet design on free trade unions was rather accurate. The very lack of harmony between the article in evidence, and the discussion which allegedly attended the reading of it, suggests to me that McFayden's testimony is not fully to be believed. Curiously, McFayden, in an apparent effort to explain his lack of specificity, testified that he "just did not pay much attention to (Price)...when he started talking like that".

In order to put the next two incident of alleged Section 19(a)(1) violations in perspective, it is necessary to discuss at this point other matters relevant to the 19(a)(2) allegation. Thus, McFayden asserted that, on October 10, 1975 Price told him that he was on the selection board which would choose between Thomas Mann and McFayden, the two applicants for the WG-10 position of Metals Inspector A, and that McFayden need not worry, he had the position. He further asserts that on November 7, when Mann was selected, he asked Price why he had lied to him, and that Price explained that he intended to choose him, but changed his mind after an incident on October 17, when he used the Union contract, after threatening to go to the Union, to vindicate his right to give blood at the Activity. Price allegedly said that nobody was going to make him do what he did not want to to do, especially by going to the Union. Later in the same day Price allegedly told him that, if he would change his attitude and forget the Union, Price would see that he got his rating in six months. Finally, even later that day, McFayden and his steward discussed with Price his application for a transfer into the shop from which Thomas Mann was promoted. Again, Price allegedly told him that such a transfer would preclude promotion to WG-10, because the vacancy was at WG-8. This, said McFayden, did not make sense because Mann had just been promoted from that position.

Price, of course, had a very different recollection of these events. He denied ever assuring McFayden that he would receive the promotion. He denied telling him that the blood donor program incident had changed his mind. He acknowledged that such an incident did occur on a Friday of a four-day week at the beginning of hunting season when much leave had

been granted and McFayden had asked for annual leave on Tuesday and Wednesday, had it approved for Tuesday only and then called in sick on Wednesday. 1/ On Friday, according to Price, he was acting Branch Manager, and the acting supervisor who was substituting for him came to him for help because McFayden had requested four hours of (administrative) leave for a blood donation, and he was needed because the shop's work was falling behind. Price said he told the supervisor to suggest that McFayden work and give blood in his neighborhood or at some other time, but approved the leave when McFayden presented a copy of the collective bargaining agreement as proof of his right to participate in the blood donor program. (This right existed apart from the contract, in Agency regulations). Price denied that he was irritated by this persistence on McFayden's part in exercising his contract rights, but admits he felt "bad" about having employees who were not more interested in the job than that.

I conclude, in all the circumstances, that the very seriously coercive statements McFayden attributes to Price were not in fact made. In terms of personal demeanor I found no basis for crediting one over the other. I am persuaded, however, from the case viewed in its entirety, that McFayden's account is, at a minimum, very largely overstated. I have noted already that his rendition of the conversation attending the Reader's Digest bears little relationship to the content of the article. Because of the lack of corroboration for his version of the January 1975 statement, and the credible testimony of O'Rourke, I found that Price did not make the statement attributed to him. Had Price told him on November 7 that he would have chosen him for the promotion had he not "gone over his head" to the Union about the blood incident, and later that day promised him a promotion if he would forget the Union, it strikes me as strange, indeed, that nothing was said about it at the meeting with Price later that day. McFayden was clearly angered by the promotion of Mann. I believe he thought he would get it, and thought Price had indicated he would. He then brought his steward to the meeting to discuss his request for a transfer. Price claims that he tried to dissuade him, pointing out that the other shop offered less promotional opportunity. McFayden's testimony indicates that he had the courage to call Price a liar, and to demand a transfer, but not to confront Price with these strongly anti-union

1/ Price's testimony that he had counselled McFayden on five or six occasions because of tardiness and use of unscheduled leave was undenied.

statements in the presence of his Union steward. I find it difficult to believe that he would not have made an issue of such alleged anti-union sentiment in any discussion of his desire for a transfer. In reaching this conclusion, I also considered the fact that McFayden was very sure of the accuracy of his recollection, even when demonstrably in error. Thus, he executed a statement on November 10, 1975, describing his conversations with Price on October 10 and 14. He was sure of the accuracy of those dates, which he had entered into a diary, even though official leave records show that he and Price could not have had such conversations on those dates. 2/ In short, I find McFayden was an unreliable witness, and I do not credit his statement that Price said he would have been selected for promotion had he not "gone over his head", nor do I credit his statement that Price assured him on an earlier occasion that he would be promoted.

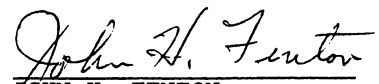
Having found no evidence in support of the Section 19(a)(1) violations alleged, and no evidence of Union animus, it follows that Complainant has not established that the selection of Mann for promotion was tainted by considerations of McFayden's Union sympathies and activities. McFayden and Mann were the two highly qualified names on the register, with scores of 90 and 88 respectively. All members of the selection panel (which included Price) testified that they unanimously decided that Mann was the better qualified candidate, and that their decision was not influenced by Union considerations. The other two panelists further testified that Price made no effort to influence them. Mann had more experience, and, in McFayden's judgment, was "just as good a man". On scuh a record I must conclude that Complainant clearly has not carried the burden of establishing, by a preponderance of evidence, that he was not selected from promotion for discriminatory reasons.

Conclusions of Law and Recommendation

Having found no persuasive evidence that the alleged Section 19(a)(1) violations occurred, or that the nonselection of McFayden was influenced by the fact of his Union member-

2/ He was unable to produce the diary, although arrangements were agreed upon to permit him to make a search and to submit it.

ship, attitude, or activities, I hereby recommend to the Assistant Secretary of Labor for Labor-Management Relations that the complaint be dismissed in its entirety.



JOHN H. FENTON
Administrative Law Judge

Dated: April 7, 1977
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. COMMISSION ON CIVIL RIGHTS,
WASHINGTON, D.C.
A/SLMR No. 869

This case involved a petition for clarification of unit (CU) filed by the Activity seeking to exclude the positions of Federal Women's Program Coordinator (FWPC) and Spanish Speaking Program Coordinator (SSPC) from the exclusively recognized unit. In this regard, the Activity contended that the employees in said positions were management officials within the meaning of the Order. Contrary to the Activity, the American Federation of State, County, and Municipal Employees, AFL-CIO, Local 2478 (AFSCME) contended that both positions should remain in the unit.

The Assistant Secretary found that the FWPC and the SSPC were not management officials within the meaning of the Order, as the evidence did not establish that employees in such positions had authority to make or to influence effectively Activity policies with respect to personnel, procedures, or programs. In this regard, the record revealed that they served as resource persons, rendering resource information and recommendations with respect to the policy in question. Moreover, it was noted that the duties of said positions were not the official duties of the incumbents, and their involvement was restricted to 20 percent of their work time. Accordingly, the Assistant Secretary clarified the exclusively recognized unit by including in the unit the positions of Federal Women's Program Coordinator and Spanish Speaking Program Coordinator.

A/SLMR No. 869

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. COMMISSION ON CIVIL RIGHTS,
WASHINGTON, D.C.

Activity-Petitioner

and

Case No. 22-7432(CU)

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES, AFL-CIO,
LOCAL 2478

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 Daniel F. Sutton. 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-Petitioner, the Assistant Secretary finds:

By its petition herein, the Activity-Petitioner, also called the Activity, seeks to exclude the positions of Federal Women's Program Coordinator (FWPC) and Spanish Speaking Program Coordinator (SSPC) from the exclusively recognized unit. In this regard, the Activity contends that the employees in said positions are management officials within the meaning of the Order. The American Federation of State, County, and Municipal Employees, AFL-CIO, Local 2478, herein called AFSCME, contends, on the other hand, that there is no basis for excluding employees in said positions from its exclusively recognized unit. 1/

1/ The Activity, in the instant petition and at the hearing in this matter, alleged that allowing the FWPC and the SSPC positions to remain in the bargaining unit could result in a "conflict of interest" as defined in Section 1(b) of the Order. In this regard, it speculated that it could be negotiating with the AFSCME on issues raised by a Coordinator who might also be a representative of AFSCME, and that a violation of Section 19 could result. It has been held previously that unfair labor practice issues such as this may not be resolved appropriately in the context of a representation proceeding. Cf. Veterans Administration Center, Togus, Maine, A/SLMR No. 317, at footnote 1.

The record reveals that the AFSCME was certified as exclusive representative for a nationwide unit consisting of all professional and nonprofessional employees of the Activity on February 26, 1973. 2/ The Activity is headed by several Commissioners and is organized into a headquarters and eight regions. The headquarters unit is headed by a Staff Director under whom is the Deputy Staff Director. Reporting to the Deputy Staff Director is the Director of Equal Employment Opportunity (EEO), who is responsible for implementing equal employment opportunity programs within the Activity. Under the Director of EEO is an EEO Committee comprised of the FWPC, the SSPC, the headquarters EEO Counselors, and the Mid-Atlantic Regional Office EEO Counselor. The FWPC and the SSPC are part-time positions and are appointed by the Deputy Staff Director for a two year term. Persons appointed to these positions spend approximately 20 percent of their time performing this work and the remaining time in their official jobs at the headquarters.

The record reveals that the FWPC and the SSPC advise the Director of EEO on matters affecting the employment and advancement of women and employees of Spanish speaking background. Recommendations for changes in the Activity's policies affecting these groups are normally processed through the Director of EEO. In the past, recommendations have included such items as upward mobility and paraprofessional training, orientation programs, utilizing bilingual and bicultural abilities, and determining titles for occupational and statistical categories. The evidence also indicates that decision making authority over recommended policy changes is restricted to the Staff Director and the Commissioners.

With respect to the recommendations submitted by the FWPC and the SSPC, the record reveals that the Director of EEO decides whether to forward them to the Deputy Staff Director and may attach his recommendations. The record also reveals that the FWPC and the SSPC are not normally present at the decision making policy discussions held concerning their recommendations.

Based on the foregoing circumstances, I find that the FWPC and the SSPC are not management officials within the meaning of the Order. Thus, in my view, the evidence establishes that such employees do not have authority to make or to influence effectively Activity policies with respect to personnel, procedures, or programs. Rather, I find that they serve as resource persons rendering resource information and recommendations with respect to the policy in question. 3/ Moreover, it was

2/ The certified unit is described as: "All General Schedule and Wage Grade professional and nonprofessional employees of the U.S. Commission on Civil Rights nationwide excluding supervisors, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, temporary appointments not to exceed 90 days, confidential employees and guards as defined in Executive Order 11491."

3/ Cf. Department of the Air Force, Arnold Engineering Development Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

noted that the duties of said positions are not the official duties of the appointed employees, and their involvement is restricted to 20 percent of their work time. Accordingly, I find that the positions of Federal Women's Program Coordinator and Spanish Speaking Program Coordinator should be included in the unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of State, County, and Municipal Employees, AFL-CIO, Local 2478 was certified on February 26, 1973, be, and hereby is, clarified by including in said unit the positions of Federal Women's Program Coordinator and Spanish Speaking Program Coordinator.

Dated, Washington, D.C.
July 22, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

July 22, 1977

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

INTERNAL REVENUE SERVICE,
OFFICE OF THE REGIONAL COMMISSIONER,
SOUTHEAST REGION
A/SLMR No. 870

This case arose as a result of a representation petition filed by the National Treasury Employees Union (NTEU) seeking an election in a unit of all professional and nonprofessional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region (Activity). The NTEU previously petitioned for the same unit which was found appropriate in Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, A/SLMR No. 565. In that case a question was raised as to the adequacy of the NTEU's showing of interest based on the eligibility findings contained in the decision. The petition was subsequently dismissed based upon the results of a reevaluation of the showing of interest. The parties agreed that the unit found appropriate in the previous case and petitioned for in the instant matter continues to be appropriate for the purpose of exclusive recognition. A Notice of Hearing was issued in the instant matter in order to adduce evidence on the eligibility of employees in certain job classifications. Specifically, the Activity contends, and the NTEU concurs, that the employees in certain job classifications should be excluded from the unit because such employees are management officials and/or confidential employees. In addition, the Activity contends that employees in the classification of Budget Analyst, GS-560-12, are supervisors and that the employee classified as Appointment Clerk, GS-203-5, is engaged in Federal personnel work in other than a purely clerical capacity,and that they, therefore, should be excluded from the bargaining unit.

The Assistant Secretary noted that with the exception of the Appointment Clerk, GS-203-5, the eligibility of all the employees in the subject classifications was fully litigated and determined in the earlier case to be included within the unit found appropriate. In the Assistant Secretary's view, it would not effectuate the purposes and policies of the Order to permit the same parties to relitigate the same issues including the same classifications raised in a prior hearing, in the absence of evidence of some change in circumstances. Accordingly, the Assistant Secretary found, based on the determination in the earlier case, that employees in the disputed classifications should be included in the unit found appropriate. However, with regard to employees classified as Budget Analyst, GS-560-12, the record disclosed that since the hearing in the previous case additional duties had been assigned to such employees. Based upon the record, the Assistant Secretary found insufficient evidence to establish that employees in this classification are supervisors within the meaning of the Order. Accordingly, he found that employees in this job classification should be included in the unit.

Finally, based on the parties' stipulation, the Assistant Secretary found that the employee classified as Appointment Clerk, GS-203-5, to be engaged in Federal personnel work in other than a purely clerical capacity and, therefore, should be excluded from the unit found appropriate.

Based on the foregoing, the Assistant Secretary found the unit sought to be appropriate for the purpose of exclusive recognition, and ordered that an election be conducted.

A/SLMR No. 870

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
OFFICE OF THE REGIONAL COMMISSIONER,
SOUTHEAST REGION

Activity

and

Case No. 40-07487(RO)

NATIONAL TREASURY EMPLOYEES
UNION

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 Annette Allen. 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's brief, the Assistant Secretary finds:

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

2. The Petitioner, National Treasury Employees Union, herein called NTEU, seeks an election in a unit of all professional and nonprofessional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in Executive Order 11491, as amended. 1/

1/ The NTEU previously petitioned for the same unit which was found appropriate in Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, A/SLMR No. 565. In that case a question was raised as to the adequacy of the NTEU's showing of interest based on the eligibility findings contained in the decision. Therefore, the Assistant Secretary directed the Area Administrator to reevaluate the showing of interest prior to proceeding further in the matter. The petition was subsequently dismissed based upon the results of the reevaluation. The parties agree that the unit found appropriate in that case, and petitioned for in the instant matter, continues to be appropriate for the purpose of exclusive recognition, and, pursuant to the parties' request, I hereby take administrative notice of the record in the earlier case.

A Notice of Hearing was issued in the instant matter in order to adduce evidence on the eligibility of employees in certain job classifications. Specifically, the Activity contends, and the NTEU concurs, that the employees in the following job classifications are management officials and/or confidential employees, and on these bases should be excluded from the bargaining unit: Fiscal Analyst, GS-501-7, 9; Budget Analyst, GS-650-9, 11, 12; Management Analyst, GS-343-11, 12; Senior Management Analyst, GS-343-12; Regional Analyst Audit, GS-512-12, 13; Senior Regional Analyst Audit, GS-512-14; Industrial Engineer, GS-896-12, 13. In addition, the Activity contends that employees in the classification of Budget Analyst, GS-560-12, are supervisors, and the employee classified as Appointment Clerk, GS-203-5, is engaged in Federal personnel work in other than a purely clerical capacity, and that they, therefore, should be excluded from the bargaining unit. 2/

Fiscal Analyst, GS-501-7, 9; Budget Analyst, GS-650-9, 11, 12; Management Analyst, GS-343-11, 12; Senior Management Analyst, GS-343-12; Regional Analyst Audit, GS-512-12, 13; Senior Regional Analyst Audit, GS-512-14; Industrial Engineer, GS-896-12, 13.

In the prior case, the eligibility of the employees in the above classifications was fully litigated and they were determined by the Assistant Secretary to be included within the unit found appropriate. The record reveals that since the earlier hearing there has been no change in the duties or responsibilities of the employees in the subject classifications. In my view, it would not effectuate the purposes and policies of the Order to permit the same parties to relitigate the same issues involving the same classifications raised in a prior hearing, in the absence of evidence of some change in circumstances. Accordingly, in the absence of such evidence, I find, based on the Assistant Secretary's determination in Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, cited above, that the employees in the above classifications should be included in the unit found appropriate.

Budget Analyst, GS-560-12

The eligibility of employees in the subject classification was litigated and determined in the earlier case. However, the record reveals that since the hearing in the previous case additional duties have been assigned to such employees. In this regard, the record reveals that employees in this classification have been designated "team leaders" of a team which consists of a lower graded Budget Analyst, a Budget Technician and/or a Budget Clerk. Employees in the subject classification report directly to the Budget Officer, and, among their additional duties, they are responsible for coordinating and routinely assigning work to the members of their team, and making recommended evaluations of their team members to assist the Budget Officer in making performance evaluations.

I find that the evidence does not establish that employees in the classification of Budget Analyst, GS-560-12, are supervisors within the meaning of Section 2(c) of the Executive Order. In this regard, it was noted that the evidence does not establish that the employees in the subject job classification have the authority to hire, discharge, promote, approve leave, adjust grievances, or effectively recommend such actions. Further the record does not reveal that they utilize independent judgment or exercise authority in other than a routine manner with respect to other employees. Accordingly, I find that employees in the job classification of Budget Analyst, GS-560-12, should be included in the unit found appropriate.

Appointment Clerk, GS-203-5

The parties stipulated that the incumbent in the subject classification spends a majority of time engaged in the preparation and processing of personnel actions, such as promotions, reassignments, pay increases, transfers, adverse action, etc., and is primarily engaged in Federal personnel work in other than a purely clerical capacity.

Based on the foregoing stipulation, and in the absence of evidence to the contrary, I find that the employee classified as Appointment Clerk, GS-203-5, is engaged in Federal personnel work in other than a purely clerical capacity and, accordingly, should be excluded from the unit.

Based upon the record developed in the earlier case, and noting the agreement of the parties herein, I find the following described unit of employees to be appropriate for the purpose of exclusive recognition under the provisions of the Order:

> All professional and nonprofessional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors 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 a unit with employees who are not professional, unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the

2/ At the hearing, the parties stipulated that employees in all of the classifications at issue herein, with the exception of the employee classified as Appointment Clerk, GS-203-5, are professional employees within the meaning of the Order. There was no contrary evidence to indicate that the parties' stipulation was improper.

professional employees as to inclusion in a 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 Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors 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 National Treasury Employees Union.

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 National Treasury Employees Union. 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 indicating whether or not the National Treasury Employees Union 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 the 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 Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors 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 will 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 Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors as defined in the Order.

(b) All professional employees of the Internal Revenue Service, Office of the Regional Commissioner, Southeast Region, excluding nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, and supervisors 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 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 National Treasury Employees Union.

Dated, Washington, D. C.
July 22, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

July 28, 1977

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

PENNSYLVANIA ARMY AND
AIR NATIONAL GUARD
A/SLMR No. 871

This case involved an unfair labor practice complaint filed by the Association of Civilian Technicians (ACT) alleging that the Respondent violated Section 19(a)(1),(2),(5), and (6) of the Order by refusing to allow an employee to have a representative of the ACT present at a meeting between the employee and his first and second level supervisors.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1),(2),(5) and (6) of the Order. In this regard, the Administrative Law Judge found that the April 23, 1976, meeting between the employee and his first and second level supervisors did not constitute a "formal discussion" within the meaning of Section 10(e) of the Order as the meeting was, in effect, a "counselling session" between supervisors and a subordinate and had no wider ramification than being a limited discussion with an individual employee concerning particular incidents as to him. In reaching this conclusion, the Administrative Law Judge rejected the argument of the ACT that the Respondent's regulations, which distinguish between informal and formal disciplinary actions, should be dispositive of the issue of the Section 10(e) character of the meeting. Further, the Administrative Law Judge found that the negotiated agreement executed by the parties on March 24, 1976, which provided for, among other things, union representation of employees at disciplinary meetings, was not effective until the May 7, 1976, approval of the Respondent, and was not in effect during the critical times herein.

The Assistant Secretary, citing the Federal Labor Relations Council's Statement On Major Policy Issue, FLRC No. 75P-2, Report No. 116, adopted the findings, conclusions and recommendations of the Administrative Law Judge, and ordered that the complaint be dismissed.

A/SLMR No. 871

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PENNSYLVANIA ARMY AND
AIR NATIONAL GUARD

Respondent

and Case No. 20-5862(CA)

ASSOCIATION OF CIVILIAN TECHNICIANS

Complainant

DECISION AND ORDER

On March 18, 1977, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision 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 Recommended Decision.

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 Recommended Decision 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. 20-5862(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 28, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ See the Federal Labor Relations Council's Statement On Major Policy Issue, FLRC No. 75P-2, Report No. 116.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

PENNSYLVANIA ARMY AND AIR NATIONAL GUARD
Respondent

and

ASSOCIATION OF CIVILIAN TECHNICIANS
Complainant

Case No. 20-5862(CA)

Major George M. Orndoff
Pennsylvania Army and Air National Guard
Adjutant General's Office, Commonwealth
of Pennsylvania, Annville, Pennsylvania
For the Respondent

Leonard Spear, Esq.,
Meranze, Katz, Spear & Wilderman
12th Floor, Lewis Tower Building
15th & Locust Sts.
Philadelphia, Pennsylvania 19102
For the Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor Management Relations (hereafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on November 12, 1976 with reference to alleged violations of Sections 19(a)(1)(2)(5) and (6) of the Order. The complaint, filed by Association of Civilian Technicians (hereafter referred to as the Union or Complainant) alleged that Pennsylvania Army and Air

National Guard (hereafter referred to as the Activity or Respondent) violated the Order by refusing to allow Richard Tworek to have a Union representative present at a meeting between Tworek and his first and second level supervisors.

At the hearing held on January 5, 1977 the parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were recieved from both parties and have been carefully considered.

Upon the entire record in this matter and from my evaluation of the evidence and observation of the witnesses and their demeanor I make the following:

Findings of Fact

At all times since 1974 the Union's Pennsylvania State Council has been the exclusive collective bargaining representative for all Army and Air National Guard Technicians within the Commonwealth of Pennsylvania. Sometime after the Union obtained representative status the parties entered negotiations for an agreement and by January 1975 reached agreement on basically all contract matters except the subjects of reduction in force and wearing of military uniforms. These two issues were referred to the Federal Service Impasses Panel which, in November 1975, recommended that the agreement be put into effect less the two disputed items. It was further recommended that bargaining on the remaining questions could resume 180 days days after the basic agreement had been signed. The Activity refused to accept the Panel's recommendations and thereafter, formal hearings were held before the Panel. Pursuant thereto, the Panel, on February 24, 1976, directed that the parties sign the agreement less the two disputed items and accordingly the agreement was signed by the parties on March 24, 1976. Section 20.1 of the agreement provides that it "...shall become effective and remain in effect for two (2) years from the date approved by the National Guard Bureau." The agreement was approved by the National Guard Bureau on May 7, 1976.

On April 23, 1976, Richard Tworek, who was at that time an employee of the Activity, 1/ was informed by his immediate supervisor Joseph Hood, that both were wanted in the office of Frank Catrain. Catrain was Hood's supervisor and Tworek's next level

1/ On September 11, 1976, Tworek was terminated from employment by virtue of his loss of military membership, a prerequisite to to retaining employment as a Civilian Technician.

Supervisor. After Tworek and Hood entered Catrain's office Catrain presented Tworek with the following letter:

"Subject: Informal Disciplinary Action

"To: SSgt Richard Tworek

"1. During normal scheduled working hours at approximately 1215 hours, 21 April 1976 within the confines of Hanger #1, Building #302, you were observed as being in violation of Base Regulations 35-1, "Dress and Personal Appearance of ANG Personnel", and AFR 35-10, Dress and Personal Appearance of A.F. Personnel. This situation was very embarrassing to me as your supervisor. You were approached by none other than the Air Commander, Brig General Phillipy in regard to your personal appearance.

"2. Repeated past briefings, letters and warnings as to the requirements of AFR 35-10, TPP 907 page 13, and Base Regulation 35-1, you were observed with your shirttail out of your trousers [sic].

"3. This is an informal disciplinary action but will not be placed in your personel file. It will be maintained by me for future reference."

Catrain asked Tworek to read the letter and endorse it. Tworek asked to have a Union representative present and Catrain refused. 2/ Catrain again asked that it be signed and Tworek again requested and was refused Union representation. Catrain gave the letter to Hood and asked him to sign and date the letter, which he did. After Tworek continued to refuse to sign the letter

2/ While some supervisors at that time followed the practice of permitting a Union representatives to be present when a written reprimand or admonishment was given to an employee, Catrain, among others, did not permit such representation.

Catrain told Tworek it was an informal action and would be put into the "file". 3/ Catrain then brought out of his desk a letter of reprimand dealing with a prior complaint of alleged abuse of sick leave on Tworek's part and asked him to sign it. 4/ Tworek refused to sign without having Union representation and counselling. Catrain again refused to allow Union representation and neither letter was signed by Tworek.

Thereafter, the unfair labor practice charges giving rise to these proceedings was filed concerning Catrain's refusal to permit Tworek representation at the April 23 meeting.

Discussion and Conclusions

Complainant contends that Catrain's meeting with Tworek was a formal meeting within the meaning of Section 10(e) of the Order and accordingly, the Activity violated the Order when Catrain refused to permit Tworek Union representation. 5/ Complainant argues that the formality of the meeting is shown by reference to the Activity's own regulations which appear to equate informal disciplinary actions with oral admonishments and formal disciplinary

3/ No explanation was given as to what specific "file" the letter would be deposited. However, the letter did not go to Tworek's official personnel file.

4/ Tworek had originally been given a letter of reprimand as to excessive absenteeism which was subsequently revised to abuse of sick leave.

5/ 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 grieviances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

actions with written admonishments 6/ and by the manner in which the letter was subsequently used. 7/ Complainant further contends that on April 23, 1976 when the Catrain - Tworek incident occurred the parties were bound by the terms of the collective bargaining agreement executed on March 24 which, according to the Union, gave Tworek the right to representation upon demand. 8/

The Assistant Secretary has held, in similar circumstances, that "counselling sessions" between supervisors and subordinates which relate only to an individual employee's alleged shortcomings are not formal discussions under Section 10(e) of the Order.

6/ T P Pam 904 of the Activity's regulations provides, in relevant part:

"a. Informal Disciplinary Actions. Oral admonitions and warnings are the first step in constructive discipline. As a general rule, such actions are taken by the supervisor on his own initiative in situations of a minor nature involving violations of a rule, standard of conduct, safety practice, or authoritative instructions. The technician should be advised of the specific infraction or breach of conduct and exactly when it occurred (date of incident), and he should be permitted to explain his conduct or act of commission or ommision.

"b. Formal Disciplinary Actions. Formal disciplinary actions consist of written admonitions or reprimands, suspensions and removals. Written notices will be as outlined in paragraph 7-42 this pamphlet. A copy of these notices will be sent to the Technician Personnel Office, since such actions may not be accomplished without action on the part of the Technician Personnel Office. A disciplinary measure should not involve a reduction in rank or compensation."

7/ After his termination, Tworek brought suit in Federal Court against the Activity. During the litigation in that forum Respondent herein offered in evidence the April 22 document, supra.

8/ Section 12.1 of the agreement provides, inter alia:

"If at any time a Technician is being questioned by a supervisor or management official and/or he believes that his rights
(continued)

According to the Secretary, such meetings have "...no wider ramifications than being limited discussions at a particular time with an individual employee...concerning particular incidents as to him."9/ In my view the meeting between Catrain and Tworek on April 23 was tantamount to a "counselling session" and did not involve general working conditions. Accordingly, I conclude the meeting did not constitute a "formal discussion" within the meaning of Section 10(e) of the Order and, in these circumstances, Tworek did not have a protected right under the Order to assistance or representation by the exclusive representative.10/

With regard to Complainant's reliance on the Activity's regulations which distinguish between informal and formal disciplinary actions, I do not find the regulations to be dispositive of the case herein. What is at issue before me is whether the April 23 meeting constituded a "formal discussion" within the meaning of Section 10(e) of the Order and not within the meaning of the Activity's regulations. Having found no formal discussion occurred on April 23 as alleged, I need not decide whether a formal discussion as envisioned in the regulations took place. In any event, an Agency's failure to abide by its own regulations does not, without more, constitute a violation of the Order. 11/

As to the subsequent use of the letter, I am unpersuaded that the introduction of the letter into Federal Court litigation establishes the April 23 meeting to be a "formal discussion."

(cont'd) are being threatened, he has a right to request that his Association representative be present. Should he elect to have an Association representative present, no further questioning or action will take place until the Technician's representative is present."

9/ Department of Denfense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336.

10/ Accord, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438, Case No. 32-3297(CA).

11/ Cf. Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 344.

Either a "formal discussion" occurred on April 23 or it did not. I have found the latter. In my view the submission of testimony, letters, records or various other evidence at a formal proceeding such as a court suit cannot relate back and elevate otherwise non-formal actions to formal acts or conduct within the meaning of the Order.

Finally, I reject Complainant's contention that the parties were bound on April 23, 1976 by the terms of the collective bargaining agreement executed on March 24, 1976 but not approved until May 7. As stated previously, the agreement provides that it "...shall become effective and remain in effect for two (2) years from the date approved by the National Guard Bureau." [Emphasis added.] Thus, the express language used by the parties made the terms of the agreement applicable for a two year period commencing with Bureau approval. I must assume the parties meant what they contractually said. Accordingly, I conclude that on April 23, 1976 the terms of the agreement were not in effect and the Activity was not obligated to accede to Tworek's request for representation at his meeting with Catrain and Hood. 12/

Recommendation

In all the circumstances herein I recommend the complaint be dismissed in its entirety.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: March 18, 1977
Washington, D.C.

12/ Cf. Veterans Administration Hospital, Montrose, New York, A/SLMR No. 484 and United States Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Western Region, A/SLMR No. 794.

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, N.Y.
A/SLMR No. 872

This case arose as the result of a petition filed by the American Federation of Government Employees, Local 2440, AFL-CIO (AFGE) seeking an election in a unit of all hospital police officers of the Activity. The AFGE contended that by virtue of the Assistant Secretary's decision in Veterans Administration Hospital, Montrose, New York, A/SLMR No. 484, in which a unit of non-guard employees was "severed" from a mixed unit of guard and non-guard employees, the hospital police officers (officers) are currently unrepresented. The Intervenor, National Federation of Federal Employees, Local 1119 (NFFE) contended that, as a result of its victory in the election directed by the Assistant Secretary in A/SLMR No. 484, the officers continued to be part of the mixed unit, and that the AFGE's petition which seeks to sever the officers from the mixed unit should be dismissed based on the criteria established in United States Naval Construction Battalion Center, A/SLMR No. 8. The Activity contended that the officers do not share a community of interest separate and distinct from other General Schedule employees in the Activity, and that such a unit would not promote effective dealings and efficiency of agency operations. It also contended that the officers have been, and continue to be, effectively represented by the NFFE.

Under all the circumstances, the Assistant Secretary concluded that subsequent to the election conducted pursuant to the Decision and Direction of Election in A/SLMR No. 484, the officers continued to be represented by the NFFE as part of the existing mixed unit of employees. In this regard, the Assistant Secretary noted that the officers were excluded from the unit found appropriate in that case only by reason of the then prohibition in the Order precluding the establishment of mixed units containing guard and non-guard employees. He further noted that such prohibition did not affect existing mixed units and that, standing alone, the filing of a petition, or the determination by the Assistant Secretary that a segment of an existing unit is appropriate for the purpose of exclusive recognition under the Order, do not constitute events which would terminate an existing mixed unit. Under these circumstances, in view of the majority vote of employees in favor of the NFFE, which, in the Assistant Secretary's judgment, constituted an indication of the desire of the employees to remain in the existing mixed unit, he found that the existing mixed unit continued in existence as constituted.

Having found that the officers continued to be part of the existing mixed unit, the Assistant Secretary found that the AFGE's petition was, in effect, an attempt to sever a portion of an existing unit. In these

circumstances, he found that the petitioned for unit was not appropriate for the purpose of exclusive recognition as there was no evidence that NFFE had failed or improperly refused to represent any employee in the existing bargaining unit and there has been a harmonious and effective bargaining relationship between the Activity and NFFE since 1965. Accordingly, in the absence of evidence of unusual circumstances, the Assistant Secretary dismissed the petition.

A/SLMR No. 872

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
MONTROSE, N.Y.

Activity

and

Case No. 30-7202(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2440, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1119

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 Raymond A. Wren. 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, American Federation of Government Employees, Local 2440, AFL-CIO, herein called the AFGE, seeks an election in a unit of all hospital police officers of the Activity, excluding all other General Schedule and Wage Grade employees, management officials, supervisors, and employees engaged in Federal personnel work in other than a purely clerical capacity. 1/ In support of its petition, the AFGE argues that, by virtue of the Assistant Secretary's decision in Veterans Administration Hospital, Montrose, New York, A/SLMR No. 484, in which a unit of non-guard employees was "severed" from a mixed unit of guard and non-guard employees, the claimed hospital police officers (officers) are, at present, unrepresented. As an alternative argument, the AFGE contends that, even if the officers are considered to be part of a mixed unit, they constitute a separate, appropriate unit which can be severed from the mixed unit.

1/ The claimed unit appears as amended at the hearing.

The Intervenor, National Federation of Federal Employees, Local 1119, herein called the NFFE, contends that the officers were severed from the mixed unit in A/SLMR No. 484, solely for the purpose of conducting an election, and the results of the election, which demonstrated rejection of the AFGE and support for the NFFE, should be viewed as having indicated the employees' desire to remain in the existing mixed unit represented by the NFFE. The NFFE further contends that as the officers are still part of the existing unit, the AFGE's petition should be dismissed based on the criteria set forth in United States Naval Contruction Battalion Center, A/SLMR No. 8.

The Activity takes the position that the claimed employees do not share a community of interest separate and distinct from the other General Schedule employees of the Activity and that such unit would not promote effective dealings and efficiency of agency operations. The Activity also asserts that the record herein establishes that the officers have been, and currently are, effectively represented by the NFFE. 2/

The record reveals that the Activity is a general medical and surgical hospital and a domiciliary. The officers, the employees sought herein, are attached to the Police Section of the Engineering Service of the Activity. The Police Section consists of a Supervisory Police Officer Chief, and approximately 12 police officers. The officers are responsible for the protection of property and personnel of the Activity, including investigations concerning thefts and other crimes, damage, and injuries, as well as controlling auto traffic on the Activity's grounds. The officers are General Schedule employees and are subject to the same personnel practices and policies and working conditions as all General Schedule employees of the Activity. They also are included in the same areas of consideration for merit promotions and reductions-in-force as other General Schedule employees of the Activity.

On September 29, 1965, the NFFE was granted exclusive recognition for a unit of all professional and nonprofessional employees of the Activity, including police officers. On September 12, 1972, the NFFE and the Activity executed a negotiated agreement, effective for a period of two years and automatically renewable for additional two year terms. 3/ Pursuant to a petition filed by the AFGE on February 4, 1975, the Assistant Secretary issued a Decision and Direction of Election in Veterans Administration Hospital, Montrose, New York, A/SLMR No. 484, in which he directed an election in a unit of all professional and nonprofessional General Schedule employees, excluding guards. 4/ The election, which was held on April 1 and 3, 1975, was won by the NFFE. On April 7, 1975, the NFFE was certified as the exclusive representative of the employees in the unit. For the reasons discussed below, the NFFE contends, and I agree, that the Area Administrator, in issuing the Certification of Representative, inadvertently excluded guards. Thereafter, on May 15, 1975, the AFGE filed a petition in Case No. 30-6183(RO) seeking a unit consisting of hospital police officers and structural firefighters who perform guard duties at the Activity. On October 3, 1975, the Regional Administrator dismissed the petition as untimely, citing the fact that the negotiated agreement covering the above employees was in effect and that the open period would not be in effect until June of 1976. On December 23, 1975, the Assistant Secretary denied the AFGE's request for review of the Regional Administrator's decision.

The record indicates that the NFFE has represented the officers over the years, including particularly protecting their interests when there was a reorganization of the Activity and the status of these employees was uncertain. Moreover, the NFFE has represented the officers in numerous grievances and there are several officers who are on authorized dues deductions.

Under all the foregoing circumstances, I find that, subsequent to the election held pursuant to the Direction of Election In A/SLMR No. 484, the officers continued to be included in a unit represented by the NFFE by virtue of its victory in that election. Thus, as noted above, the only reason for the exclusion in the Direction of Election of the officers from the unit found appropriate in A/SLMR No. 484 was the then existing prohibition contained in the Order against the establishment of any unit which included both guard and non-guard employees. 5/ However, the "legislative history" of the Order, as set forth in the Study Committee's Report and Recommendations (1969), clearly established that such prohibition did not affect existing units. In applying these principles under slightly different circumstances, it was earlier held that the prohibition regarding mixed units of guard and non-guard employees related only to the establishment of new units, and that until some event occurred which could be said to have terminated an existing mixed unit, such mixed unit was free to continue in existence as constituted. 6/ It was further held that neither the filing of a petition, nor a determination by the Assistant Secretary that a segment of an existing unit is an appropriate unit for the purpose of exclusive recognition, standing alone, constituted events which would terminate an existing unit. Although the petition filed by the AFGE, which resulted in the

2/ The Activity also argues that its position herein is supported by the Regional Administrator's decision of October 3, 1975, in Case No. 30-6183(RO), in which he dismissed an AFGE petition seeking the same unit as the instant petition as untimely, based upon the termination date of the NFFE's negotiated agreement.

3/ During all times relevant herein the agreement was in effect, having been automatically renewed since the original agreement was signed. There is no contention that the petition herein is untimely.

4/ The Officers were excluded from the unit found appropriate by reason of the then existing prohibition contained in the Order.

5/ See Section 10(b)(3) of the Order as it existed prior to February 6, 1975. Executive Order 11838, signed by the President on Feburary 6, 1975, amending Executive Order 11491, as amended, revoked Section 10(b)(3). In this regard, see also the Report and Recommendations of the Federal Labor Relations Council, (1975) Section I(3).

6/ See United States Department of the Army, Rocky Mountain Arsenal, Denver, Colorado, A/SLMR No. 325, and General Services Administration, Region 9, San Francisco, California, A/SLMR No. 333, where the petitions involved sought units of guards to be severed from existing mixed units.

Decision and Direction of Election in A/SLMR No. 484, sought to sever a unit of non-guards from the existing mixed unit, in my view, the principles set forth in the earlier cases noted above are applicable. Thus, in my opinion, the vote of the majority of the employees in favor of the NFFE, the incumbent labor organization which had been representing the mixed unit, constituted, in effect, an indication of the desire of the employees to remain in the existing mixed unit. Under these circumstances, I find that the existing mixed unit continued in existence as constituted subsequent to the election.

Having found that the officers continued to be represented by the NFFE as part of the mixed unit, I find that the AFGE's petition is, in effect, an attempt to sever a portion of the existing exclusively recognized unit. It has been held previously that the purposes and policies of the Order will best be effectuated by finding inappropriate a separate unit severed out of an existing unit where the evidence shows that an established, effective and fair collective bargaining relationship is in existence, absent unusual circumstances. 7/ As noted above, there is no evidence that the NFFE has failed or improperly refused to represent any employee, including the officers, in the existing bargaining unit. Further, the record reveals that a harmonious and effective bargaining relationship has been maintained since 1965 between the Activity and the NFFE. Accordingly, in the absence of any unusual circumstances which would warrant severance of certain employees from the existing exclusively recognized unit, I find that the unit sought by the AFGE herein is inappropriate for the purpose of exclusive recognition and, accordingly, I shall dismiss the petition. 8/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 30-7202(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
July 28, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

7/ See Headquarters, United States Army Field Artillery Center, Directorate of Facilities Engineers, Ft. Sill, Oklahoma, A/SLMR No. 696; General Services Administration, Region No. 5, Quality Control Division, Federal Supply Service, A/SLMR No. 526; Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, FLRC No. 72A-24; and United States Naval Construction Battalion Center, A/SLMR No. 8.

8/ In view of my disposition herein, I find it unnecessary to determine the eligibility of employees classified as Police Officer, GS-083-6.

August 4, 1977

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

NAVAL AIR REWORK FACILITY, PENSACOLA, FLORIDA,
and SECRETARY OF THE NAVY, WASHINGTON, D. C.
A/SLMR No. 873

On January 26, 1976, the Assistant Secretary issued his Decision and Order in A/SLMR No. 608, in which he found that the Respondent Secretary of the Navy, Department of the Navy, Washington, D. C. (Agency) had violated Section 19(a)(1) of the Order by directing the Respondent Naval Air Rework Facility, Pensacola, Florida (Activity) to terminate environmental differential pay paid pursuant to certain arbitration awards processed under the Activity's negotiated agreement with the Complainant. He found also that the Activity violated Section 19(a)(1) and (6) of the Order by unilaterally terminating such payments. Accordingly, the Assistant Secretary ordered, among other things, that the Activity and Agency cease and desist from the conduct found violative of the Order, and that the Activity reimburse each of the affected employees all monies deducted or withheld from them by reason of the termination of the environmental differential pay.

On May 4, 1977, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 76A-37, sustaining in part and setting aside in part the Assistant Secretary's Decision in A/SLMR No. 608, and remanding the case to the Assistant Secretary for appropriate action consistent with its Decision. In remanding the case to the Assistant Secretary, the Council, among other things, enunciated certain principles which it believed properly controlled in the subject case. Thus, in the Council's view, when the Assistant Secretary finds acts or practices which constitute unfair labor practices by "agency management," as defined in Section 2(f) of the Order, the Order provides no basis for drawing artificial distinction between organizational levels of such agency management so as to relieve them of the responsibility for their acts, which would otherwise be violative of the Order. The Council found that no distinction exists between alleged violations of 19(a)(6), on the one hand, and alleged violations of the remainder of 19(a) on the other hand, when the acts and conduct are attributed to agency management at a higher organizational level within the agency than the level of exclusive recognition. Further, the Council concluded that although the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of Section 19(a) of the Order by agency management, such conduct may not,

standing alone, provide the basis for finding a separate violation of the Order by "agency management" at a lower organizational level of the agency where the unit of exclusive recognition exists. Accordingly, the Council concluded that where, as in the instant case, agency management at the departmental level directed the termination of environmental differential pay by the Activity, and the pay was terminated as a result of such direction, the conduct of the Agency could be considered violative of Section 19(a)(6) of the Order, but a separate finding of violation would not lie against the Activity based solely on its ministerial actions in implementing the higher agency direction, as the Activity had no choice but to so comply.

The Assistant Secretary, consistent with the guidelines established by the Council in its Decision, modified the order in A/SLMR No. 608 to require the Agency to cease and desist from the conduct found violative of the Order and to take certain affirmative actions, and he dismissed those portions of the complaint alleging violations of Section 19(a)(1) and (6) of the Order by the Activity.

A/SLMR No. 873

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NAVAL AIR REWORK FACILITY,
PENSACOLA, FLORIDA

Respondent

and

Case No. 42-2529(CA),
A/SLMR No. 608,
FLRC No. 76A-37

SECRETARY OF THE NAVY,
DEPARTMENT OF THE NAVY,
WASHINGTON, D. C.

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1960

Complainant

SUPPLEMENTAL DECISION AND ORDER

On April 17, 1975, Administrative Law Judge Rhea M. Burrow issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondents had engaged in certain unfair labor practices. In essence, the complaint in the instant case alleged that the Respondent Naval Air Rework Facility, Pensacola, Florida (Activity) and the Respondent Secretary of the Navy, Department of the Navy, Washington, D.C. (Agency) had violated Section 19(a)(1) and (6) and Section 19(a)(1) of the Executive Order, respectively, based on the Agency's directing the Activity to terminate environmental differential pay for two classes of the latter's employees, which differential pay had been awarded in two separate arbitration cases processed under the negotiated agreement between the Complainant and the Activity, and on the latter's termination of such pay.

On January 26, 1976, in A/SLMR No. 608, the Assistant Secretary found that the Agency had violated Section 19(a)(1) of the Order by directing the Activity to terminate differential pay paid pursuant to the arbitration awards. He found also that the Activity violated Section 19(a)(1) and (6) of the Order by unilaterally terminating such payments. Accordingly, the Assistant Secretary ordered, among other things, that the Activity and Agency cease and desist from the conduct found violative of the Order, and that the Activity reimburse each of the affected employees all monies deducted or withheld from them by reason of the termination of the arbitration awards.

On July 16, 1976, the Federal Labor Relations Council (Council) accepted the Agency's petition for review (FLRC No. 76A-37) and granted its request for a stay of the Assistant Secretary's Decision and Order. On October 7, 1976, the Comptroller General, pursuant to a request of the Agency, ruled that the environmental differential pay awards involved herein were legal and might be reinstated, and "[e]mployees who lost the environmental differential after the awards were terminated...are entitled to backpay...as ordered by the Assistant Secretary of Labor." [56 Comptroller General 8 (1976)]. Thereafter, on October 14, 1976, the Complainant filed a motion with the Council seeking to dissolve the stay of the Assistant Secretary's remedial order insofar as it related to that part of the order which provided for the payment of monies to the employees involved. In view of the Comptroller General's decision, and without objection by the Agency, on October 27, 1976, the Council granted the Complainant's request, but continued the stay with respect to the remainder of the Assistant Secretary's Decision and Order. On November 22, 1976, the Agency notified the Assistant Secretary that it was directing the Commanding Officer of the Activity to reinstate retroactively the arbitration awards.

On May 4, 1977, the Council issued its Decision on Appeal in FLRC No. 76A-37, sustaining in part and setting aside in part the Assistant Secretary's Decision in A/SLMR No. 608, and remanding the case to the Assistant Secretary for appropriate action consistent with its Decision.

In its Decision, the Council enunciated certain principles which it deemed were applicable to the subject case. Among other things, the Council stated that when the Assistant Secretary finds acts or practices which constitute unfair labor practices by "agency management," as defined in Section 2(f) of the Order, the Order provides no basis for drawing artificial distinctions between organizational levels of such agency management so as to relieve them of the responsibility for their acts which would otherwise be violative of the Order. The Council found that no distinction exists between alleged violations of 19(a)(6), on the one hand, and alleged violations of the remainder of 19(a) on the other hand, when the acts and conduct are attributed to agency management at a higher organizational level within the agency than the level of exclusive

recognition. That is, when acts and conduct constitute a refusal to confer, consult, or negotiate as required by the Order, such acts and conduct may properly be found violative of Section 19(a)(6) regardless of the organizational level of the agency management which committed the violative conduct. Further, the Council concluded that although the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of Section 19(a) of the Order by agency management, such conduct may not, standing alone, provide the basis for finding a separate violation of the Order by "agency management" at a lower organizational level of the agency where the unit of exclusive recognition exists.

In the instant case, the Council concluded that where agency management at the departmental level directed the termination of environmental differential pay by the Activity, and the pay was terminated as a result of such direction, the conduct of the Agency could be considered violative of Section 19(a)(6) of the Order, but a separate finding of violation would not lie against the Activity based solely on its ministerial actions in implementing the higher agency directions, as the Activity had no choice but to so comply.

Based upon the Decision on Appeal of the Council in FLRC No. 76A-37, remanding the case to the Assistant Secretary for appropriate action, and the findings contained therein, the order issued in A/SLMR No. 608 is modified consonant therewith.

REMEDY

Having found that the Respondent Agency had engaged in certain conduct prohibited in Section 19(a) of Executive Order 11491, as amended, I shall order that the Respondent Agency 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 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Office of Civilian Manpower Management, Department of the Navy, Washington, D. C. shall:

1. Cease and desist from:

(a) Changing terms and conditions of employment at the Naval Air Rework Facility, Pensacola, Florida, by directing the Naval Air Rework Facility, Pensacola, Florida, to discontinue payment of environmental differential pay made pursuant to the arbitration awards of October 4, 1972, and October 25, 1972, rendered under the negotiated

agreement between the Naval Air Rework Facility, Pensacola, Florida, and the American Federation of Government Employees, AFL-CIO, Local 1960.

(b) In any like or related manner interfering with, restraining, or coercing employees represented by the American Federation of Government Employees, AFL-CIO, Local 1960, in the exercise of their rights assured by the Executive Order 11491, as amended.

2. Take the following affirmative actions in order to effectuate the purposes and policies of Executive Order 11491, as amended: 1/

(a) Post at its Washington, D. C. facility, and at the Naval Air Rework Facility, Pensacola, Florida, 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, Office of Civilian Manpower Management, Department of the Navy, Washington, D. C., 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 of the Office of Civilian Manpower Management, Washington, D. C. and the Naval Air Rework Facility, Pensacola, Florida, are customarily posted. The Director, Office of Civilian Manpower Management shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that those portions of the complaint in Case No. 42-2529(CA) alleging violations of Section 19(a)(1) and (6) of the Order by the Naval Air Rework Facility, Pensacola, Florida, be, and they hereby are, dismissed.

Dated, Washington, D. C.
August 4, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ As noted above, pursuant to the Comptroller General's ruling and the vacating of the Council's stay with respect to the Assistant Secretary's order in A/SLMR No. 608 in this regard, the payment of the environmental differential pay in question has been reinstated retroactively. Accordingly, I find it unnecessary to issue such an order in the instant proceeding.

APPENDIX

NOTICE TO ALL EMPLOYEES

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 the employees of

the Naval Air Rework Facility, Pensacola, Florida, that:

WE WILL NOT change terms and conditions of employment at the Naval Air Rework Facility, Pensacola, Florida, by directing the Naval Air Rework Facility, Pensacola, Florida, to discontinue payment of environmental differential pay made pursuant to the arbitration awards of October 4, 1972, and October 25, 1972, rendered under the negotiated agreement between the Naval Air Rework Facility, Pensacola, Florida, and the American Federation of Government Employees, AFL-CIO, Local 1960.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees represented by the American Federation of Government Employees, AFL-CIO, Local 1960, in the exercise of their rights assured by Executive Order 11491, as amended.

WE HAVE CAUSED TO BE MADE WHOLE all employees of the Naval Air Rework Facility, Pensacola, Florida, who were improperly denied environmental differential pay awarded pursuant to the arbitration awards of October 4, 1972, and October 25, 1972, rendered under the negotiated agreement between the Naval Air Rework Facility, Pensacola, Florida, and the American Federation of Government Employees, AFL-CIO, Local 1960.

(Agency)

Dated:_____ By:_____
Director, Office of Civilian Manpower
Management, Department of the Navy,
Washington, D. C.

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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Room 300, 1371 Peachtree Street, NE, Atlanta, Georgia 30309.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Naval Air Rework Facility
Pensacola, Florida

and

Secretary of the Navy,
Department of the Navy,
Washington, D.C.

A/SLMR No. 608
FLRC No. 76A-37

and

American Federation of Government
Employees, AFL-CIO, Local 1960

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This case arose when the American Federation of Government Employees, AFL-CIO, Local 1960 (the union), filed an unfair labor practice complaint against the Department of the Navy (the Department) and the Naval Air Rework Facility, Pensacola, Florida (the activity). The complaint alleged that the Department and the activity had violated section 19(a)(1) and (6) of the Order[1/] when the Department directed the activity to terminate environmental differential pay for certain employees at the activity and the activity complied with that direction and terminated such pay. (The environmental differential pay had been awarded the employees in arbitration proceedings processed under the negotiated agreement between the union and the activity.) The Assistant Secretary found that the activity violated section 19(a)(1) and (6) of the Order by its termination of the environmental differential pay and that the Department violated section 19(a)(1) by ordering the activity to do so. The Department appealed the Assistant Secretary's decision to the Council.

1/ Section 19(a) of the Order provides in pertinent part:

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 pertinent factual background of this case, as found by the Assistant Secretary, is as follows: The activity and the union had been parties to two negotiated agreements containing certain provisions authorizing additional pay for employees engaged in hazardous or "dirty" work at the activity's facility. Pursuant to the parties' agreement, two arbitrators issued awards directing the activity to pay environmental differential pay to two categories of its employees. The activity did not file exceptions to these awards with the Council but, after accepting both awards by letter, began paying the differentials to the affected employees —which payment continued for over a year. During an ensuing review of the Department's adherence to, and proper administration of, applicable pay laws, the Department's Office of Civilian Manpower Management (OCMM) questioned the propriety of these differential payments made by the activity pursuant to the two arbitration awards. Because it believed that the payments were improper under applicable laws and the Federal Personnel Manual (FPM), OCMM wrote to the Civil Service Commission (CSC) expressing its concern; noting (without specifying) that there were arbitration awards with respect to these matters; and setting forth its views as to why the employees should not be considered eligible for differential pay. In response to the Department's letter, the CSC advised OCMM that the latter's interpretation of the FPM with respect to the propriety of such differential pay was in accord with the intent and the requirements as delineated in the FPM Supplement concerning the payment of environmental differentials.2/

Thereafter, the OCMM Director notified the activity that OCMM could no longer condone the payment of these differentials for employees of the activity and directed the discontinuance of the differential payments as soon as possible. Although the activity's Commanding Officer disagreed with this conclusion, he was informed that he had no leeway in this matter. Subsequently, he provided the union with a copy of OCMM's correspondence, requested that the union study and evaluate the impact of the action on unit employees, and invited it to meet and confer on the matter prior to the activity's taking any action. Approximately 2 weeks later, having received no response from the union, the Commanding Officer of the activity wrote to the union's local president, citing the union's failure to forward

2/ With respect to the CSC advice to OCMM, in reaching his decision in the instant case the Assistant Secretary concluded that the Department's letter constituted merely a request for clarifying information regarding the CSC's interpretation of the FPM provisions concerning environmental differentials. He further concluded that the CSC response did not, and was not intended to, reflect a CSC policy interpretation that any particular arbitration award, based on the pertinent facts developed during a specific arbitration proceeding, was invalid under the pertinent provisions of the FPM. In this regard, the Assistant Secretary quoted from a subsequent letter from CSC to the union setting out the FPM procedures on environmental differentials and concluding, "we have made no determinations regarding a specific case nor do we contemplate doing so." [Emphasis in Assistant Secretary's decision.]

the matter to its National Office, and informing the union of the activity's intent to comply with OCMM's instructions by terminating the environmental differentials in question about 2 1/2 weeks later. The union did not respond to this letter and made no request or demand to meet and confer concerning this action. Thereafter the payment of environmental differentials, pursuant to the two arbitration awards, was terminated. The union then filed the complaint alleging that the Department and the activity violated section 19(a)(1) and (6) of the Order. The case was heard before an Administrative Law Judge (ALJ) who issued a Report and Recommendations finding that the activity and Department had engaged in certain unfair labor practice conduct. The Department filed exceptions to these findings.3/

The Assistant Secretary found, in pertinent part, that the Department violated section 19(a)(1) of the Order by directing the activity to terminate the environmental differential pay. He found further that the activity violated section 19(a)(1) and (6) by unilaterally terminating such payments.4/ As a remedy, the Assistant Secretary ordered that the activity and Department cease and desist from the unfair labor practice conduct, that the activity reimburse to each of the affected employees all monies deducted or withheld from them by reason of the termination of the environmental differential pay, and that the usual notice be posted at the activity.

The Department appealed the Assistant Secretary's decision to the Council, alleging that the decision presented major policy issues. The Council accepted the Department's petition for review, concluding that the decision of the Assistant Secretary raises certain major policy issues, namely:

> (1) whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding

3/ In a footnote in its brief before the Assistant Secretary, the Department noted that it was considering, and had taken the preliminary steps to effectuate, an appeal to the Comptroller General with respect to the pay questions raised by the arbitration awards involved in the proceedings.

4/ The union's section 19(a)(6) complaint against the Department was dismissed by the Assistant Regional Director, and such dismissal was sustained by the Assistant Secretary, who found that:

> [T]he obligation to meet and confer under Section 11(a) of 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. In this regard, . . . the [a]ctivity herein and not the [Department] accorded recognition to the exclusive representative and is a party to the negotiated agreement that was in effect at all times material herein.

a violation of section 19(a) of the Order by such agency management at that level of the agency and/or by other agency management at a lower organizational level of the agency where a unit of exclusive recognition exists; and

(2) whether it is consistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payment is in reasonable doubt.

The Council also granted the Department's request for a stay, having determined that the request met the criteria set forth in section 2411.47 (e)(2) of its rules (5 CFR 2411.47(e)(2)). The union filed a brief with the Council as provided in section 2411.16 of the Council's rules (5 CFR 2411.16). The Department did not file a brief.

Subsequent to Council acceptance, the Comptroller General ruled, in effect, that the environmental differential pay involved herein was legal and may be reinstated and, further, that employees who lost the environmental differential after such pay was terminated, were entitled to backpay for the period of termination (56 Comp. Gen. 8 (1976)). The union then requested that the Council vacate the stay insofar as it relates to that part of the Assistant Secretary's remedial order which provides for the payment of monies to the employees involved. The Council thereafter granted the union's request. With respect to the remainder of the Assistant Secretary's decision and order, the subject stay continued in effect.

Opinion

1. The first major policy issue is:

Whether the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of section 19(a) of the Order by such agency management at the level of the agency and/or by other agency management at a lower organizational level of the agency where a unit of exclusive recognition exists.

As noted above, the Assistant Secretary found that the Department violated section 19(a)(1) of the Order by directing the activity to terminate the environmental differential pay, and that the activity violated section 19 (a)(1) and (6) of the Order by unilaterally terminating such payments. As noted previously, the Assistant Secretary sustained the dismissal of the 19(a)(6) complaint against the Department because, in his view, the obligation to meet and confer under section 11(a) of 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 (see note 4). Further, the Assistant Secretary found that the activity had violated section 19(a)(6) by terminating the payments, notwithstanding the fact that the activity did so under direction by higher level management within the Department and did so only after the activity's Commanding Officer expressed disagreement with this higher level direction. In our view, these findings and conclusions by the Assistant Secretary are inconsistent with the purposes of the Order.

Section 19(a) of the Order provides a list of specified unfair labor practices in which "agency management" may not engage, including 19(a)(6) which prohibits "agency management" from refusing to consult, confer, or negotiate with a labor organization as required by the Order. The phrase "agency management" is specifically defined in section 2(f) of the Order:

"Agency management" means 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[.]

Accordingly, it is clear that the acts and conduct of any individual found to be agency management, as defined in section 2(f), may provide the basis for a section 19(a) violation. Of course, pursuant to section 6(a)(4) of the Order, it is the responsibility of the Assistant Secretary to decide whether specific acts and conduct constitute an unfair labor practice. Where he finds that an act or conduct constitutes an unfair labor practice and that the individuals who committed the act are agency management, there is no basis in the Order to draw artificial distinctions between organizational levels of such agency management so as to relieve them of the responsibility for their acts which would otherwise be violative of the Order.

We turn now to the question of whether a difference exists between alleged violations of 19(a)(6), on the one hand, and alleged violations of the remainder of 19(a) on the other, when the acts and conduct are attributed to agency management at a higher organizational level within the agency than the level of exclusive recognition. We see no distinction. That is, when acts and conduct constitute a refusal to confer, consult, or negotiate as required by the Order, such acts and conduct may properly be found violative of section 19(a)(6) regardless of the organizational level of the member of agency management who committed the violative conduct.

While it is true, as the Assistant Secretary noted, that the obligation to meet and confer under section 11(a) applies only in the context of the exclusive bargaining relationship between the exclusive representative and the activity or agency which has accorded exclusive recognition, contrary to the Assistant Secretary's conclusion, this does not mean that the acts and conduct of agency management from a higher level may not provide the basis of a 19(a)(6) finding when such acts and conduct constitute a violation of that section. The extent of the obligation to negotiate

coincides with the unit of exclusive recognition. However, agency management above the level of exclusive recognition may engage in acts and conduct which are violative of that obligation where, for example, such management, as here, initiated the unlawful conduct involved. In other words, when the obligation to negotiate is breached by the acts and conduct of agency management, such a breach may properly provide the basis for a 19(a)(6) finding regardless of the location of that agency management in the agency chain of command.5/

Hence, in the facts of the instant case where agency management at the departmental level directed the termination of the environmental differential pay and such pay was terminated as a result of such direction, such acts and conduct could be found to be a violation of section 19(a)(6) of the Order. Further, where, as found by the Assistant Secretary in the facts of this case, agency management at the activity level complied with such direction from agency management at a higher level because the activity had no choice but to do so, a separate finding of a violation would not lie against the activity as such, solely on the basis of its ministerial actions in implementing the direction from higher agency authority.

Accordingly, with reference to the first major policy issue, we conclude that the acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of section 19(a) of the Order by "agency management," but may not, standing alone, provide the basis for finding a separate violation by "agency management" at a lower organizational level of the agency where a unit of exclusive recognition exists.

Applying the foregoing principles to the facts and circumstances of this case, we conclude that "agency management" violated sections 19(a)(6) and 19(a)(1) of the Order. This conclusion is predicated solely upon the actions of the Department in initiating the conduct which the Assistant Secretary found violative of these sections of the Order, rather than upon the ministerial conduct of the activity in the circumstances of this case.

2. The second major policy issue is:

> Whether it is consistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payment is in reasonable doubt.

The Assistant Secretary's authority to prescribe remedial orders is set forth in section 6(b) of the Order:

5/ See United States Department of Agriculture and Agricultural Research Service, A/SLMR No. 519, FLRC No. 75A-65 (Dec. 24, 1975), Report No. 94.

> Sec. 6. Assistant Secretary of Labor for Labor-Management Relations.
>
> . . . . . .
>
> (b) In any matters arising under paragraph (a) of this section, the Assistant Secretary may require an agency or a labor organization to cease and desist from violations of this Order and require it to take such affirmative action as he considers appropriate to effectuate the policies of this Order.

As the Council has previously stated, section 6(b) confers considerable discretion on the Assistant Secretary to fashion such remedial action as he considers appropriate to effectuate the policies of the Order.6/ However, such discretion is not without limitation. For example, as the Council stated in Department of the Army, Aberdeen Proving Ground, A/SLMR No. 412, FLRC No. 74A-46 (Mar. 20, 1975), Report No. 67, at 7 of its decision:

> [T]he Assistant Secretary, in fashioning a remedial order in unfair labor practice cases, may not require a party to engage in an illegal action. In this connection, the Assistant Secretary's remedial order must "effectuate the purposes of the Order." Obviously, it would be inconsistent with such purposes to require a party to violate applicable law, appropriate regulation or the Order. [Footnote omitted.]

When a remedy involves the possible payment of monies by an agency, the Assistant Secretary, consistent with his responsibilities under the Order, must be reasonably assured that such payment is proper pursuant to law and decisions of the Comptroller General. In most situations, established precedent will provide the Assistant Secretary with reasonable assurance as to the propriety of a monetary remedy and the Assistant Secretary can issue such a remedy without prior authorization.7/ Where the Assistant Secretary lacks reasonable assurance as to the propriety of a monetary payment remedy, he should, as the Council does,8/ obtain an advance

6/ See U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, FLRC No. 76A-94 (Feb. 25, 1977), Report No. 122, and cases cited therein.

7/ In this regard, such decision and remedy are subject to appeal to the Council, consistent with its requirements for review as set forth in section 2411.12 of the Council's rules of procedure. Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, 1 FLRC 472 [FLRC No. 72A-30 (July 25, 1973), Report No. 42].

8/ See, e.g., Professional Air Traffic Controllers Organization and Federal Aviation Administration, Eastern Region (Wolf, Arbitrator), FLRC No. 76A-10 (Jan. 18, 1977), Report No. 121; Department of Transportation, Federal Aviation Administration, Montgomery RAPCON/Tower, Montgomery,

(Continued)

decision from the Comptroller General as to the legality of such a payment.[9] In this way, the Assistant Secretary can eliminate the possibility of ordering a party to violate law or decision of the Comptroller General.

In this latter regard, if the legality of a monetary payment has already been referred to the Comptroller General, the Assistant Secretary must await the Comptroller General's ruling as to the legality of such payment before requiring a party to make the payment. He may do this either by awaiting the ruling of the Comptroller General before fashioning a remedial order directing such payment, or by making such requirement in a remedial order contingent upon the Comptroller General's subsequent ruling.[10] Of course, should the Comptroller General rule that the payment of monies at issue is not proper, the Assistant Secretary may not require such payment.[11]

(Continued)

Alabama and Professional Air Traffic Controllers Organization (Amis, Arbitrator), FLRC No. 75A-32 (Dec. 20, 1976), Report No. 119; and Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thomson, Arbitrator), FLRC No. 75A-91 (June 14, 1976), Report No. 106.

9/ The Assistant Secretary has previously sought advance decisions from the Comptroller General with respect to such payment questions. For example, the Assistant Secretary requested a decision from the Comptroller General as to whether he has the authority to employ make-whole remedies under the Back Pay Act (5 U.S.C. § 5596 (1970)) or any other relevant statute when he finds violations of the Order involving the discriminatory failure to promote, to hire and/or to pay overtime. In response, the Comptroller General ruled that the Assistant Secretary does have such authority. 54 Comp. Gen. 760 (1975), at 762.

10/ In affirming the authority of the Assistant Secretary to employ make-whole remedies, the Comptroller General has stated:

> We also point out that although the A/SLMR may order an agency head to take remedial action with respect to an employee, including the payment of backpay, allowances and differentials and other substantial employment benefits, his order does not preclude the agency head or the authorized certifying officer of the agency from exercising their statutory rights under provisions of 31 U.S.C. 74 and 31 U.S.C. 82d in requesting an advance decision from this Office as to the propriety of such payments. Accordingly, an agency may properly delay the implementation of an order issued by the A/SLMR involving the expenditure of funds until it has obtained an advance decision from this Office. [54 Comp. Gen. 760 (1975), at 764.]

11/ In such situations, the Assistant Secretary may, pursuant to his section 6(b) authority, fashion alternative remedies—consistent with applicable law, appropriate regulation and the Order—as he deems appropriate.

In our view, the foregoing approach is consistent with the purposes of the Order, properly acknowledges the respective jurisdictions of the General Accounting Office and the Assistant Secretary in such circumstances, and avoids the enforcement difficulties which would otherwise arise if the Assistant Secretary's remedial order requiring the payment of monies were to become effective prior to the Comptroller General's resolution of the reasonable doubt concerning the legality of such payments.

In the instant case, while the Department had requested a decision from the Comptroller General as to the legality of the payment of monies prior to the Assistant Secretary's issuance of his decision and order, it is unclear from the record whether the Department apprised the Assistant Secretary that it had, in fact, requested a ruling from the Comptroller General.[12] In any event, subsequent to the issuance of the Assistant Secretary's decision, the Comptroller General ruled that the payment of monies directed by the Assistant Secretary's remedial order was legal. Accordingly, as there no longer exists a dispute concerning the legality of the payment of monies in this case, the Assistant Secretary's remedial order in this regard is hereby sustained.[13] However, in all future cases wherein the Assistant Secretary, after finding that an unfair labor practice was committed, fashions a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, he must do so in a manner consistent with the purposes of the Order as set forth above.

Conclusion

In summary, with regard to the major policy issues presented herein, we conclude that:

12/ As previously indicated, supra note 3, in a footnote in its brief before the Assistant Secretary, the Department stated only that it "is considering, and has taken the preliminary steps required by the Department of Defense to effectuate, an appeal to the Comptroller General" with respect to the pay question.

13/ The Comptroller General's ruling, following the Assistant Secretary's issuance of his remedial order herein, that both arbitration awards are legal and may be reinstated, and that employees who lost the environmental differential after the awards were terminated are entitled to backpay as ordered by the Assistant Secretary, does not resolve the major policy issue as to the nature of the Assistant Secretary's responsibilities in fashioning remedial orders which are consistent with the purposes of the Order in circumstances such as those in the instant case. Accordingly, the foregoing ruling by the Comptroller General does not render this major policy issue moot, and the union's motion to dismiss the issue on that basis (dated Feb. 9, 1977) is therefore denied.

(1) The acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of section 19(a) of the Order by "agency management," but may not, standing alone, provide the basis for finding a separate violation by "agency management" at a lower organizational level of the agency where a unit of exclusive recognition exists.

Applying the foregoing principles to the facts and circumstances of this case, we conclude that "agency management" violated sections 19(a)(6) and 19(a)(1) of the Order. This conclusion is predicated solely upon the actions of the Department in initiating the conduct which the Assistant Secretary found violative of these sections of the Order, rather than upon the ministerial conduct of the activity in the circumstances of this case.

(2) It is inconsistent with the purposes of the Order for the Assistant Secretary, after finding that an unfair labor practice was committed, to fashion a remedial order which includes as part of a remedy a requirement for the payment of monies to employees, when the legality of such payment is in reasonable doubt. Rather, such a remedial order either must await or be made contingent upon the Comptroller General's ruling as to the legality of the payment. In the instant case, as the Comptroller General has upheld the legality of the payments directed by the Assistant Secretary, the remedial order in this regard is therefore sustained.

Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we sustain in part and set aside in part the Assistant Secretary's decision and order and remand the case to him for appropriate action consistent with our decision herein.

By the Council.

Henry B. Frazier III
Executive Director

Issued: May 4, 1977

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

INTERNAL REVENUE SERVICE,
GREENSBORO, NORTH CAROLINA
A/SLMR No. 874

This case involved an Application for Decision on Grievability or Arbitrability filed by the National Treasury Employees Union (NTEU). The NTEU contended that its request for advisory arbitration pursuant to Article 34 of the Multi-District Agreement between the Internal Revenue Service (IRS) and the NTEU was timely submitted. The IRS took the position that the Multi-District Agreement, which stated that, "The Union has twenty-one (21) days to invoke advisory arbitration on behalf of an employee," required that such a request be received in the office of the appropriate District Director of the IRS within 21 days from the date the employee was given notice of the decision to take an adverse action, while the NTEU claimed that the agreement language only required that the request for advisory arbitration be postmarked within 21 days of the effective date of the adverse action.

The Administrative Law Judge, after noting that the agreement was not specific as to when the 21-day period should begin to run, found that the most reasonable interpretation of the agreement language suggested that the date of decision (and notification), rather than the effective date of the proposed action, was controlling. Thus, he found that the relevant contractual language spoke in terms of a decision without mentioning the effective date of the action. Moreover, he found that there is no language in the agreement which supported the NTEU's contention, nor was there any evidence to support a policy or practice of giving the NTEU 21 days from the effective date of the adverse action to invoke advisory arbitration. He noted also that, while the parties agreed that the advisory arbitration of adverse actions was an alternative to the Civil Service Commission's adverse action appeals procedures, there was insufficient evidence to establish that the parties agreed that the contractual procedure would follow the Commission's procedure of having the appeal period run from the effective date of an adverse action. The Administrative Law Judge therefore concluded that the NTEU's request for advisory arbitration in the instant matter had been untimely submitted to the Activity.

The Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge.

A/SLMR No. 874

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
GREENSBORO, NORTH CAROLINA

Activity

and

Case No. 40-6685(GA)

NATIONAL TREASURY EMPLOYEES
UNION

Applicant

DECISION ON ARBITRABILITY

On April 29, 1977, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision in the above-entitled proceeding, finding that the Applicant's request to the Activity for advisory arbitration pursuant to the parties' negotiated agreement had been untimely submitted. Thereafter, the Applicant filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and the Activity filed an answering brief to the Applicant'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 Recommended Decision and the entire record in the subject case, including the Applicant's exceptions and supporting brief, and the Activity's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. 1/

1/ Although the Administrative Law Judge inadvertently failed to make a recommendation with respect to the disposition of the Application in the instant proceeding, it is clear in view of his findings and conclusions that he recommends that the matter be found not subject to the advisory arbitration procedures of the negotiated agreement as the Applicant's request for advisory arbitration was untimely filed.

FINDING

IT IS HEREBY FOUND that the Applicant's request to the Activity for advisory arbitration pursuant to the parties' negotiated advisory arbitration procedure was not timely submitted, and, therefore, the matter is not subject to advisory arbitration.

Dated, Washington, D. C.
August 4, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

INTERNAL REVENUE SERVICE
GREENSBORO, NORTH CAROLINA
Activity

and

NATIONAL TREASURY EMPLOYEES UNION
Applicant

Case No. 40-6685(GA)

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Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION

Preliminary Statement

This matter arises from an Application for Decision on Grievability or Arbitrability under Section 13 of Executive Order 11491, as amended (hereinafter referred to as the Order).

The application was filed by National Treasury Employees Union (hereinafter referred to as the Union or the Applicant) challenging a determination by Internal Revenue Service, Greensboro, North Carolina (hereinafter referred to as the Activity) that a request by the Union to invoke arbitration was untimely under the terms of the parties existing collective bargaining agreement.

Pursuant to a Notice of Hearing issued by the Labor-Management Services Administration on November 30, 1976, a hearing on the application was held in Greensboro, North Carolina on February 2, 1977. At the hearing the parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Thereafter, briefs were filed by both parties.

Upon the entire record in this matter and from my evaluation of the evidence and observation of the witnesses and their demeanor, I make the following:

Findings and Conclusions

On February 19, 1975 Robert E. LeBaube, the Activity's District Director, notified employee Hattie Angel by letter that she was to be removed from employment effective close of business February 28, 1975. Pursuant to appropriate Civil Service regulations the letter, inter alia, informed Mrs. Angel that an appeal of this adverse action could be made to the Civil Service Commission at any time but not later than fifteen days from the effective date of her removal. By letter dated March 18, 1975, which was post-marked March 20 and received by the Activity on March 24, the Union notified the Activity that it was invoking advisory arbitration of the matter as provided by the parties agreement. In a letter dated March 26, 1975 District Director LeBaube rejected as untimely the request for arbitration. 1/ LeBaube based the rejection on Article 33, Section 4 of the parties

1/ Subsequent to LeBaube's issuing his decision on March 26, 1977, the Union brought the matter to the attention of Robert Hastings, the Activity's Chief of Union Relations Branch, Washington, D.C., and sought to have LeBaube's decision reversed. Hastings informed the Union that he would "see what he could do" in the matter. However, LeBaube's decision was never changed. In these circumstances I find that Hastings' comments had no effect upon LeBaube's March 26 decision on behalf of the Activity.

multi-district collective bargaining agreement (herein sometimes referred to as MDA-II). Article 33, Section 4 of MDA-II which was in effect at all times relevant hereto provides, in pertinent part:

> "A. An official who sustains the proposed charges against an employee in an adverse action will set forth his findings with respect to each charge and specification against the employee in his notice of decision.
>
> "B. 1. An employee against whom charges are sustained may appeal the decision on any basis allowed by applicable laws and regulations.
>
> 2. The Union has twenty-one (21) days to invoke advisory arbitration on behalf of an employee.
>
> "C. An employee dissatisfied with the decision may, with the concurrence of the Union, appeal pursuant to Article 34, except that the following matters will not be subject to arbitration...." 2/

Thus, the Activity takes the position that the terms of the agreement require that a request for advisory arbitration must be received by the Activity within twenty-one days from the time the employee was given notice of the decision to take an adverse action. The Applicant contends that the request for advisory arbitration was timely filed since the request was postmarked within 21 days from the effective date of the adverse action. 3/ According to the Applicant, the provision for advisory arbitration was meant to be a substitute for an appeal to the Civil Service Commission which could be filed within fifteen days from the effective date of the adverse action.

2/ Article 34 of the agreement provides for advisory arbitration of adverse actions.

3/ The parties also disagree as to whether the date of receipt or postmark controls when computing the number of days under this provison. However, I find it unnecesary to reach this issue.

MDA-II, signed in May 1974, sets forth in separate articles, two distinct procedures to deal with disciplinary and adverse actions. Disciplinary actions - oral admonishments confirmed in writing, a written reprimand, or a suspension of 30 days or less - are treated in Article 32 of the agreement. Under that article an Activity's final decision to impose a disciplinary action may generally be challenged by recourse to the parties negotiated four step grievance procedure. The Activity's adverse decision at step four is then generally appealable to binding arbitration if the Union, within twenty-one days of the decision, notifies the Activity of its desire to appeal. 4/

Adverse action appeal procedures are contained in Article 34 of the agreement, the relevant portion of which is contained in Section 4, as set forth above. 5/ While Section 4.B.2. of that Article indicates the Union has twenty-one days to invoke advisory arbitration, it does not specify whether the time begins to run from the date of the Agency's decision or the effective date of the action. Indeed, parties agree that during the negotiations which culminated in MDA-II, signed May 1974, there were no discussions pertaining to the language in question. Rather, the bargaining history for that section of the agreement had its origin in the negotiations for MDA-I which became effective in June 1972. 6/

MDA-I placed both disciplinary and adverse actions under the same article. Thus, with regard to adverse action situations, Section 4 of Article 31 provides as follows:

> "A. An official who sustains the proposed charges against an employee in an adverse action will set forth

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4/ Under this grievance procedure all unfavorable decisions rendered at step four may be appealed to arbitration if the appeal is made within twenty-one days of the Activity's decision.

5/ Adverse actions are defined in the agreement and include reductions in grade or pay, removals and suspension for more than thirty days.

6/ The parties also agree that the relevant portions of MDA-II contain no change in meaning from that found in MDA-I and merely reflects an attempt to present the subject matter in a more cogent manner.

his findings with respect to each charge and specification against the employee in his notice of decision.

"B An employee against whom charges are sustained may appeal the decision on any basis allowed by applicable laws and regulations.

"C. An employee dissatisfied with the decision may with the concurrence of the Union, appeal pursuant to Article 32, except that the following matters will not be suject to arbitration...." 7/

Section 6 of Article 31 sets forth the procedure to challenge an unfavorable Activity decision in a disciplinary action situation and provides:

"A. An employee dissatisfied with the Employer's decision on a disciplinary matter as defined in Section 1 of this Article may file a grievance pursuant to Article 33 of this Agreement.

"B. Adverse decision rendered in Step 4 of the grievance procedure may be appealed to arbitration as provided in Article 34 under the following conditions;

1. The Union notifies the Office of the District Director by certified mail with twenty-one (21) days of the decision of its desire to appeal...."

While no specific time in which to appeal an adverse action is mentioned in MDA-I, the parties acknowledge that the twenty-one days set out in Article 31 Section 6 above was applicable to such situations. However, nowhere does the agreement expressly state whether the twenty-one days will begin to run from the date of decision or effective date of the action.

7/ Article 32 of MDA-I contains the advisory arbitration procedures for adverse actions.

During the negotiations for MDA-I the parties realized that the advisory arbitration of adverse actions would be a substitute for an appeal to the Civil Service Commission. Since the appeal right to the Commission vests in the individual through statute and may not be bargained away by the Union, only the Union was given the right to invoke advisory arbitration. In return, the Union gave the Activity its assurance that it would represent the individual employee in either an appeal to the Commission or in advisory arbitration, but not both. Since the Union's national headquarters in Washington would in each case determine whether advisory arbitration would be invoked, the Union desired and was given six days for mailing purposes beyond the fifteen days for appeal provided in the Federal Personnel Manual for adverse action appeals. Accordingly, the parties agreed that, when an employee received the Activity's final decision to impose an adverse action, the employee received two copies of the decision, the second containing the notation "You may at your option give this copy to the Union." Further, the Activity wished to have a consistant twenty-one day appeal period in the agreement for ease of administration. Thus, under the agreement there would be a twenty-one days to request arbitration in disciplinary action situations, grievance matters and adverse actions. However, no specific mention was made as to whether the times being considered in adverse actions were to be from date of adverse decision or effective date of action.

Although the agreements do not specifically state whether the twenty-one days will begin to run from the date of the decision or the effective date of the adverse action, I find that the most reasonable interpretation of the contract language suggests that the date of decision (and notification) is controlling. The relevant contract language contains no mention of the effective date of the action. However, Article 33, Section 4 of MDA-II, above, consistantly refers to the "decision" as being the critical act against which the employee may appeal. While only the Union may invoke binding arbitration of the Activity's Step 4 grievance decisions which are unfavorable to employees, that appeal must be made within twenty-one days of the Activity's Step 4 decision. Thus, the agreement consistantly reflects that twenty-one days from the Activity's decision which is unfavorable to the employee is the time within which action must be taken. Moreover, there is no language in the agreement which supports the Union's contention nor is there any evidence to support a policy or practice of giving the Union

twenty-one days from the effective date of the adverse action to invoke advisory arbitration.

Further, while a "substitute" for the Civil Service Commission's adverse action appeals procedure was provided by the agreement, the evidence is insufficient to establish that the parties agreed that the advisory arbitration procedure would exactly duplicate the time allowed to pursue an appeal under the Commission's procedures (plus six days). Rather, although fifteen days was a point of reference in establishing the time allowed the Union to invoke advisory arbitration, the language ultimately decided on by the parties indicates that, consistant with other appeals procedures in the agreement, twenty-one days from the Activity's decision to impose an adverse action was the controlling period.

Accordingly, in all the circumstances herein I find and conclude that under the terms of the parties agreement, the Union's request to arbitrate the adverse action was untimely.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: 29 APR 1977
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

ENVIRONMENTAL PROTECTION AGENCY
A/SLMR No. 875

This case involved a petition for clarification of unit (CU) filed by the Activity seeking clarification of the status of one employee, an Environmental Protection Specialist, GS-14, who serves as a Program Manager in the Technical Assistance Branch of the Activity's Office of Solid Waste Management Programs. The Activity took the position that the incumbent was a supervisor and, therefore, should be excluded from the existing unit. The exclusive representative, the American Federation of Government Employees, AFL-CIO, Local 3331, contended that the incumbent was not a supervisor within the meaning of Section 2(c) of the Order.

The Assistant Secretary found that the employee in the disputed classification was not a supervisor within the meaning of the Order. In this connection, the record revealed that work assignments made by the Program Manager to the upward mobility employee assigned to his program were transmitted from higher authority through the Program Manager, were routine in nature and did not require the use of independent judgement. Moreover, while the Activity contended that the Program Manager had the authority to approve leave and travel requests, make recommendations for awards and resolve minor employee complaints, there was no evidence that the Program Manager had ever exercised this authority. Nor was there evidence that he had exercised independent judgment on the one occasion he was instructed to complete a performance evaluation, or that his recommendation with regard to hiring was effective. Under these circumstances, the Assistant Secretary found that the incumbent was not a supervisor within the meaning of the Order and clarified the existing exclusively recognized unit consistent with his findings.

A/SLMR No. 875

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ENVIRONMENTAL PROTECTION AGENCY

Activity-Petitioner

and

Case No. 22-7727(CU)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3331

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 C. Duffy Raap. 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 filed by the labor organization, the Assistant Secretary finds: 1/

The Activity-Petitioner, the Environmental Protection Agency (EPA), seeks to clarify the status of an Environmental Protection Specialist, GS-028-14, who is employed in the Technical Assistance Branch of the Office of Solid Waste Management Programs. The EPA contends that the Environmental Protection Specialist is a supervisor within the meaning of Section 2(c) of the Order. The American Federation of Government Employees, AFL-CIO, Local 3331, which is the exclusive representative of certain EPA Headquarters employees, contends that the employee in question is not a supervisor and is, therefore, eligible for inclusion within its exclusively recognized unit.

The Office of Solid Waste Management Programs, a component of the EPA, consists of several divisions including the Resource Recovery Division which is responsible for implementing a national program to recover energy and materials from solid waste streams and to reduce the generation of solid wastes. Within this Division is the Technical Assistance Branch which provides technical assistance, consultation, advice, studies, analyses and information to public and private organizations, and to agencies and individuals, regarding the implementation of resource recovery systems. The Technical Assistance Branch is headed by a Branch Chief who supervises the local government assistance program as well as the state and federal government assistance program, each of which is headed by a Program Manager. The position in question, the Environmental Protection Specialist, GS-028-14, is the Program Manager for the state and federal government assistance program.

The Program Manager advises state and federal governments about their resource recovery programs, fulfills the responsibilities of the Office of Solid Waste Management Programs relative to the implementation of the Resource Recovery Facilities Guideline in accordance with Executive Order 11752, and provides guidance to EPA regional offices on resource recovery issues. Working with the Program Manager is an Environmental Protection Specialist, GS-301-5, who is in an upward mobility training program. 2/ This latter employee has several ongoing projects in other branches of the Activity and, in this connection, may consult with the other branch chiefs. However, the majority of her work is centered in the state and federal government assistance program. Work assignments to this employee are channeled from the Branch Chief through the Program Manager who generally reviews the work before submitting it to the Branch Chief.

The record reveals that on one occasion the Program Manager was given a certificate of eligibles by the Branch Chief and was instructed to interview those applicants he felt were qualified for a vacant position in the state and federal government assistance program. Although the Program Manager recommended one applicant, the Branch Chief subsequently interviewed that applicant and another, neither of whom was hired. The record reveals also that the one time, during the Branch Chief's absence, that the Program Manager was instructed by the Deputy Division Director to complete a quarterly performance evaluation for the upward mobility employee in accordance with her training program requirements, he merely copied from the quarterly evaluation which had been filled out previously by the Branch Chief. Further, although the Activity contends that the Program Manager has the authority to approve leave and travel requests, make recommendations for awards and resolve minor employee complaints, the record contains no evidence that he has ever exercised such authority.

Based on the foregoing, I find that the Program Manager in the Technical Assistance Branch who is classified as an Environmental Protection Specialist, GS-028-14, is not a supervisor within the meaning of the

1/ A request by the Activity-Petitioner for an extension of time in which to file a post-hearing brief was untimely filed.

2/ A GS-9 Environmental Protection Specialist position in the state and federal government assistance program has been unoccupied since shortly after the Program Manager assumed his position in August 1976.

Order. Thus, the evidence establishes with respect to assigning work that such work assignments as are made by the Program Manager to the employee in the upward mobility program are transmitted by the Branch Chief through the Program Manager, and that the assignment of work is routine in nature and does not require the exercise of independent judgement. Moreover, the Program Manager does not regularly evaluate employees and did not exercise independent judgement on the one occasion he completed a performance evaluation. Further, the record reveals he does not have the authority to hire, promote, transfer, suspend, lay off or recall or discipline employees. Nor is there evidence that his recommendations with respect to such matters as hiring are effective or that he approves leave or travel requests, makes recommendations for awards or resolves grievances or minor employee complaints. Under all of these circumstances, I find that the Environmental Protection Specialist, GS-028-14, 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 existing exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, AFL-CIO, Local 3331, was certified as exclusive representative on October 27, 1972, be, and it hereby is, clarified by including in said unit the position of Environmental Protection Specialist, GS-028-14, the Program Manager for the state and federal government assistance program.

Dated, Washington, D.C.
August 5, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

August 9, 1977

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

BUREAU OF FIELD OPERATIONS,
OFFICE OF PROGRAM OPERATIONS,
SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE, CHICAGO REGION V-A
A/SLMR No. 876

This case involved a petition for consolidation of units filed by the American Federation of Government Employees, Local 1395, AFL-CIO (AFGE) seeking to consolidate two units for which it is the current exclusive representative -- the employees of the Bureau of Field Operations, Social Security Administration, Region V-A, assigned to the Champaign, Illinois, Social Security District Office and the employees of the Bureau of Field Operations, Social Security Administration, Region V-A, assigned to all District Offices, Branch Offices, Teleservice Centers and the Reconciliation and Analysis Unit, Cook County, Illinois. The Activity contends that the consolidated unit requested by the AFGE would not be appropriate because the employees in the existing two units do not share a community of interest and, because of the geographical separation of the employees, the consolidated unit would not promote efficiency of operations and effective labor-management relations dealings.

The Assistant Secretary noted that in view of the clear policy guidelines in the consolidation of units area formulated by the Federal Labor Relations Council (Council), there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. In the context of these policy considerations, the Assistant Secretary found that the petitioned for unit is appropriate for the purpose of exclusive recognition under the Order. He noted that all employees in the unit sought share a common mission, common overall supervision, uniform job classifications, essentially common working conditions and uniform personnel and labor relations practices. Under these circumstances, the Assistant Secretary found that the employees in the proposed consolidated unit shared a clear and identifiable community of interest. Furthermore, he found that as all employees of the Region were serviced by the same personnel office, and that the Regional Representative has been delegated the ultimate authority for labor relations matters, the proposed consolidated unit would promote effective dealings. Moreover, noting that the Regional Representative coordinates the operation of the components within the proposed consolidated unit, as well as labor relations, grievance and personnel matters, the Assistant Secretary found that the proposed consolidated unit would promote the efficiency of the agency's operations. Finally, the Assistant Secretary found that the petitioned for consolidated unit, which provided for bargaining in a single, rather than in the existing two bargaining units, would promote a more comprehensive bargaining unit structure and reduce fragmentation.

A/SLMR No. 876

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BUREAU OF FIELD OPERATIONS,
OFFICE OF PROGRAM OPERATIONS,
SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE, CHICAGO REGION V-A 1/

Activity

and

Case No. 50-13073(UC)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1395, AFL-CIO

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 James J. Zouvas. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

The Petitioner, American Federation of Government Employees, Local 1395, AFL-CIO, herein called AFGE, seeks to consolidate two units for which it is the current exclusive representative 2/ into a consolidated unit consisting of all employees in the Champaign, Illinois, Social Security District Office, and all District Office and Branch Office employees, Teleservice Center Employees, and Reconciliation and Analysis Unit employees of the Bureau of Field Operations, Social Security Administration Region V-A, whose office or parent office is located in Cook County, Illinois, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees and supervisors as defined in Executive Order 11491, as amended. The Activity contends that the consolidated unit requested by the AFGE would not be appropriate because the employees in the existing two units do not share a community of interest and, because of the geographical separation of the employees, the consolidated unit would not promote efficiency of agency operations and effective dealings.

The record discloses that Region V-A of the Bureau of Field Operations is under the direction of a Regional Representative. 3/ Within its Chicago, Illinois, Regional Office there are three branches: Analysis and Appraisal, Management, and Operations. Each branch is headed by a Staff Officer, who reports to the Regional Representative. Region V-A is further divided into Area Offices in Minnesota, Wisconsin, Indiana, and three in Illinois, each headed by an Area Director, who reports directly to the Regional Representative. The Area Offices are further divided into District Offices, Branch Offices, and Teleservice Centers. The managers of these offices report to their respective Area Director. However, the record reveals that District Office Managers have some degree of autonomy in operating their offices consistent with the guidelines established by the Activity's National Office. Although the District Managers have been delegated the authority to bargain with labor organizations and handle grievances, they are responsible directly to the Regional Representative, who has the ultimate authority in these matters. The AFGE, on the other hand, provides a steward or an individual with similar authority in each district office throughout the Region who represents the AFGE in contract negotiations and grievances, and who meets on a monthly basis with his respective District Manager to discuss problems. The stewards are under the supervision of the AFGE's Vice President, who may be called in to handle any problem areas.

The Cook County unit consists of 9 District Offices and 2 Teleservice Centers in Chicago within Area Four, and 4 District Offices in Cook County within Area Five. The Champaign unit is a single District Office within Area Six.

The mission of the Activity is to accept and process applications for benefits under the Retirement and Survivors Insurance Program, the Disability Program, the Health Insurance Program and the Supplemental Security Income Program.

The record reveals that all district offices, branch offices and teleservice centers contain employees with similar job classifications, performing similar work, and that all employees throughout the Region enjoy common overall supervision, uniform personnel policies and practices and essentially similar working conditions, which may vary from area to area depending upon the case load and the clients serviced.

In a recent decision, I found that in view of the clear policy guidelines in the consolidation of units area formulated by the Federal Labor Relations Council, there has been established, in effect, a presumption favoring the appropriateness of proposed consolidated units. 4/

1/ The name of the Activity appears as amended at the hearing.

2/ The AFGE was recognized on December 30, 1969, as the exclusive bargaining representative in a unit of all District Office and Branch Office employees, Teleservice Center employees and Reconciliation and Analysis Unit employees of the Bureau of Field Operations, Social Security Administration, Region V-A, whose office or parent office is located in Cook County, Illinois, and was certified as the exclusive representative in a unit of all nonsupervisory employees in the Champaign, Illinois Social Security District Office on September 9, 1971.

3/ The Regional Representative is also known as the Assistant Regional Commissioner for Field Operations.

4/ Education Division, Department of Health, Education and Welfare, Washington, D.C., A/SLMR No. 822.

Given these circumstances, I find that the proposed consolidated unit is appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended. Thus, as noted above, all the employees in the proposed consolidated unit share a common mission, common overall supervision, uniform job classifications, essentially common working conditions and uniform personnel and labor relations practices. Based on these considerations, I find that the employees in the proposed consolidated unit share a clear and identifiable community of interest. Further, as all employees of the Region are serviced by the same personnel office, and the Regional Representative has been delegated the ultimate authority for labor relations matters, I find that the proposed consolidated unit will promote effective dealings. Moreover, noting that the Regional Representative coordinates the operations of the components within the proposed consolidated unit, as well as labor relations, grievance and personnel matters, I find that the proposed consolidated unit will promote the efficiency of the agency's operations. Finally, I find that the proposed consolidated unit, which provides for bargaining in a single unit, rather than in the existing two bargaining units, will promote more comprehensive bargaining and reduce fragmentation.

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

> All employees of the Bureau of Field Operations, Social Security Administration, Region V-A, assigned to the Champaign, Illinois, Social Security District Office, and all employees assigned to District Offices, Branch Offices, Teleservice Centers, and the Reconciliation and Analysis Unit, Cook County, Illinois, excluding all management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees and supervisors as defined in Executive Order 11491, as amended. 5/

Under the Order, absent the expression of the affected employees' desire for an election, an agency may accord exclusive recognition to a labor organization without an election where the appropriate unit, as above, has been established through the consolidation of existing exclusively recognized units represented by that organization and the parties

5/ At the hearing, the parties stipulated that there are no professional employees in the currently existing bargaining units sought to be consolidated herein.

have bilaterally agreed to consolidation without an election. In the instant case, neither party requested an election to determine whether or not the employees desire to be represented in the proposed consolidated unit by the AFGE. Therefore, I shall order that the appropriate Area Administrator request that the Activity post copies of a Notice to Employees, in places where notices are normally posted affecting employees in the proposed consolidated unit, which states that if, within ten days from the date of posting of such notice, 30 percent or more of the employees in the proposed consolidated unit have notified the Area Administrator in writing that they desire the Assistant Secretary to hold an election on the issue of the proposed consolidation, such an election will be supervised by the Area Administrator.

If 30 percent or more of the employees in the proposed consolidated unit do not seek an election, a certification will be issued by the Area Administrator to the AFGE for the consolidated unit which I find to be appropriate for the purpose of exclusive recognition.

DIRECTION OF ELECTION

The Activity shall post, as soon as possible, copies of a Notice to Employees, which shall be furnished by the appropriate Area Administrator, in places where notices are normally posted affecting the employees in the consolidated unit found appropriate. Such notice shall conform in all respects to the requirements of Section 202.2(h)(4) of the Assistant Secretary's Regulations. If, within ten days from the date of posting of such notice, 30 percent or more of the employees in the consolidated unit found appropriate above have notified the Area Administrator in writing that they desire to hold an election on the issue of the proposed consolidation, 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 the posting period for the Notice to Employees is completed. 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 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 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 in the proposed consolidated unit by the American Federation of Government Employees, Local 1395, AFL-CIO, or remain in their existing recognized units represented by the American Federation of Government Employees, Local 1395, AFL-CIO.

Dated, Washington, D.C.
August 9, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

August 9, 1977

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 THE ARMY,
MILITARY TRAFFIC MANAGEMENT COMMAND,
MILITARY OCEAN TERMINAL, SUNNY POINT
A/SLMR No. 877

This case involved a petition for clarification of unit (CU) filed by the Activity-Petitioner (Activity) seeking to clarify whether or not after a 1968 reorganization at the Activity, employees in the Activity's Communications Division, who were administratively transferred intact to the U.S. Army Communications Command (USACC, Sunny Point), are still included within the exclusively recognized unit represented by the American Federation of Government Employees, Local 1708, AFL-CIO (AFGE). In this regard, the Activity contended, and all of the parties concurred, that some 15 USACC, Sunny Point, employees are included in the AFGE's exclusively recognized unit and that the USACC, Sunny Point, the gaining employer entity, is a successor employer and joint employer of said unit which the parties asserted is appropriate under Section 10(b) of the Order.

The Assistant Secretary concluded that as the 1968 reorganization involved the administrative transfer to the gaining employer, the USACC, Sunny Point, of only a portion of the employees in the existing exclusively recognized unit, no "successorship" relationship had been established by the reorganization. Rather, the Assistant Secretary found that the USACC, Sunny Point, employees remained within the AFGE's existing exclusively recognized unit subsequent to the administrative transfer to the Communications Division of the Activity to the USACC, Sunny Point. In this regard, it was noted that, subsequent to the reorganization, the employees of the USACC, Sunny Point, continued to share a community of interest with other employees located at the Activity in that they continued to perform the same job functions in the same location with no substantial change in their working conditions, immediate supervision and job contacts or personnel policies.

The Assistant Secretary found further that the retention of the USACC, Sunny Point, employees in the AFGE's exclusively recognized unit would promote effective dealings and efficiency of agency operations. With regard to effective dealings, he found that the Activity's Civilian Personnel Office (CPO) also services the USACC, Sunny Point, employees and is responsible for the labor relations program of all civilian employees it services, including the negotiation of agreements with all recognized labor organizations physically located at the Activity and that, subsequent to the reorganization, there continued to be stable labor-management relations between the Activity and the AFGE, with the AFGE being treated as the exclusive representative of the USACC, Sunny Point, employees. With respect to efficiency of agency operations, the Assistant Secretary noted that the continued inclusion of the USACC, Sunny Point, employees in the AFGE's exclusively recognized unit would prevent fragmentation of the existing unit, all of whose employees are serviced by the same CPO.

Accordingly, the Assistant Secretary ordered that the unit represented exclusively by the AFGE be clarified consistent with his findings.

A/SLMR No. 877

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
MILITARY TRAFFIC MANAGEMENT COMMAND,
MILITARY OCEAN TERMINAL, SUNNY POINT 1/

Activity-Petitioner

and

Case No. 40-7639(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1708, AFL-CIO

Labor Organization

and

U.S. ARMY COMMUNICATIONS COMMAND
AGENCY-SUNNY POINT

Party-in-Interest

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 Renee B. Rux. 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, which is located at Southport, North Carolina, and which hereinafter is called the Activity, filed a petition for clarification of unit (CU) seeking to clarify whether or not after a 1968 reorganization at the Activity, employees in the Activity's Communications Division, who were administratively transferred intact to the U.S. Army Communications Command, hereinafter called the USACC, Sunny Point, are still included within the exclusively recognized unit represented by the American Federation of Government Employees, Local 1708, AFL-CIO, hereinafter called AFGE. 2/ In this regard, the Activity contends that some 15 USACC, Sunny Point (Communications Division) employees are included in the exclusively recognized unit represented by the AFGE and that the USACC, Sunny Point, the gaining employer entity, is a successor employer and joint employer of said unit, which unit, it is asserted, is appropriate under Section 10(b) of the Order. All of the parties concur in the position of the Activity and desire to amend the recognition of said unit to reflect a multi-employer unit consisting of employees of the Activity and the USACC, Sunny Point.

The mission of the Activity is to plan, coordinate and accomplish the transhipment of ammunition and other dangerous cargoes to and from overseas areas. 3/ Prior to the 1968 reorganization, communications services were provided for the Activity through an internal subordinate organization under the Activity's Director of Services. This subordinate organization, the Communications Division, provided communications, electronics and photographic services for the Activity. The Communications Division was composed of some 9 Wage Grade and General Schedule employees in the positions of telephone operators, communications specialists and a photographer. On October 9, 1968, pursuant to a reorganization, the employees assigned to the Activity's Communications Division were transferred intact to the USACC, Sunny Point, a new organization, which used the same grounds and facilities as were used before the reorganization. The effect of the reorganization was that the Communications Division became a tenant organization located at the Activity.

The record reveals that while most conditions of employment remained the same for the USACC, Sunny Point, employees subsequent to the reorganization, certain changes were effected. Thus, personnel actions concerning pay and promotions were transferred to the USACC, Fort Ritchie, Maryland; criteria and guidelines for rating and ranking employees were developed and processed by the USACC, Fort Huachuca, Arizona; agency grievances were handled through the USACC channels instead of those of the Activity; and a separate reduction in force area was established for the USACC, Sunny Point,

1/ The name of the Activity-Petitioner appears as amended at the hearing.

2/ The AFGE was granted exclusive recognition in 1962. The Activity and the AFGE agree that the 1964 negotiated agreement description of the (Continued)

2/ unit which was "all employees in the recognized terminal-wide unit, except those positions specifically excluded by the ineligible list," accurately reflects the exclusively recognized unit. The AFGE's current negotiated agreement with the Activity describes the unit as "all employees of Military Ocean Terminal, Sunny Point, excluding management officials, supervisors, employees engaged in Federal personnel work in other than a purely clerical capacity and guards".

3/ The Activity employs 89 Wage Grade and 144 General Scheule employees, (42 of whom are guards and are represented by the International Brotherhood of Police Officers). The USACC, Sunny Point, employs 2 Wage Grade and 17 General Schedule employees.

employees. However, the record also reveals that after the reorganization the communications employees continued to perform the same job functions in the same location with no substantial change in their working conditions, immediate supervision and job contacts or personnel policies. Further, the USACC, Sunny Point, as a tenant organization, is serviced by the Activity's Civilian Personnel Office (CPO) 4/ which is responsible for labor relations for all of the civilians located at the Activity. Thus, the record reflects that the CPO's responsibilities"... would include all dealings with whatever Unions are recognized, negotiation of contracts, responsibility for negotiating, consulting and conferring with the proper people on any personnel matter that affects working conditions of employees." 5/ In this regard, it was noted that the CPO is responsible for employee recruiting for the USACC, Sunny Point, vacancies, classifying the USACC, Sunny Point, positions up to General Schedule 12 and counselling the USACC, Sunny Point, employees on such matters as sick leave and adverse actions. It was noted also that the USACC, Sunny Point, employees are covered under the same merit promotion plan as the employees of the Activity and are considered for job vacancies at the Activity, that the USACC, Sunny Point, employees have the same leave and adverse action policies as Activity employees; and that the USACC, Sunny Point, employees have taken positions at the Activity and vice versa.

The record reflects that the Activity has continued to recognize the AFGE as representing the USACC, Sunny Point, employees. In this regard, the Activity's CPO has permitted a USACC, Sunny Point, employee to be represented by the AFGE regarding a downgrade procedure, and dues withholdings for the AFGE members of the USACC, Sunny Point, have continued up to the present time. In addition, an AFGE steward has been appointed for the USACC, Sunny Point, employees and has been recognized by the Activity.

Under the circumstances herein, and noting particularly that the evidence establishes that the 1968 reorganization involved the administrative transfer to the gaining employer, the USACC, Sunny Point, of only a portion of the employees in the existing exclusively recognized unit, I find that no "successorship" relationship has been established by the reorganization. 6/ Rather, I find that, based on the circumstances herein, the USACC, Sunny Point, employees have remained within the AFGE's existing exclusively recognized unit after the administrative transfer of the Communications Division of the Activity to the USACC, Sunny Point. Thus, the

4/ The Civilian Personnel Office was created as a staff section of the Activity in 1971.

5/ Tr., pgs. 46 and 47.

6/ See Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 615, FLRC No. 74A-22.

evidence establishes that after the reorganization the communications employees continued to perform the same job functions in the same location with no substantial change in their working conditions, immediate supervision and job contacts or personnel policies as before the reorganization. Nor do I consider the fact that the USACC, Sunny Point, employees are covered by different payroll and agency grievance procedures or experienced minor changes involving personnel policies as a consequence of the reorganization as materially affecting the employees continued community of interest with other employees located at the Activity, in view of the continuity of most of the employment conditions applicable to these employees and their continued close working relationship with the Activity's employees. Under these circumstances, I find that the communications employees continue, subsequent to the reorganization, to share a community of interest with other employees located at the Activity, who are represented by the AFGE.

Moreover, I find that the retention of the communications employees in the AFGE's exclusively recognized unit will promote effective dealings and efficiency of agency operations. With regard to effective dealings, the evidence establishes that the Activity's CPO office also services the USACC, Sunny Point, employees and is responsible for the labor relations program as it applies to all civilian employees it services, including the negotiation of agreements with all recognized labor organizations physically located at the Activity. In this connection, the record reflects that subsequent to the reorganization there continued to be stable labor-management relations between the Activity and the AFGE, with the AFGE being treated as the exclusive representative of the USACC, Sunny Point, employees. With respect to efficiency of agency operations, it is noted that the continued inclusion of the USACC, Sunny Point, employees in the AFGE's exclusively recognized unit will prevent fragmentation of the existing unit, all of whose employees are serviced by the same CPO. Accordingly, I find that the communications employees of the USACC, Sunny Point, have remained within the AFGE's existing exclusively recognized unit subsequent to the 1968 reorganization. 7/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein for which the American Federation of Government Employees, Local 1708, AFL-CIO, was accorded recognition as the exclusive bargaining representative in 1962 be, and it hereby is, clarified to include in said unit the United

7/ Cf. Army and Air Force Exchange Service, MacDill Air Force Base Exchange, MacDill Air Force Base, Florida, A/SLMR No. 514, FLRC No. 75A-61, and Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, A/SLMR No. 669, FLRC No. 75A-93.

States Army Communications Command employees located at the Military Ocean Terminal, Sunny Point, Southport, North Carolina.

Dated, Washington, D. C.
August 9, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

August 10, 1977

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, MEBA, AFL-CIO
A/SLMR No. 878

This case involves an unfair labor practice complaint filed by Taso Peter Anthan (Complainant) alleging that the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, (Respondent) violated Section 19(b)(1) and (3) of the Order by certain coercive acts taken by agents of the Respondent against the Complainant while he was engaged in his air traffic control duties and was exercising his rights assured by Section 1(a) of the Order. Specifically, the Complainant contended that on June 25, 1975, agents of the Respondent failed to cooperate with him in carrying out his air traffic control duties and took specific action which impeded his work performance. Further, the Complainant contended that on June 29, 1975, he was improperly threatened by the Respondent's Facility Representative.

The Administrative Law Judge concluded that both the Respondent and its Local 352 had violated Section 19(b)(1) and (3) of the Order. In reaching this determination, the Administrative Law Judge found, among other things, that: (1) although Local 352 was not specifically named as a co-Respondent in the complaint, the allegations of the complaint were sufficiently broad so as to encompass Local 352 as a Respondent; (2) the Respondent and its Local 352, by and through the actions of their agents, engaged in a pervasive pattern of conduct designed to restrain and coerce the Complainant, and other unspecified employees, in the exercise of their Section 1(a) right under the Order to refrain from assisting a labor organization in violation of Section 19(b)(1) of the Order; and (3) the pattern of conduct engaged in by the agents of both the Respondent and its Local 352 against the Complainant, and other members of the organization, had the effect of hindering or impeding their work performance, productivity or discharge of their duties owed as employees of the United States in violation of Section 19(b)(3) of the Order.

The Assistant Secretary found, in agreement with the Administrative Law Judge, that the Respondent PATCO violated Section 19(b)(1) and (3) of the Order by the actions of its agents with respect to the Complainant. However, with respect to the Administrative Law Judge's finding that the Respondent's Local 352 also violated Section 19(b)(1) and (3) of the Order, the Assistant Secretary concluded that procedural due process precluded construing a complaint so broadly as to include as party respondents components of national labor organizations not named in the complaint. The Assistant Secretary also disagreed with the Administrative Law Judge's findings of violations of the Order with respect to events not set forth in the complaint. In this regard, he concluded that the complaint was quite specific as to the incidents which form the basis of the complaint.

However, the Assistant Secretary noted that incidents and events not specified in the complaint may be used as background evidence to explain and illuminate the nature and character of the events specified as the actual basis of the complaint. In this regard, the Assistant Secretary found that a pattern of conduct was engaged in by the Respondent's agents which was designed to "persuade" the Complainant to cooperate with the Respondent and which culminated in the incidents specified in the complaint. The Assistant Secretary concluded, in this regard, that the purpose and intent of the specified incidents was made clear when viewed in the context of the surrounding events. Thus, the Assistant Secretary noted that subsequent to the occurrence of the specified incidents agents of the Respondent were involved in incidents, which when considered together, may be reasonably construed as attempts to carry out the threat alleged as one aspect of the unfair labor practice complaint. Therefore, the Assistant Secretary concluded that the Respondent, by the actions of its agents on June 25 and June 29, 1975, coerced, or attempted to coerce, the Complainant, a member of its organization, for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an employee of the United States in violation of Section 19(b)(3) of the Order. Additionally, the Assistant Secretary viewed such conduct, along with the threat made to the Complainant by Respondent's Facility Representative, as having the effect of interfering with, restraining, or coercing the Complainant in the exercise of his Section 1(a) right to refrain from assisting a labor organization in violation of Section 19(b)(1) of the Order.

Accordingly, 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.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, MEBA, AFL-CIO

Respondent

and

Case No. 62-4631(CO)

TASO PETER ANTHAN, AIR TRAFFIC CONTROLLER, FLORISSANT, MISSOURI

Complainant

DECISION AND ORDER

On September 29, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions, as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and 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. 1/ The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in this case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The complaint herein alleges, in substance, that the Respondent labor organization violated Section 19(b)(1) and (3) of Executive Order 11491, as amended, by certain coercive acts taken by its agents against the Complainant while the latter was engaged in his air traffic control duties and was exercising his rights assured by Section 1(a) of the Order. Specifically, the Complainant alleges that on June 25, 1975, agents of the Respondent failed to cooperate with him in carrying out his air traffic control duties and took specific action which impeded his work performance. Additionally, the Complainant alleges that on June 29, 1975, he was improperly threatened by the Respondent's Facility Representative.

1/ In its exceptions, the Respondent contended that certain rulings made by the Administrative Law Judge at the hearing were contradictory. Based upon an examination of the record, I find no basis for the Respondent's contention that the rulings in question were either contradictory or prejudicial.

The essential facts of the case, are set forth, in detail, in the Administrative Law Judge's Recommended Decision and Order, and I shall repeat them only to the extent necessary as indicated below.

The Complainant, formerly an air traffic controller at the Kansas City Municipal Airport, transferred to the St. Louis, Missouri, Air Traffic Control Facility on June 10, 1974. As a result of his transfer, he was required to undergo training and certification at each air traffic position at the facility for approximately one year. The record reflects that, at the Complainant's request, employee Dennis Reardon assisted in much of this training. 2/ However, some time in the late Fall of 1974, relations between the Complainant and Reardon, which had been amicable, changed abruptly. The record reflects that the Complainant, who was an active member of the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, herein also referred to as PATCO, disagreed with Reardon over certain methods advocated by Reardon to carry out the PATCO's goals. Subsequently, as disclosed by the unrefuted testimony of the Complainant and other witnesses, Reardon and other employees identified among the leadership of Respondent's Local 352, attempted, through various acts, to "persuade" the Complainant to agree with their approach to labor-management relations. Although this "persuasion" included such conduct as merely "shunning" the Complainant, a pattern of refusing to cooperate with him while he was carrying out his air traffic control duties also developed.

Prior to June 25, 1975, this lack of cooperation generally was limited to not responding immediately when he requested assistance in carrying out his air traffic control responsibilities. However, as found by the Administrative Law Judge, on June 25, 1975, Regenhold, a controller at the facility, who was identified as a PATCO crew or team representative, made an apparent deliberate attempt to cause a "systems error" by the Complainant. While the evidence does not establish that Reardon was directly involved in this incident, it does establish that Reardon was in the vicinity at the time it happened. Moreover, when confronted by the Complainant on June 29, 1975, about the incident, which the record discloses was clearly the fault of Regenhold, Reardon told the Complainant that he did not see anything wrong with it, that he had heard that the Complainant was a dangerous controller, and, finally, alluding to the fact that Complainant had used Reardon and other controllers to check out at the facility, Reardon threatened the Complainant to the effect that the Complainant would get his in the end.

Shortly after the incidents of June 25 and June 29, 1975, alleged in the complaint, but prior to the filing of the complaint, several other incidents followed which, when considered together, may be reasonably construed as attempts by the Respondent and its agents to carry out Reardon's threat. On July 7, 1975, Reardon intimated to the Facility Chief that the Complainant had caused a "systems error" and stated that

2/ The record also discloses that Reardon, in addition to being an experienced controller, held the dual positions of President of Respondent's Local 352 and Facility Representative of the Respondent at St. Louis during the critical time period herein.

it had been a bad operation. 3/ During the same time period, Reardon and other controllers, identified as among the leadership of Local 352, protested working with the Complainant to the Facility Chief. 4/ Finally, the record reveals that shortly after his July 7, 1975, discussion with Reardon, the Facility Chief was informed by his Regional Office that the Regional Vice President of the PATCO had charged that the Facility Chief was covering up a "systems error" involving the Complainant.

In his Recommended Decision and Order, the Administrative Law Judge concluded that both the Respondent and its Local 352 had violated Section 19(b)(1) and (3) of the Order. In reaching this conclusion, the Administrative Law Judge found, among other things, that: (1) although Local 352 was not specifically named as a co-Respondent in the complaint, the allegations of the complaint were sufficiently broad so as to encompass Local 352 as a Respondent in the instant complaint; (2) the Respondent and its Local 352, by and through the actions of their agents, engaged in a pervasive pattern of conduct designed to restrain and coerce the Complainant, and other unspecified employees, in the exercise of their Section 1(a) right under the Order to refrain from assisting a labor organization, in violation of Section 19(b)(1) of the Order; and (3) the pattern of conduct engaged in by the agents of both the Respondent and its Local 352 against the Complainant, and other members of the organization, had the effect, among other things, of hindering or impeding their work performance, productivity, or discharge of their duties owed as employees of the United States in violation of Section 19(b)(3) of the Order.

Based on the foregoing, and in agreement with the Administrative Law Judge, I find that the Respondent named in the complaint, the PATCO, violated Section 19(b)(1) and (3) of the Executive Order by the above-noted conduct of its agents with respect to the Complainant. However, with regard to the Administrative Law Judge's finding that PATCO Local 352 also violated the Order, in my view, procedural due process precludes construing a complaint so broadly as to include as party respondents components of national labor organizations not named in the complaint. In my view, to allow otherwise would impede the orderly processing of unfair labor practice complaints and deprive constituent local unions of the knowledge of the nature and extent of the allegations confronting them as well as inhibit their right to defend against such allegations. Moreover, it is noted that the PATCO, and not Local 352, is the exclusive representative of the employees in question.

As to the Administrative Law Judge's recommendation that violations should be found with respect to events not set forth in the complaint, I disagree. Thus, the complaint is quite specific as to the incidents which form the basis of the allegations therein. It sets forth the

3/ If, in fact, the Complainant had been responsible for a "systems error" he would have been subject to discipline up to, and including, dismissal.

4/ The record reflects that none of these controllers actually refused to work with the Complainant.

incidents which occurred on June 25 and June 29, 1975, as the basis of the complaint. Under these circumstances, I do not adopt the Administrative Law Judge's findings of violation of the Order based upon incidents or events not set forth in the complaint.

However, although incidents and events not specified in the complaint may not themselves be independently adjudicated under the Order, they may, in my view, serve as background evidence to explain and illuminate the nature and character of the events specified as the actual basis for the complaint. As noted more fully in the attached Administrative Law Judge's Recommended Decision and Order, the Respondent engaged in a pattern of conduct designed to "persuade" the Complainant to cooperate with the Respondent, culminating in the June 25 incident, which, along with the related June 29 conversation between the Complainant and Reardon, constitute the gravamen of the instant complaint.

The purpose and intent of the June 25 incident, as well as its origin, becomes clear when viewed in the context of the surrounding events. Thus, shortly after the June 25 incident, on June 29, during a conversation initiated by the Complainant concerning the incident, Reardon first attempted to defend Regenhold, who was directly involved in the incident, by saying that he saw nothing wrong in the incident; then he verbally attacked the Complainant by asserting that he had heard that the Complainant was a dangerous controller; and, finally, alluding to the Complainant's failure to support the Respondent after having used Reardon and other controllers to check out at the facility, Reardon threatened the Complainant that he would get his in the end. Shortly thereafter, in a conversation with the Facility Chief concerning the June 25 incident, Reardon implied that the Complainant was involved in a "systems error"; but, when questioned closely by the Facility Chief, Reardon retreated from that implication by asserting that it was a bad operation. Shortly thereafter, a Vice President of the Respondent communicated with the Regional Office of Federal Aviation Administration, asserting that the Complainant was involved in a "systems error" on June 25. Finally, within this same time frame, Reardon, Regenhold, and other controllers identified as cooperating with Reardon, protested working with the Complainant to the Facility Chief.

In my judgment, these incidents, when viewed in their totality, provide substantial and persuasive basis for finding that the Respondent, by and through the actions of its agent, Reardon, engaged in a pattern of conduct, culminating in the June 25 incident and the conversation of its agent with the Complainant on June 29, designed to coerce the Complainant to cooperate with the Respondent or be punished for his refusal to do so. 5/

5/ The record reflects that none of the above-noted incidents occurred after the complaint in this matter was filed.

As indicated above, I find, in agreement with the Administrative Law Judge, that by its actions on June 25 and June 29, 1975, the Respondent violated Section 19(b)(3) of the Order. 6/ The evidence clearly establishes that, at all time material herein, the Complainant was a member of the Respondent, 7/ and that the Respondent coerced, or attempted to coerce, the Complainant for the purpose of hindering or impeding his work performance, productivity, or the discharge of his duties owed as an employee of the United States. 8/ Further, I view the Respondent's conduct on both of the above-noted dates as having the effect of interfering with, restraining, or coercing the Complainant in the exercise of his Section 1(a) right to refrain from assisting a labor organization, in violation of Section 19(b)(1) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, shall:

6/ Section 19(b)(3) provides: "A labor organization shall not -- (3) 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."

7/ The unrefuted testimony of the Complainant establishes that he resigned from the Respondent approximately two weeks after the events which constitute the basis of the instant complaint.

8/ Contrary to the contentions of the Respondent in its brief in support of its exceptions, I do not view the proscription of Section 19(b)(3) as being limited strictly to situations involving internal union discipline. Rather, I view this Section of the Order as expressing a specific concern to protect members of a labor organization from any type of coercion by the organization as punishment for, or for the purpose of hindering or impeding their work performance, productivity, or the discharge of their duties. Although this Section of the Order proscribes actions traditionally associated with internal union recourses against members, such as fines or other economic sanctions, it also proscribes coercion or attempts to coerce, and qualifies such proscribed acts with the clause ". . . 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." In my view, the above-noted language contained in Section 19(b)(3) indicates that the Executive Order was intended to protect union members from any act by a labor organization which in any way interferes with the performance of their duties as employees.

1. Cease and desist from:

(a) Coercing, or attempting to coerce, Taso Peter Anthan, or any other member of its organization, for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an employee of the United States.

(b) Interfering with, restraining, or coercing Taso Peter Anthan, an employee of the Department of Transportation, Federal Aviation Administration, Air Traffic Control Tower, St. Louis, Missouri, in the exercise of his rights assured by the Order, by engaging in conduct which has the effect of hindering employee Anthan in the discharge of his air traffic control duties or by threatening Anthan regarding employment related matters.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their right assured by the Order to refrain from assisting a labor organization.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Executive Order.

(a) Post at PATCO Local 352's Office at the Department of Transportation, Federal Aviation Administration, Air Traffic Control Tower, St. Louis, Missouri; at the PATCO's Regional Office which encompasses St. Louis, Missouri; and at the PATCO's National 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 President of the PATCO 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 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 Chief of the Air Traffic Control Tower, St. Louis, 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 203.27 of the Regulations, notify the Assistant Secretary of Labor for Labor-Management Relations, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
August 10, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 the St. Louis, Missouri, Air Traffic Control Tower that:

WE WILL NOT coerce, or attempt to coerce, a member of the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, for the purpose of hindering or impeding his work performance, his productivity, or the discharge of his duties owed as an employee of the United States.

WE WILL NOT interfere with, restrain, or coerce Taso Peter Anthan, an employee of the Department of Transportation, Federal Aviation Administration, Air Traffic Control Tower, St. Louis, Missouri, in the exercise of rights assured by the the Order, by engaging in conduct which has the effect of hindering employee Anthan in the discharge of his air traffic control duties or by threatening Anthan regarding employment related matters.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the right assured by the Order to refrain from assisting a labor organization.

_____
PATCO/MEBA, AFL-CIO

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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 2200 Federal Office Bldg., 911 Walnut Street, Kansas City, Missouri 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, MEBA, AFL-CIO, ST. LOUIS, MISSOURI
Respondent

and

TASO PETER ANTHAN, AIR TRAFFIC CONTROLLER, FLORISSANT, MISSOURI
Complainant

Case No. 62-4631(CO)

Charles P. Oldham, Esquire
Room 326
706 Chestnut Street
St. Louis, Missouri 63101
For the Complainant

William B. Peer, Esquire
General Counsel, Professional
Air Traffic Controllers Organization
Barr and Peer
Suite 1002
11101 17th Street, N.W.
Washington, d.C. 20036
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as "Order"). It was initiated by a written charge filed with the labor organization or its agents on, or about, July 7, 1975, and a Complaint against labor organization or its agents filed August 20, 1975, alleging

violations of Section 19(b)(1) and (3) of the Order. Notice of Hearing issued March 8, 1976, scheduling a hearing on May 6, 1976, and on May 3, 1976, at the request of the parties, an Order Rescheduling Hearing to July 14, 1976, issued, pursuant to which a hearing was duly held before the undersigned on July 14 and 15, 1976, in St. Louis, Missouri. The Complaint names Professional Air Traffic Controllers Organization Affiliated with M.E.B.A. (AFL-CIO)(hereinafter PATCO) and charges PATCO and its representative, Mr. Dennis M. Reardon, local representative of PATCO, with violation of Sections 19(b)(1) and (3) of the Order.

A Motion to dismiss was made at the hearing by counsel for Respondent, was carried with the case and will be decided herein.

All parties were represented by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and briefs were timely filed by the parties which have been carefully considered. Upon the basis of the entire record, 1/ including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

Respondent called no witnesses and presented no testimony. Accordingly, the following findings represent, in essence, a brief summary of the testimony and evidence presented by Complainant. 2/

1. Complainant, Taso Peter Anthan, was an air traffic controller in the Navy, is a licensed commercial pilot, holds an instrument rating, multi-engine rating, flight instructor rating and an advance ground instructor rating. Complainant started work for FAA in 1966 in Kansas City, initially as a weather briefer and communications specialist with the flight service station at the Kansas City Municipal Airport, and in

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1/ The parties have not made any motion or request to correct the transcript; nevertheless, I have noted some obvious errors which I hereby correct on my own motion as set forth in Appendix "A: hereto.

2/ Respondent introduced, in the cross-examination of Mr. Early, one exhibit, Res. Exh. I, a letter dated August 6, 1975, from Mr. Early to Complainant, Taso P. Anthan.

1968 was accepted at the Kansas City Municipal Air Traffic Control Tower where he trained for approximately one year prior to becoming a full performance controller in the approach control radar and tower. Kansas City is now a Level 2 airport (St. Louis is a Level 4 airport - 300,000 operations per year - as are such airports as LaGuardia, O'Hare, Miami, Atlanta, Los Angeles and Denver).

2. Upon transfer from one facility to another, controllers, even those in supervisory jobs, must undergo training and certification at each position in the facility. On June 10, 1974, Complainant transferred to St. Louis and, as he had known Mr. Dennis Reardon in Kansas City, asked to be assigned to Mr. Reardon as his trainee. Mr. Reardon thereafter acted as Complainant's instructor until about January or February, 1975.

3. Complainant initially became a member of PATCO in Kansas City in late 1969 or early in 1970; resigned in March, 1970; rejoined in 1973, about a year before coming to St. Louis; and remained a member of PATCO until he resigned a couple of weeks after the June 25, 1975, incident, infra.

4. Complainant's relations with Messrs. Reardon and Regenhold were close and amicable for some time after June 10, 1974, and Complainant discussed union affairs with both from time to time. Mr. Reardon was President of PATCO Local 352 from July 1, 1974 to June 30, 1975, a member of PATCO's Regional Constitution Committee, a member of PATCO's Regional Negotiating Committee, and PATCO's facility representative at the St. Louis Tower. Mr. Regenhold was identified as a PATCO team, or crew, representative. During the fall of 1974, and continuing thereafter through the spring and summer of 1975, considerable disagreement arose between PATCO and management concerning various matters, including separation of aircraft, combining of positions, avoidance of overtime by using trainees, request for early descent, etc. Complainant testified that in the fall of 1974, Mr. Reardon discussed with him one union technique which was to slow down aircraft by requiring bigger and bigger slots on final approach and Complainant further testified that he had worked opposite controllers who ran slots (separations) from 8 to 17 miles as compared to the required separation of 3 miles or 1,000 feet of altitude. Complainant stated that Mr. Reardon advised him that it would be better if he didn't participate in some of the slowing down techniques because he was still in a training status; however, Complainant did take sick leave on occasions to support PATCO's stance. On one occasion, Assistant Facility Chief Hardy had called Complainant to come in on the midnight (mid-watch) shift and he had agreed to do so; but Mr. Reardon called Complainant and told him that management was trying to avoid overtime by using a trainee, so Complainant called Mr. Hardy back and told him he could not accept the mid-watch assignment.

5. Another procedure urged by Mr. Reardon was that each controller invoke Article 55 3/ of the PATCO-FAA agreement whenever a controller had some professional disagreement with supervisors' instructions. Mr. Irving R. Burnhart testified that in 1975, while he, Burnhart, was still a controller (Mr. Burnhart became an Evaluation Proficiency Development Specialist in September, 1975) in the locker room at shift change, at about 3:30 p.m., Mr. Reardon, speaking to the six or eight controllers asked that all members of the bargaining unit invoke Article 55 at any time they were told to combine positions; that Complainant asked what would be the result if he did not wish to do that and Mr. Reardon replied that "he felt that the Union's position would not be as strong in the event it would become necessary to defend one of the members of the bargaining unit if they did not, in fact, invoke Article 55." Mr. Burnhart further testified that he discussed the invoking of Article 55 with Mr. Reardon later and Mr. Reardon again said he was requesting everyone in the bargaining unit to invoke Article 55.

6. Complainant disagreed with Mr. Reardon on his approach to labor-management relations and the relationship with Mr. Reardon abruptly changed as did the attitude of certain other controllers. Complainant was shunned and Mr. Don Early, Facility Chief, testified that he had observed in the lunchroom in the ready room area that when Complainant was present he was "alone in a crowd"; that on one occasion he had seen Complainant sit down and another controller had got up and moved to another table. From the time that Complainant expressed disagreement with Mr. Reardon on labor-management policies, a marked lack of coordination and cooperation developed on the part of various controllers, identified by Complainant as John Chandler, Secretary-Treasurer of PATCO Local 352; Tom Ferring, Vice President of PATCO Local 352 (now President of Local 352); Jim Stack; Rick Raugh; Rick Regenhold; and Dennis Reardon, then President of PATCO Local 352. Messrs. Stack and Raugh were not officers of Local 352 but were members of PATCO. Two or more witnesses testified that they believed Mr. Regenhold was the team, or crew, PATCO representative.

The lack of coordination and cooperation in air traffic control was through delay in responding to Complainant's requests, repeated requests to "say again", denial of Complainant's requests for entry of aircraft into their controlled air space, denial of Complainant's requests for early descent, etc., which affected Complainant's ability to move air traffic

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3/ Art. 55. "In the event of difference in professional opinion between the employee and the supervisor, the employee shall comply with the instructions of the supervisor and the supervisor shall assume responsibility for his own decisions.

and greatly intensified the pressure on Complainant as an air traffic controller. Michael LaBaty, a controller and member of PATCO, testified that on one occasion when he was sitting next to Complainant, Complainant asked for a descent and it was denied and Complainant "just kind of threw up his hands in frustration". Mr. Lyle Bjerkestrand, who became team supervisor of the team on which Complainant worked on February 2, 1975, testified that on one occasion when Mr. Reardon was working departure 2 handoff and Complainant was working arrival, Complainant requested an early descent and Mr. Reardon called over to Mr. Bjerkestrand that he didn't go along with this and if Bjerkestrand didn't take action to stop requests for early descent he, Reardon, was going to make an issue of the point. Mr. Bjerkestrand stated that it was perfectly proper to request early descent because, if air space is available, early descent goes to expedite the flow of traffic. 4/ Mr. Bjerkestrand was critical of Mr. Reardon's complainats about early descent in the TRACON room in the middle of traffic.

7. The record is clear that delays in response by a controller, in view of the speed of aircraft, may be tantamount to denial and that a delay of even seven to ten seconds may readily amount to a denial.

8. On June 25, 1975, an incident occurred which dramatically illustrated the serious extent of the deterioration of coordination by other controllers with Complainant, the resulting effect on air safety, and an apparent deliberate attempt by controller Regenhold to cause a systems error. Complainant was working Arrival 2 (AR-2); Regenhold was working Departure 2 (DR-2). 5/ There was a thunderstorm to the northwest of the airport, along the final approach course for runway 12-Right inside the final approach fix, which also affected the I.L.S. for 12-Right, and arriving aircraft, including TWA 876, were urgently requesting deviations to avoid having to penetrate

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4/ For a short period of time, during the late summer of 1975, the St. Louis Tower had published a facility order which placed certain restrictions on areas where early descents could be requested. This facility order had been recommended by the Facility Air Traffic Technical Advisory Committee (FATTAC). The order was not then in effect (it was issued later) and the facility order was subsequently cancelled after a brief trial period.

5/ Mel Wise was shown by the operational log as working the TCA-2 position at 1757:00Z to 1757:05Z. The operational log further showed that Mr. Wise worked this position from 1649Z to 1758Z. Mr. Reardon relieved Mr. Wise at TCA-2 at 1758Z.

into the thunderstorm and lower altitudes. 6/ Complainant sought permission to enter air space controlled by other controllers and, because he could not effect the coordination, had to penetrate some of his aircraft into thunderstorms. Specifically as to TWA 876, Complainant at 1756:55Z, requested 4,000 five west of Maryland Heights. Mr. Regenhold on DR-2, at 1757Z, responded "Say again", Complainant repeated the request; and, at 1757:05Z, Mr. Regenhold on DR-2 approved (Comp. Exh. 4). Complainant instructed TWA 867 to descend and maintain 4,000 reduce to 180. TWA 876 acknowledged at 1757:00Z. In the meantime, Mr. Regenhold, controlling the departure of Frontier 23, had placed FL 23 at 5,000 feet and had vectored FL 23 into the area needed, and approved by him, for the descent of TWA 867. Complainant saw the position of FL 23 on his radar console and, at 1757:20Z, ordered TWA 876 to maintain 6,000 feet. Mr. Thomas Jones, then team supervisor, testified that he saw Complainant stand up and say something across the room and then Complainant said to Mr. Jones "Tell those guys to keep their airplanes away from me"; that he, Jones, then went over to Departure 2 and TCA-2 and told them that Complainant was using the area in the vicinity of Lake with his arrivals and to keep their airplanes away from there. Mr. Jones received an acknowledgement from Mr. Regenhold. Mr. Jones did not recall whether Mr. Reardon was then working TCA-2.

9. Several days after June 25, 1975, Complainant had a conversation with Mr. Reardon, in an office at the facility, about the June 25 situation. Complainant asked Mr. Reardon what he thought about the operation and Mr. Reardon said he didn't think there was anything wrong with it; stated that he had heard reports that Complainant was a dangerous controller; that Complainant had used people to check out in the facility and said that "... I would get mine in the end."

10. Mr. Bjerkestrand had become team supervisor of the team on which Complainant worked on February 2, 1975, and on February 9, 1975, because Complainant was encountering some difficulty in certifying on arrival radar, extended Complainant's training time and assigned him to Messrs. Rayfield and Kelker for training. Complainant became fully certified in early May of 1975.

6/ The arrival controller is assigned the air space at 6,000, 7,000 and 8,000 feet; departures are restricted to 5,000 feet, to avoid climbing through an arrival track, until the departure controller establishes communications and he can climb them above the approach tracks or around aircraft on approach tracks.

11. On June 30, 1975, Complainant brought to the attention of the Chief, St. Louis Tower, Mr. Don D. Early, the events of June 25, 1975. Mr. Early met with Mr. Reardon on July 7, 1975, at which time Mr. Reardon was accompanied by Mr. Glenn Chance. At that time Mr. Reardon implied that less than standard separations had existed on June 25 (i.e., a systems error) but when asked specifically told Mr. Early he was not stating that there had been less than standard separations of aircraft; that it was just a bad operation.

12. While the matters brought to the attention of Mr. Early by Complainant were being investigated by Mr. Early, Mr. Early received a call from Mr. Charles Bumstead, in the FAA Regional Office, who advised him that Mr. Max Winter, Regional Vice President of PATCO had asserted that there was a systems error on June 25, 1975, involving Complainant and that facility management was covering up that systems error. Upon notification of Mr. Winter's charge, Mr. Early broadened the investigation already underway and directed Ivan F. Hunt, Operations Officer, St. Louis Tower, to investigate the charge that a systems error involving Complainant had occurred on June 25, 1975. Mr. Hunt conducted an investigation. The precise date that Mr. Hunt began the investigation was not fixed beyond the date of his conversation with Mr. Regenhold which he stated was "within a few days either side of 7/9/75". Mr. Hunt stated that he concluded that there was no systems error. The conclusion from his report, which was not introduced as an exhibit, was:

> "Conclusion, minimum horizontal distance between TWA 876 and Frontier [23] ... was in excess of what is required."

When pressed by counsel for Respondent, Mr. Hunt stated it was his opinion,

> "That there was no basis for a recommendation that we had, in fact, had a systems error."

Mr. Hunt testified that, although the facility took no action against Mr. Regenhold, there were alternatives available to him based on the traffic situation at that time that were much preferable to what he had done. Mr. Hunt further testified that the fact that Mr. Regenhold put his aircraft in close proximity to the area that is known as the 12 right descent approach quadrant did add complexity to the system and he didn't believe that airplane needed to be there and that Mr. Regenhold did it deliberately. Indeed, when pressed by

counsel for Respondent, as to whether Mr. Regenhold "set this whole thing up in order to put the squeeze or in order to pressure or to in any way affect his job performance; that is, the job performance of Mr. Anthan", Mr. Hunt stated that in his opinion Mr. Regenhold did.

Team supervisor Jones testified that departure 2 and TCA-2 are physically side by side and try to keep track of what each other is doing; that it seemed strange to him at the time (June 25, 1975) that any controller would turn an aircraft going out the St. Paul gate to a west to northwest heading and head the aircraft directly at not only the apprach quadrant but directly at what he had to know was a severe thunderstorm; that he did not pursue the matter further at the time because he had confidence in Mr. Regenhold as a controller; but that he felt Mr. Regenhold had used very poor judgment.

Mr. Enrique Hermsillo, a controller on duty at the time of the June 25, 1975 incident, and who sat next to Mr. Regenhold, testified that Complainant needed air space, needed to deviate from, around weather and he was not given the full cooperation which ones requires under those conditions; that he was aware of conflict between certain controllers as the result, in part, of Article 55 which some people do not care to use, and that Mr. Regenhold was guilty of a lack of cooperation on June 25, 1975.

13. By letter dated August 6, 1975, Mr. Early advised Complainant, in part, as follows:

> "This letter responds to the problem areas you called to my attention on June 30, 1975. As a result of investigatory proceedings, it has been determined that there is no tangible evidence to challenge the propriety of controller to controller cooperation demonstrated on June 25, 1975. The voice recordings and controller statements reviewed in the process of investigation confirm that there were no situations of less than standard separation. ...
>
> "To my knowledge, the other problem areas that you brought to management's attention are now, in part, the subject of a ULP proceeding. In consonance with this fact, we do not consider it appropriate that management take official

action on problem areas that possibly could overlap the subject of a ULP proceeding.

* * * *" (Res. Exh. 1)

Nevertheless, Mr. Early testified that,

"Based on the facts that were presented to me by those who have technical expertise in that area, I would have to question why Mr. Regenhold handled that aircraft in the particular manner he did, whether it was a case of his own judgment or what I cannot say. But it is not the normal thing that would be done in a situation like that."

15. Mr. Early testified that verbal complaints had been made to him by other controllers of the lack of cooperation because they did not go along with certain views of the union. Mr. Michael LaBaty, a controller with FAA since 1969 and at St. Louis since November, 1974, is a member of PATCO and testified that members of the union, including Messrs. Ferring and Reardon, had tried to influence him to go along with their line of thinking; that he had said, in a very friendly manner, "no" because he didn't believe they were doing the right thing; and that as a result some controllers talked about him in a very derogatory manner, laughed at him, and refused to cooperate in air traffic control by denying requests arbitrarily. Mr. LaBaty testified that two controllers who had denied cooperation with him in air traffic control were Dennis Sheern and Jim Stack; and that there had been several others. Mr. LaBaty stated that he had brought the lack of cooperation to the attention of various supervisors; had talked to Mr. Reardon; and in the winter of 1974 when Mr. Winter was in St. Louis, he called Mr. Robert Poli, Executive Vice President of PATCO, to talk to him about these problems. Mr. LaBaty stated that Mr. Poli cut him off with the statement that he, LaBaty, would have to talk to Mr. Reardon and when Mr. LaBaty told Mr. Poli that he had already discussed the matters with Mr. Reardon, Mr. Poli again refused to discuss the matter and said he would have Mr. Reardon speak to him. Mr. LaBaty stated that he had never heard from Mr. Reardon. Mr. LaBaty stated that the lack of coordination by other controllers did affect his job perforance and his ability to move traffic; and that his concern over this problem had resulted in his request for relief from duty on numerous occasions.

Mr. Willie Moore, who has been a controller at St. Louis for more than 5-1/2 years, testified that he was aware of the conflict over the use of Article 55; that he had disagreed with certain members of PATCO and they chose not to speak to him for a certain period.

16. The record also shows that supervsior Thomas Jones experienced severe lack of coordination and cooperation by other controllers during his training and, as a result, he voluntarily withdrew from the training program at the St. Louis Tower and transferred to another facility.

17. After Complainant filed his charge in this matter, he testified that lack of cooperation by some other controllers intensified; that he didn't believe he had worked a single shift during which some controller had not refused cooperation as manifested by not approving requests for early descents or using other people's air space or delay on coordination lines. Messrs. Reardon, Chandler, Ferring, Stack, Regenhold, Bauer and Raugh formally advised management that they would work with Complainant only under protest. Mr. Reardon informed Mr. Jones that he would work with Complainant only under protest but said he was not invoking Article 55. Mr. Chandler's response to Mr. Early was that Complainant did not go along with his other controllers - stabbed his fellow controllers in the back. Mr. Bauer told Mr. Early he protested the undesirability of having Complainant and Mr. Reardon working in the operation quarters at the same time; that it put a strain on the facility. Mr. Raugh simply told Mr. Early he protested having to work in the quarters when Complainant was on duty. In December, 1974, or January, 1975, Mr. LaBaty talked to Mr. Hunt about the difficulty of working with Complainant when Messrs. Ferring and Reardon were on the same shift.

18. Complainant, at the time of the hearing, had been selected for a supervisory position outside the St. Louis facility; Mr. Reardon is now medically disqualified and can no longer control traffic; Mr. Raugh is involved in the second career program (i.e., no longer a controller); and Mr. Regenhold is a controller in a Level 2 VFR tower at Orlando, Florida.

CONCLUSIONS

1. Section 19(b)(1) Allegations.

Section 19(b)(1) of the Order is identical to Section 19(a)(1), except, of course, that 19(b)(1) applies to "A labor

organization" while 19(a)(1) applies to "Agency management" and provides as follows:

> "(b) A labor organization shall not -
>
> "(1) interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order;"

The rights assured by this Order include the rights set forth in Section 1(a), in part, as follows"

> "Section 1. Policy (a) 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.)

The record shows a pattern of conduct by individual controllers, including the officers of Local 352 and PATCO facility representatives. The nature of the conduct is discussed hereinafter. A labor organization, like an agency, an activity, or a corporation, acts only through its agents and a principal may be responsible for the acts of his agent within the scope of the agent's authority, even though the principal has not specifically authorized or, indeed, may have specifically forbidden the act in question. United Furniture Workers of America, et al., 81 NLRB 886, 23 LRRM 1424 (1949). PATCO and/or its Local 352 may be liable as a principal; in addition, PATCO, as the exclusive bargaining representative, may be liable for violation of its obligation to serve the interest of all members of a designated bargaining unit without hostility or discrimination, with complete good faith and without arbitrary conduct.

a) Duty of Fair Representation

As specifically noted on repeated occasions, the Order differs in many essential respects from the National Labor Relations Act (hereafter "Act"); nevertheless, in many areas the Order reflects the same basic labor policy. Section 1(a) of the Order, for example, like Section 7 of the Act, insures employees the right to self-organization, to form, join or assist labor organizations, as well as the right to refrain from any such activity; the proscription of 19(b)(1) of the Order is substantially identical in effect to Section 8(b)(1)(A) of the Act; and the Order, like the Act, provides for exclusive

representation in designated bargaining units. It has long been recognized that the grant of exclusive representation to a union imposes quite different obligations on the union than would attach in a simple agency relationship. This was succinctly stated by the Supreme Court, in Vaca v. Sipes, 386 U.S. 171 (1967) as follows:

> "Under this doctrine [of fair representation], the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humprey v. Moore, 375 U.S. at 342, 84 S.Ct. at 367." (386 U.S. at 177).

Although the Supreme Court spoke in terms of an agent's statutory representation authority under the Act, the doctrine applies with equal force to the exclusive agent's authority under the Order.

Until its decision in Miranda Fuel Company, Inc., 140 NLRB 181 (1962), the Board had not viewed a violation by a union of its duty of fair representation as an unfair labor practice in the absence of a showing that the breach of duty encouraged or discouraged union membership. In its Miranda Fuel decision, supra, the Board majority held that it was an unfair labor practice for a bargaining representative to act in an unreasonable, arbitrary, or invidious manner in regard to an employee. Although enforcement was denied by the Second Circuit, NLRB v. Miranda Fuel Co., 326 F.2d 172 (1963), it appears, now, to have won the day. See, Kaj Kling v. NLRB, 503 F.2d 1044 (9th Cir. 1975); Vaca v. Sipes, supra. Indeed, the Second Circuit, in NLRB v. Local 485, Electrical, Radio & Machine Workers, 454 F.2d 17 (1972), although it noted that,

> "... we are not forced to reconsider this court's controversial disposition of the Board's broader theory in Miranda Fuel Co., 140 NLRB 181 (1962), enforcement denied, 326 F.2d 172 (2nd Cir. 1963), that any arbitrary or invidious action which violates a union's duty of fair representation is prohibited by section 8(b)(1)(A)." (454 F.2d at 21, n. 6)

the Court held that where a union's action is calculated retaliation against an employee for the exercise of a right clearly

protected by the Act, the union is guilty of an unfair labor practice for its breach of its duty of fair representation. The Court stated, in part, as follows:

> "The Board found that Barclay's criticism of the Local's position on the overtime issue was protected activity under section 7, 29 U.S.C. §157, and that the Local's refusal to process his wrongful discharge grievance because of the criticism was an attempt to 'restrain or coerce ... employees in the exercise of rights guaranteed in section [7] ...' 29 U.S.C. §158(b)(1)(A). We agree with the Board's conclusion that this was an unfair labor practice. ..." (454 F.2d at 21).

Whether any arbitrary or invidious action in violation of a union's duty of fair representation is an unfair labor practice in violation of Section 8(b)(1)(A) of the Act, at least the violation of fair representation constitutes a violation of 8(b)(1)(A) of the Act when the union's action is calculated retaliation against an employee for the exercise of a right clearly protected by the Act. For the purpose of the present case, it is unnecessary to go further. Because the rights and obligations under the Order are the same in this respect as the corresponding rights and obligations under the Act, a violation of a union's duty of fair representation as calculated retaliation against an employee for the exercise of a right clearly protected by the Order is an unfair labor practice in violation of Section 19(b)(1) of the Order. In a sense, the same conduct may be directly remedied under Section 19(b)(1); but recognition of the duty of fair representation adds the significant aspect that the exclusive agent's authority under the Order to represent all members of a designated bargaining unit carries with it the obligation to abstain from hostility or discrimination toward any, and reaches the refusal of a union to act, at least where the violation of the duty of fair representation is an attempt to restrain or corece employees in the exercise of rights guaranteed by the Order, and not merely overt acts of the union. It further is significant in establishing union responsibility, in that a union's liability may flow, not merely, or even primarily, from ratification of conduct of its agents, but directly from the union's own violation of its duty of fair representation.

b) Parties.

The Complaint named "Professional Air Traffic Controllers Organization Affiliated with M.E.B.A. (AFL-CIO)." In addition, the Complaint charged PATCO and its representative, Mr. Dennis M. reardon, local representative of PATCO, with violations of

Sections 19(b)(1) and (3) of the Order. The Complaint also identified Mr. Reardon as President of Local PATCO. At the commencement of the hearing, counsel for Respondent inquired who were the charged parties and counsel for Complainant responded that the charged parties were: "Mr. Reardon, in his capacity as president of the local PATCO organization against the local PATCO and against the International". 7/

The threshold question is whether a complaint which names only PATCO is sufficient in order to remedy an alleged unfair labor practice committed by an unnamed local union. No case involving the sufficiency of a complaint against a labor organization has been called to my attention nor have I found any authority directly in point; however, the matter has arisen in connection with complaints against agencies and, as the basic principles are the same, the same result should pertain. In essence, the question is whether you can go too high. On the one hand, if a complaint names only a subordinate activity, neither the activity nor the agency is a party. Iowa State Agricultural Stablization and Conservation Office, Department of Agriculture, A/SLMR No. 453 (1974). On the other hand, if the complaint names only the agency but clearly and concisely sets forth the allegation asserted to have constituted the violation at an activity and Respondent, by its response to the complaint demonstrates that it was fully advised of the violation alleged, then the unfair labor practice against the activity may be remedied even though the activity was not named in the complaint. Department of the Treasury, Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union and NTEU Chapter 099, Case No. 30-6126(CA)(1976).

There is no question, of course, that the complaint herein is sufficient as to PATCO which is the named labor organization. PATCO is the certified bargaining representative of air traffic controllers employed by the Federal Aviation Administration, Department of Transportation (hereinafter FAA) in a nationwide unit, with certain exceptions not relevant (See, Federal Aviation Administration, Department of Transportation and PATCO, A/SLMR No. 173 (1972)), and has entered into a collective bargaining

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7/ At the close of the hearing Complainant's motion to amend the Complaint to conform to the proof was granted and the Complaint, as amended, is directed against PATCO, Local Union 352, and Mr. Dennis M. Reardon, local representative of PATCO.

agreement with FAA which is nationwide in scope (See, 2 Gov. Employee Rel. Report 81: 6501). When viewed in perspective, the Complaint as filed, against PATCO and Dennis M. Reardon, local representative of PATCO, becomes quite logical. PATCO is the certified bargaining representative for the St. Louis Tower, PATCO entered into the collective bargaining agreement, and Mr. Reardon was the designated principal representative of PATCO at the St. Louis Tower. In addition, Mr. Reardon was, inter alia, also President of PATCO Local 352. The Complaint set forth the allegation asserted to have constituted the violation, charged Dennis M. Reardon, local representative of PATCO,as well as PATCO, with violations of Sections 19(b)(1) and (3) of the Order. Respondent demonstrated that it was fully advised of the violation alleged and of the relationship of its Local Union 352 to the violations alleged. Accordingly, by analogy to Department of the Treasury, supra, I conclude that the complaint against PATCO is sufficient to reach, and to permit the remedy of, alleged unfair labor practices by a constituent local union. Accordingly, Respondent's Motion to Dismiss is denied.

c) Interference, Restraint or Coercion

Respondents in their brief do not discuss the 19(b)(1) allegation; rather, their brief is directed wholly toward the 19(b)(3) allegation. Significantly, however, Respondents' brief states,

> "Respondents may well have impeded his work performance by not giving him early descents, for example, as he requested; may well have impeded his productivity by delaying coordination with him; may well have hindered the discharge of his duties owed as a controller by calling him a 'dangerous controller,' by not talking with him, by leaving him 'alone in the crowd.'" (Respondents' Brief pp. 4-5)

Whether Respondents' failure to controvert the 19(b)(1) allegation implies concession of a 19(b)(1) violation or whether Respondents' concessions as set forth above constitute an admission, the record shows, in any event, a pervasive pattern of conduct by a number of named and identified individuals directed against Complainant, and other controllers, which was intended to bring pressure on Complainant, and other controllers, to force them to support certain union objectives. The concerted shunning of Complainant, and other controllers, was, itself, a

form of restraint or coercion. Such concerted activity perhaps has reached its zenith in miting, see, Generich v. Swartzentruber, 22 Ohio N.P. N.S. 1, 3, 13, and the fact that Mr. Moore stated that he did not let the same things "phase me too much" does not alter in the slightest the conclusion that such conduct constituted restraint and coercion within the meaning of the Order. The concerted hinderance of the discharge of the duty of controllers by delaying or denying coordination was intended to restrain or coerce Complainant, and other controllers, in the exercise of their right under the Order to refrain from assisting a labor organization. Deliberate action intended to impede work performance is a form of interference, restraint or coercion within the meaning of Section 19(b)(1).

d) Responsibility of Local 352

The record shows that Mr. Reardon advocated, both as President of Local 352 and as principal representative of PATCO, certain positions, including the invocation of Article 55 of the PATCO agreement; opposition to the combining of positions, principally through the invocation of Article 55; greater separation of aircraft; limitation on early descent; etc., and that when Complainant, and other controllers, declined to support these union positions the various individual acts of interference, restraint or coercion immediately followed. Mr. Reardon, President of Local 352 joined in these acts. The Vice President of Local 352 during Mr. Reardon's term as President and Mr. Reardon's successor as President of Local 352, Mr. Ferring, the Secretary-Treasurer of Local 352, Mr. Chandler, and a team, or crew, representative, Mr. Regenhold, all joined in these acts as did various other named controllers. The immediate application of these tactics by the officers of Local 352 and by other members who followed their lead clearly demonstrated concert of action and the record shows that the individuals, namely Messrs. Reardon, Ferring, and Chandler, were acting within the scope of their authority as officers of Local 352, and, accordingly, the acts of interference, restraint or coercion which they committed, directed, or incited became the acts of their principal, Local 352, and Local 352 thereby violated Section 19(b)(1) of the Order.

Messrs. Reardon, Chandler, Ferring, Stack, Regenhold, Bauer and Raugh promptly, after Complainant filed his charge in this proceeding formally protested to FAA working with Complainant for the stated reason that Complainant did not go along with his fellow controllers and had filed a charge under the Order. Such action interferred with Complainant's right to the assured and unimpaired access to the complaint procedure of the Order.

Although these acts occurred after the charge herein was filed and, apparently, after the Complaint herein was filed, because this conduct was part of the continuing acts of interference, restraint and coercion alleged in the Complaint, these matters were fully litigated, and Complainant's motion at the close of the hearing to amend the Complaint to conform to the proof was granted, I deem it proper to consider these continuing violations of Section 19(b)(1) of the Order. Mr. Ferring was then President of Local 352 and acted within the scope of his authority as President of Local 352. The action of the President of Local 352 and the concerted participation therein by Messrs. Reardon, Chandler, Stack, Regenhold, Bauer and Raugh, alone, makes Local 352 responsible for the acts of its agents and Local 352 thereby interferred with, restrained and coerced Complainant in the exercise of his right to the assured and unimpaired access to the complaint procedures of the Order in violation of Section 19(b)(1) of the Order. Cf. National Labor Relations Board, Region 17 and National Labor Relations Board, A/SLMR No. 671 (1976). Interference with Complainant's right to the assured and unimpaired access to the complaint procedures of the Order was, moreover, a part of the continuing pattern of interference, restraint or coercion by the officers of Local 352, and other identified controllers who joined with them in concerted action, to interfer with the rights of Complainant, and other controllers, in violation of Section 19(b)(1) of the Order.

e) Responsibility of PATCO

As noted above, Mr. Reardon occupied a dual position. He was both President of Local 352 and the facility representative of PATCO. Mr. Ferring succeeded Mr. Reardon both as President of Local 352 and as facility representative of PATCO, although the record does not indicate when Mr. Reardon ceased to be facility representative of PATCO and/or the date Mr. Ferring became facility representative of PATCO. 8/

8/ Article 2, Section 3 of the FAA-PATCO Agreement provides, in part, as follows:

> "Section 3. The Union [PATCO] may designate facility representatives at each facility. The Union [PATCO] may designate one representative and one designee for each team, crew, or group as appropriate, in each facility. ... In addition, the Union [PATCO] shall designate in writing the principal representative and one designee. Only the principal representative and/or his designee may deal with the Facility Chief."

Mr. Reardon acted in his capacity as facility representative in advocating the union objectives or positions including invocation of Article 55 of the PATCO Agreement, separations, early descent, combining of positions, etc., and he acted within the scope of his authority as facility representative when he committed, directed, or incited the acts of interference, restraint or coercion, as set forth above in his capacity as president of Local 352. The same was true, of course, of Mr. Ferring when he became facility representative of PATCO. As agents of PATCO acting within the scope of their authority, their acts became the acts of their principal, PATCO, and the same acts which constitute interference, restraint and coercion by virtue of their capacity as agents of Local 352 also constitute interference, restraint and coercion, within the scope of their authority as agents for PATCO, for which their principal, PATCO, is liable.

Mr. Regenhold's action on June 25, 1975, standing alone, might not make PATCO liable for his action; but his action cannot be viewed in vacuo. First, it was part and parcel of the concerted acts of interference, restraint and coercion directed against Complainant. Second, when Complainant discussed the incident with Mr. Reardon, as President of Local 352 and as PATCO facility representative, Mr. Reardon who had been present in the TRACON room on June 25, 1975, stated that he saw nothing wrong with the operation; told Complainant he had heard other controllers state that he (Complainant) was a dangerous controller; and concluded with the threat that Complainant would get his in the end. Third, in a discussion with Facility Chief Early on July 7, Mr. Reardon 9/ intimated that a systems error involving Complainant had occurred on June 25, 1975, although he told Mr. Early, when asked if he

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9/ As noted in n. 8, Article 2, Section 3 of the PATCO Agreement provides,

> "Only the principal representative and/or his designee may deal with the Facility Chief."

The record shows that Mr. Early called Mr. Ferring, when Mr. Reardon was not available, and later met with Mr. Reardon. In the absence of any evidence or testimony to the contrary, I draw the inference that Mr. Reardon was PATCO facility representative on July 7, 1975, notwithstanding Mr. Ferring's election as President of Local 352, effective July 1, 1975.

were charging a systems error, that he was not asserting that an improper separation had occurred. Fourth, Mr. Reardon, nevertheless, characterized the June 25 operation as a bad operation. Fifth, Mr. Winter, Regional Vice President of PATCO did charge that he was in possession of information that a systems error involving Complainant had occurred on June 25, and that facility management was attempting to cover it up.

It is apparent that Mr. Winter, on behalf of PATCO, relied upon information furnished by its agents and I have drawn the inference, from all the testimony and evidence, that the source relied upon was Mr. Reardon. The record shows that the incident of June 25 was a deliberate act by Mr. Regenhold designed to greatly complicate Complainant's performance of his duty as a controller, if not, indeed, a deliberate attempt to cause a systems error, was part of the concerted activity by the officers of Local 352 and the facility representatives of PATCO to interfer with, restrain and coerce Complainant in the exercise of his rights under the Order; that PATCO, through Mr. Winter, its Executive Vice President, took action which resulted in a charge that Complainant had been involved in a systems error, which further interferred with, restrained, and coerced Complainant, as such charge was without justification and was in bad faith 10/ as part of the plan and design to interfer with, restrain and coerce Complainant. Accordingly, the acts of interference, restraint or coercion which Messrs. Reardon, Regenhold, Ferring and Winter committed, directed, or incited within the scope of their authority as agents of PATCO became the acts of their principal, PATCO, and PATCO thereby violated Section 19(b)(1) of the Order.

Wholly apart from its responsibility as a principal, PATCO, as the exclusive bargaining representative, had a duty to represent all members of the bargaining unit without hostility or

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10/ I do not question Mr. Winter's good faith, nor that he was duped by PATCO's facility representatives; but his action becomes tainted by the bad faith of PATCO's facility representatives. That is, PATCO, although it acted upon information furnished by its facility representatives, is responsible for the acts of its agents and because its agents acted in bad faith, PATCO, by its action, in reliance thereon, became a participant to such bad faith.

discrimination and to avoid abitrary conduct. The record shows that PATCO had knowledge, both through its facility representative and through its Executive Vice President, Mr. Poli, of the acts of impeding work performance of controllers to force or compel controllers to support positions of the Union. The record shows that Mr. Poli cut Mr. LaBaty off and insisted he discuss the matter with Mr. Reardon even after Mr. LaBaty told Mr. Poli that he had already discussed the matter with Mr. Reardon. Although Mr. Poli stated that he would have Mr. Reardon contact Mr. LaBaty further, Mr. Reardon never did so. Because PATCO, through its facility representatives and through Mr. Winter, took action in violation of its duty of fair representation as calculated retaliation against Complainant for the exercise of a right clearly protected by the Order, PATCO thereby violated Section 19(b)(1) of the Order.

2. Section 19(b)(3) Allegation

Section 19(b)(3) provides:

> "A labor organization shall not -
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> * * * *
>
> "(3) 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."

The one conclusion on which there is likely to be unanimous agreement is that this provision will never be considered for any award for clarity of draftsmanship. It would appear that there are two related but somewhat different proscriptions which may be paraphrased as follows:

> a) A labor organization shall not - coerce, attempt to coerce, or discipline ... a member of the organization as punishment or reprisal for ... his productivity, or the discharge of his duties ..."
>
> b) A labor organization shall not - coerce, attempt to coerce, or discipline ... a member of the organization ... for the purpose of hindering or impeding his work

performance, his productivity, or the discharge of his duties ...

The first proscription, a) above, goes to coercion, etc., because of productivity or discharge of duty. This would reach, for example, discipline because of production or work quotas (see Judge Dowd's comments in American Federation of Government Employees, Local 987 and Jerry L. Norris, Case No. 40-4790 (CO)(1974) n. 7, aff'd in part and rev'd in part, A/SLMR No. 420 (1974)). In addition, it would appear to reach inter alia, coercion, etc. for the discharge of duties, i.e., for working at all.

The second proscription, b) above, goes to coercion, etc., for the purpose of hindering or impeding work performance, productivity, or the discharge of duties.

This analysis is not intended to be all encompassing. It is recognized that other constructions may be equally valid. While "member of the organization" means to me, member of the labor organization subject to the proscription of 19(b)(3), it is conceivable that "member of the organization" could be given a much broader meaning to denote member of activity or member of the bargaining unit. Nevertheless, as I construe 19(b)(3) it means that union x shall not coerce a member of union x. As so construed Section 19(b)(3) makes it an unfair labor practice for a union to coerce its own members; it does not reach the same conduct directed against a non-member, even it such person were a member of another labor organization. As counsel for Respondents stated, "The 'legislative history' of Section 19(b)(3) reveals little or nothing. The substantive provisions of Section 19(b) were originally promulgated as a part of the Code of Fair Labor Practices, by the Civil Service Commission, under Executive Order 10988 ... Counsel for Respondents has contacted the Civil Service Commission and the Office of the Assistant Secretary and is advised that no explanation exists on the scope of the Code provisions, and nothing exists on the interpretation of Section 19(b)(3) when it was incorporated into the Executive Order." (Respondents' Brief p. 5 footnote).

It is the second proscription, b) above, which more directly applies to this case and, for the purpose of this decision, the first proscription, a) above, will be assumed, but without deciding, to be inapplicable. The second proscription, b) above, although, as Judge Dowd noted, for a violation of this section to be found some nexus between the offensive union conduct and the employee's job performance must be shown, applies to any

coercion against a member of the union which has as its purpose the hindering or impeding of his job performance, his productivity, or the discharge of his duties. That is, 19(b)(3) is violated whenever a union coerces a member for the purpose of hindering or impeding his work performance, etc., without regard to the reason for the coercion. In so concluding I have given careful consideration to the Assistant Secretary's statement in American Federation of Government Employees, Local 987, supra, that,

> "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." (A/SLMR No. 420 n.5) 11/

The permissible limits of discipline are set forth in Section 19(c) of the Order while Section 19(b)(3) of the Order proscribes coercion, under any guise, for the purpose of hindering or impeding a member's work performance, productivity or discharge of his duties owed as an officer or employee of the United States.

Respondents' contention that Section 19(b)(3) applies only to interference with rights as a member of a labor orbanization is untenable. The record shows, and Respondents' concede, that action was taken against Complainant, and other controllers, which impeded their productivity and hindered their discharge of duty owed as controllers. That Local 352 and PATCO were responsible has been discussed hereinabove with respect to the 19(b)(1) allegations. The further issue with regard to Section 19(b)(3) is whether such acts of coercion were directed against a member of PATCO.

Complainant was a member of PATCO until sometime after June 25, 1975. The record shows only that Complainant submitted

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11/ To like effect, see Local 1858, American Federation of Government Employees (Redstone Arsenal, Alabama) and Robert L. Murphy, A/SLMR No. 275 (1973); see also, American Federation of Government Employees, Local 1650 (Beeville, Texas), et al., A/SLMR 294 (1973).

his resignation a couple of weeks after June 25, 1975, which would indicate that his resignation was submitted on or about July 9, 1975, and that he revoked his dues payment authorization. Respondents did not refute or challenge this testimony and Respondents did not offer any evidence as to when Complainant's resignation became effective. 12/ From all testimony and circumstances, I draw the inference and, therefore, conclude, that Complainant was a member of PATCO at the time Mr. Winter, PATCO Regional Vice President, made the charge on or about July 7, 1975, that Complainant had been involved in a systems error on June 25, 1975, and for the reasons set forth hereinabove with regard to the Section 19(b)(1) allegations, that Local 352 and PATCO were responsible for the coercion directed against Complainant, a member of PATCO, 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 in violation of Section 19(b)(3) of the Order. Like acts of coercion, or attempted coercion, were directed by agents of Local 352 in the scope of their authority against other members of PATCO for the purpose of hindering or impeding their work performance, their productivity, or the discharge of their duties as controllers which was also in violation of Section 19(b)(3) of the Order. PATCO, by the acts of its designated representatives, was responsible for the conduct of its designated agents and thereby violated Section 19(b)(3) of the Order as to members other than Complainant.

In addition, PATCO, with knowledge of conduct which hindered or impeded the work performance, productivity, or discharge of duties of members of PATCO, in violation of its duty of fair representation, joined in action which hindered or impeded Complainant's work performance, productivity, or the discharge

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12/ Article 4, Section 5 of the FAA-PATCO Agreement provides, in part, as follows:

> "... Upon receipt of a revocation form ... the payroll office shall discontinue the withholding of dues from the employee's pay effective the first pay period for which a deduction would otherwise be made beginning after March 1, or September 1, whichever comes sooner. ..." 2 Gov. Employee Rel. Report 81: 6503

This provision appears to provide semi-annual "escape" periods. If so, Complainant may have remained a member of PATCO until on or after September 1, 1975.

of Complainant's duties as a controller by charging Complainant with involvement in a systems error on June 25, 1975, which charge was arbitrary and because of the bad faith of its agents, was made in bad faith by PATCO. Accordingly, for this further reason PATCO also violated Section 19(b)(3) of the Order.

RECOMMENDATION

Having found that Respondent PATCO, its Local No. 352, and Dennis M. Reardon, President of Local 352 and Facility Representative of PATCO, engaged in conduct which was in violation of Sections 19(b)(1) and (3) of the Executive Order, I recommend that the Assistant Secretary adopt the following order:

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, its Local Union 352, and their officers, representatives, and agents, including Dennis M. Reardon, shall:

1. Cease and desist from:

a) Interfering with, restraining, or coercing employees of the Department of Transportation, Federal Aviation Administration, Air Traffic Control Tower, St. Louis, Missouri, in the exercise of their right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, as guaranteed to them by Section 1 of the Executive Order, by delay in coordination in air traffic control; by refusal to approve requests for early descent of aircraft; by any threat directed at any employee because an employee has declined to invoke Article 55 of the PATCO-FAA collective bargaining agreement; by the lodging in bad faith of charges against an employee of involvement in a systems error; by any arbitrary conduct as calculated retaliation against any employee for the exercise of a right protected under the Executive Order; by interfering with, restraining, or impeding in any manner, the right of all employees to the free and unimpeded access to the complaint procedures of the Executive Order; or in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured by Executive Order 11491, as amended.

b) Coercing, or attempting to coerce a member of the Professional Air Traffic Controllers Organization 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, by delay in coordination in air traffic control; by refusal to approve requests for early descent of aircraft; by any threat directed at any member of PATCO because the member of PATCO has declined to invoke Article 55 of the PATCO-FAA collective bargaining agreement; by the lodging in bad faith of charges against any member of PATCO of involment in a systems error; by any arbitrary conduct against any member of PATCO as calculated retaliation against such member of PATCO for the exercise of a right protected under the Executive Order; or in any like or related manner coercing, or attempting to coerce, any member of PATCO 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.

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

a) Post in conspicuous places in the business office of Local 352, at the National business office of Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, and at the Regional Office of Professional Air Traffic Controllers Organization, MEBA, AFL-CIO which encompasses St. Louis, Missouri, where notices to members are customarily posted, copies of the attached Notice signed by the National President of PATCO-MEBA, by the Regional Vice President of PATCO-MEBA, for the Regions encompassing St. Louis, Missouri, and by the current St. Louis Tower Facility Representative of PATCO MEBA, which is marked "Appendix B". Said copies of the Notices shall be posted for a period of 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by PATCO-MEBA and by Local 352 to insure that said Notices are not altered, defaced, or covered by other material.

b) Mail a copy of said Notice to each member of PATCO now employed at the St. Louis, Missouri, Air Traffic Control Tower and to each member of PATCO employed at the St. Louis, Missouri, Air Traffic Control Tower on June 25, 1975, but who are not now employed at the St. Louis, Missouri facility.

c) Furnish sufficient copies of said Notice to the Federal Aviation Administration for posting, if the Agency and facility agree to do so, at places at the St. Louis, Missouri, Air Traffic Control Tower where it customarily posts information to its controllers. Notices should be furnished to FAA within 14 days of the date of this Decision and Order.

d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 29, 1976
Washington, D.C.

APPENDIX B

N O T I C E T O A L L M E M B E R S A N D 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 you that:

WE WILL NOT interfere with, restrain, or coerce employees of the Department of Transportation, Federal Aviation Administration, Air Traffic Control Tower, St. Louis, Missouri, in the exercise of their right, freely and without fear of penalty or reprisal, to self-organization, to form, join, or assist labor organizations or to refrain from any such activity.

WE WILL NOT coerce, or attempt to coerce, any member of PATCO 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.

WE WILL NOT interfere with, restrain, or coerce any employee or member of PATCO, aforesaid, by delay in coordination in air traffic control; by refusal to approve requests for early descent of aircraft; by any threat because an employee or member of PATCO has declined to invoke Article 55 of the PATCO-FAA collective bargaining agreement; by the lodging in bad faith of charges of involvement in a systems error; by any arbitrary conduct as calculated retaliation for the exercise of a right protected under the Executive Order; by interfering with, restraining, or impeding in any manner the right of all employees to the free and unimpeded access to the complaint procedures of the Executive Order; or in any like or related manner interfere with, restrain or coerce any employee or member of PATCO in the exercise of rights assured by Executive Order 11491, as amended.

Professional Air Traffic Controllers
Organization, affiliated with
National Marine Engineers
Beneficial Association, AFL-CIO

Dated:_____ BY_____
President

Appendix B (cont'd)

Dated:_____ By_____
Regional Vice President

Dated:_____By _____
PATCO Facility Representative
St. Louis, Missouri

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 or members of PATCO 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 220, 911 Walnut Street, Kansas City, Missouri 64106.

August 10, 1977

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,
FOREST SERVICE, OUACHITA NATIONAL
FOREST, HOT SPRINGS, ARKANSAS
A/SLMR No. 879

This case involved a petition for clarification of unit (CU) filed jointly by the National Federation of Federal Employees, Local 796 (NFFE) and the Activity seeking to clarify the status of various job classifications located in an exclusive bargaining unit at the Ouachita National Forest. The Activity took the position that employees in the various classifications were either supervisors, confidential employees, or engaged in Federal personnel work in other than a purely clerical capacity. The NFFE contended, on the other hand, that all of the classifications should be included in the unit.

The Assistant Secretary found that employees in the following classifications were supervisors within the meaning of the Order and should be excluded from the unit: Clerk (Typing), GS-4 (Technical Services); Computer Operator, GS-6; Criminal Investigator, GS-11; Supervisory Forestry Technician, GS-11 (Tree Improvement); and Supervisory Surveying Technician, GS-9. In this regard, he noted that said employees either had the authority to hire, promote, discipline and/or reward subordinate employees, or to effectively recommend such action. He also found that employees in the Clerk (Typing), GS-5 (District Clerk) and the Clerk-Typist, GS-2 (Management Services) classifications should be excluded from the exclusively recognized unit as confidential employees based on their relationship with the District Ranger or the Director of Management Services who are responsible for either formulating or effectuating management policies in the field of labor relations.

As to employees in the remaining disputed classifications, the Assistant Secretary found the evidence insufficient to establish that they were either supervisory or confidential employees. Accordingly, he ordered that the unit be clarified consistent with his findings.

A/SLMR No. 879

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
FOREST SERVICE, OUACHITA NATIONAL
FOREST, HOT SPRINGS, ARKANSAS

Activity-Petitioner

and

Case No. 64-2988(CU)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 796

Labor Organization-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 Louis Paul Eaves. 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 National Federation of Federal Employees, Local 796, herein called NFFE, 1/ the Assistant Secretary finds:

In the instant joint-petition the Activity and the NFFE seek to clarify the status of employees in 18 job classifications. The Activity takes the position that employees in the disputed job classifications are confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, or supervisors within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the exclusively recognized unit. The NFFE, on the other hand, contends that there is no basis for excluding the employees in the classifications in question from its exclusively recognized unit. 2/

1/ The Activity submitted an untimely brief which has not been considered.

2/ The parties stipulated that certain named individuals in various job classifications either were or were not supervisors within the meaning of Section 2(c) of the Order; were confidential employees; or performed Federal personnel work in other than a purely clerical capacity and on these bases should be excluded from or included in the exclusively recognized unit. There is no evidence to indicate that the parties' agreement was improper. Under these circumstances, I view the agreement of the parties as a withdrawal of the request for clarification in this regard. Accordingly, I approve the withdrawal request and, therefore, find it unnecessary to make a determination as to these particular employees and classifications. Cf. New Jersey Department of Defense, A/SLMR No. 121.

The record reveals that the NFFE was certified as the exclusive representative for nonprofessional employees of the Ouachita National Forest on October 31, 1974. 3/ The mission of the Forest Service is to stimulate the effective management of forested land of state and public ownership. The National Forest System is headed by the Chief of the Forest Service and is organized into various regions each headed by a Regional Forester. The Southeast Region (Region 8), headquartered in Atlanta, Georgia, encompasses 15 National Forests, among which is the Activity, which has approximately 500 permanent and temporary employees and is headed by a Forest Supervisor who is directly responsible to the Regional Forester. Under the Forest Supervisor is a headquarters staff and 12 Ranger Districts, each of which is headed by a Forest Ranger. The headquarters staff is organized into Management Services and Technical Services.

The record reveals that the Forest Supervisor has retained hiring authority for permanent employees, and the District Rangers have been delegated hiring authority for temporary and seasonal employees. 4/ The personnel records for all personnel are maintained in the headquarters of the hiring authority involved. With regard to labor relations authority, step 2 of the parties' negotiated grievance procedure is the District Ranger level, and step 3 of the negotiated grievance procedure is the Forest Supervisor level.

Clerk (Typing), GS-4 (Technical Services); Computer Operator, GS-6; Criminal Investigator, GS-11; Supervisory Forestry Technician, GS-11 (Tree Improvement); Supervisory Surveying Technician, GS-9

The Activity contends that employees in these classifications should be excluded from the bargaining unit as supervisors within the meaning of Section 2(c) of the Order.

Clerk (Typing), GS-4 This position, currently occupied by Carol Ennis, is located in the Division of Technical Services. The record reveals that Ennis is responsible for providing clerical and administrative support to the Director of Technical Services and has one permanent employee under her direction. The evidence establishes that Ennis effectively recommended the hiring of her subordinate and that the exercise of such authority required the use of independent judgment.

3/ The certified unit is described as: "All nonprofessional employees of the Ouachita National Forest, U.S. Department of Agriculture, Forest Service, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, confidential employees, temporary employees with appointments not to exceed 90 days, employees of the Ouachita Civilian Conservation Center, and supervisors and guards as defined in Executive Order 11491, as amended."

4/ The Forest Supervisor has delegated hiring authority for permanent employees to the Director of Management Services and the Personnel Officer. Eleven of the 12 District Clerks share hiring authority for temporary and seasonal employees with their respective District Rangers.

Computer Operator, GS-6 This position, currently occupied by Bessie Reardon, is located in the Division of Management Services. The record reveals that Reardon is responsible for operating the Activity's computer terminal and related peripheral equipment, coordinating the use of the terminal, and has two permanent employees under her direction. The record also reveals that the authority exercised by Reardon in effectively recommending the hiring and subsequent promotion of her subordinates required the use of independent judgment.

Criminal Investigator, GS-11 This position, currently occupied by Edwin Outlaw, is located in the Division of Management Services. The record reveals that Outlaw serves as the primary investigator for the Ouachita and the Ozark-St. Francis National Forests in criminal cases involving the application of fire, timber, range and other resource use regulations and laws. Further, he occasionally conducts investigations of civil claims and has one permanent employee under his direction. The evidence establishes that he effectively recommended that his subordinate be retained at the end of her probationary period and, subsequently, effectively recommended that she be promoted to a higher grade.

Supervisory Forestry Technician, GS-11 (Tree Improvement) This position, currently occupied by James McMahen, is located in the Womble Ranger District. The record reveals that McMahen serves as the Seed Orchard Manager and is responsible for planning the collection and grafting of superior tree scions, outplanting, spraying and weeding of ramets, maintaining cover to prevent erosion, conducting controlled pollination, and collecting cones. He has three permanent employees working under his direction, and the evidence establishes that he effectively recommends the hiring and promotion of his subordinates.

Supervisory Surveying Technician, GS-9 These positions are located in the Fourche and Jessieville Ranger Districts. The incumbents are primarily responsible for providing technical guidance for locating, monumenting, recording, and maintaining property boundaries. Each has either three or four permanent employees under his direction. The record reveals that the incumbents in this classification possess the authority to hire or to effectively recommend hiring, disciplining and rewarding of subordinates and that the exercise of such authority requires the use of independent judgment.

Based on all the above circumstances, I find that employees in the above-noted classifications are supervisors within the meaning of Section 2(c) of the Order. Thus, the evidence establishes that they possess the authority to hire, promote, discipline and/or reward subordinate employees, or to effectively recommend such action. Accordingly, I find that employees classified as Clerk (Typing), GS-4 (Technical Services); Computer Operator, GS-6; Criminal Investigator, GS-11; Supervisory Forestry Technician, GS-11 (Tree Improvement); and Supervisory Surveying Technician, GS-9, should be excluded from the exclusively recognized unit.

Civil Engineering Technician, GS-7; Forestry Technician, GS-5 (Timber Stand Improvement); Forestry Technician, GS-6 (Timber Marking); Forestry Technician, GS-7 (Timber Marking and Sales Administration); Forestry Technician, GS-7 (Recreation Area Maintenance); Forestry Technician, GS-9 (Timber Sales Administration); Supervisory Forestry Technician, GS-5 (Sale Area Betterment); Supervisory Forestry Technician, GS-6 (Sale Area Betterment); Supervisory Forestry Technician, GS-11 (Fire Management); Surveying Technician, GS-7

The Activity contends that employees in these classifications should be excluded from the bargaining unit on the basis that they are supervisors within the meaning of Section 2(c) of the Order.

Civil Engineering Technician, GS-7 5/ These positions are located in 6 of the 12 Ranger Districts, and the incumbents are primarily responsible for providing technical engineering assistance for all aspects of surveying, construction, and maintenance of improvements, including buildings, roads, and signs. They each have three permanent employees and occasional temporary employees working under their direction. While employees in this classification have authority to recommend hiring subordinate employees, there is no evidence that such recommendations are effective. The record reveals that employees in this classification routinely approve annual leave and training and make routine performance evaluations of employees under their direction. The record also discloses that such direction as may be given by the incumbents to other employees does not require the use of independent judgment.

Forestry Technician, GS-5 (Timber Stand Improvement) 6/ This position, occupied by Guy Meek, is located in the Tiak Ranger District. Meek's duties primarily involve tree planting, pest control, cone collection and making regeneration checks of areas previously planted. The Tiak District organization chart indicates that Meek has one permanent subordinate. The position description discloses no supervisory authority as set forth in Section 2(c) of the Order.

Forestry Technician, GS-6 (Timber Marking) 7/ These positions are located in 7 of the 12 Ranger Districts, and the incumbents are primarily responsible for selecting and marking timber for cutting. Employees in this classification each direct four permanent employees in addition to occasional seasonal and temporary employees. Although the incumbents in this classification make recommendations concerning the hiring of temporary

5/ The parties stipulated that the testimony of James Chambliss should be considered applicable to five other employees of the Activity in this classification.

6/ The parties stipulated that the determination of the supervisory status of Guy Meek should be based solely on position description No. 8U1431, dated March 17, 1975.

7/ The parties stipulated that the testimony of Oscar Briggs should be considered applicable to six other employees of the Activity in this classification.

and seasonal personnel, the evidence establishes that such recommendations are not effective. The record reveals that the incumbents are authorized to routinely approve annual leave and training and make routine performance evaluations of employees under their direction. However, the record further reveals that such direction as may be given to other employees does not require the use of independent judgment.

Forestry Technician, GS-7 (Timber Marking and Sales Administration) 8/ These positions are located in 4 of the 12 Ranger Districts. The incumbents' timber marking responsibilities are the same as those of the Forestry Technician, GS-6 (Timber Marking) noted above. In addition, they assist in administering the timber sales program. The record reveals that the incumbents each direct three permanent employees. Although the incumbents are authorized to recommend rewards for employees under their direction, there is no evidence that such recommendations are effective, or that such direction as may be given to other employees requires the use of independent judgment.

Forestry Technician, GS-7 (Recreation Area Maintenance) This position, occupied by Clovis Price, is located in the Womble Ranger District. Price's duties from June through August involve inspecting and maintaining the recreation areas of the district. During the winter months, he is assigned to timber marking or tree planting activities. He has two permanent employees under his direction only for the summer months. The record reveals that, although Price may routinely direct other employees, such direction as may be given does not require the use of independent judgment.

Forestry Technician, GS-9 (Timber Sales Administration) This position, occupied by Jean Hawkins, is located in the Fourche Ranger District. The record reveals that Hawkins is primarily responsible for administering the timber sales program and that he directs one permanent employee. Hawkins is authorized to routinely approve annual leave and training and to make routine performance evaluations of the subordinate employee. However, the evidence establishes that such direction as may be given to his subordinate employee does not require the use of independent judgment.

Supervisory Forestry Technician, GS-5 (Sale Area Betterment) 9/ These positions are located in 5 of 12 Ranger Districts, and the incumbents are primarily responsible for the release of desirable reproduction, regeneration release, pruning of crop trees, site preparation, prescribed burning, precommercial thinning, planting, and seeding of the forest. Employees in this classification each direct either 4 or 5 permanent employees in addition to occasional seasonal employees. While employees in this classification have authority to recommend hiring certain employees, there is

8/ The parties stipulated that the testimony of Floyd Irons should be considered applicable to three other employees of the Activity in this classification.

9/ The parties stipulated that the testimony of Raymond Head should be considered applicable to five other employees of the Activity in this classification.

no evidence that such recommendations are effective. The record discloses that the incumbents are authorized to routinely approve leave and training and make routine performance evaluations of employees under their direction. However, the record further discloses that such direction as may be given to other employees does not require the use of independent judgment.

Supervisory Forestry Technician, GS-6 (Sale Area Betterment) 10/ These positions are located in 3 of the 12 Ranger Districts, and the incumbents' responsibilities are essentially the same as those of the Supervisory Forestry Technician, GS-5 (Sale Area Betterment) noted above. The incumbents each direct three permanent employees in addition to several temporary employees. While the incumbents in this classification make work priority recommendations, there is no evidence that such recommendations are effective. The record reveals that the incumbents are authorized to routinely approve annual leave and training and make routine performance evaluations of employees under their direction. However, the record further reveals that such direction as may be given to other employees does not require the use of independent judgment.

Supervisory Forestry Technician, GS-11 (Fire Management) This position, occupied by Bobby McLane, is located in the Division of Technical Services. McLane serves as a technical assistant to the Fire Management Staff Officer and performs operational duties associated with the execution of the Activity's Fire Management Program. The three permanent employees who work under McLane are not physically located in the same office as McLane. The record reveals that McLane is authorized to routinely approve annual leave and training in the course of directing other employees. However, the record also reveals that such direction as may be given by the incumbent to other employees does not require the use of independent judgment.

Surveying Technician, GS-7 This position, occupied by Henry Brown, is located in the Mena Ranger District. For eight months of the year, Brown's duties primarily involve locating and establishing property boundaries and maintaining a land corner card file. From May through August, Brown is responsible for the management of the district's recreation area. While engaged in surveying, he directs three permanent employees, who are borrowed from the Timber Stand Improvement Section. During the summer months, Brown directs two lifeguards. The evidence does not establish that Brown exercises effective authority to recommend the promotion or discharge of employees under his direction. While Brown directs other employees, the record does not reveal that such direction, as may be given, requires the use of independent judgment.

Based on all of the foregoing circumstances, I conclude that employees in the above noted classifications are not supervisors within the meaning of Section 2(c) of the Order. Thus, the evidence establishes that such

10/ The parties stipulated that the testimony of L. D. Ryan should be considered applicable to two other employees of the Activity in this classification.

employees do not possess, or exercise the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or to effectively recommend such actions. Moreover, the authority exercised by these employees in directing subordinates is of a routine nature and does not require the use of independent judgment. Accordingly, I find that employees classified as Civil Engineering Technician, GS-7; Forestry Technician, GS-5 (Timber Stand Improvement); Forestry Technician, GS-6 (Timber Marking); Forestry Technician, GS-7 (Timber Marking and Sales Administration); Forestry Technician, GS-7 (Recreation Area Maintenance); Forestry Technician, GS-9 (Timber Sales Administration); Supervisory Forestry Technician, GS-5 (Sale Area Betterment); Supervisory Forestry Technician, GS-6 (Sale Area Betterment); Supervisory Forestry Technician, GS-11 (Fire Management); Surveying Technician, GS-7, 11/ should be included in the unit.

Clerk (Typing), GS-5 (District Clerk); Clerk-Typist, GS-2 (Management Services)

The Activity contends that employees in these classifications should be excluded from the bargaining unit as either supervisory employees, confidential employees or employees engaged in Federal personnel work in other than a purely clerical capacity.

Clerk (Typing), GS-5 (District Clerk) 12/ This position is located in each of the 12 District Offices. The incumbent, the chief clerical in each District Office, is responsible for providing clerical and administrative assistance to the District Ranger and for coordinating and directing the business management activities of the district. The District Ranger is responsible for all labor relations matters within his district. The record reveals that the incumbents attend staff meetings where personnel and labor relations matters are discussed, and type and handle confidential material pertaining to promotions, reductions-in-force, grievances, and employee discipline.

Clerk-Typist, GS-2 (Management Services) This position, occupied by Barbara Jeffers, is located in the Division of Management Services. Jeffers is a telephone operator-receptionist and serves as the personal secretary for the Director of Management Services, who has been designated the Activity's chief labor relations representative. The record discloses that she types confidential labor relations correspondence between the Activity and the NFFE, management positions on employment and labor relations matters, and memoranda of labor relations meetings. Further, she also has access to labor relations files and materials pertaining to reorganizational plans.

11/ In regard to the Surveying Technician, GS-7 classification, see U.S. Department of Agriculture, Forest Service, Francis Marion and Sumter National Forest, A/SLMR No. 227.

12/ The parties stipulated that the testimony of Bernice Keener and Patsy White should be considered applicable to the ten other employees of the Activity in this classification.

Because the employees in these classifications assist and act in confidential capacity to individuals who formulate or effectuate management policies in the field of labor relations, I find that they are confidential employees. 13/ Accordingly, I find that employees classified as Clerk (Typing), GS-5 (District Clerk) 14/ and Clerk-Typist, GS-2 (Management Services) should be excluded from the unit.

Clerk-Typist, GS-4 (Secondary Clerk)

The Activity contends that employees in this classification should be excluded from the bargaining unit as confidential employees.

The position of Clerk-Typist, GS-4 (Secondary Clerk) 15/ is located in 5 of the 12 Ranger Districts. The incumbents perform a variety of clerical, typing and receptionist duties under the direction of the Clerk (Typing), GS-5 (District Clerk). The record reveals that, occasionally, they type grievances, minutes of labor relations meetings, and correspondence between the NFFE and the Activity.

I conclude that the evidence does not establish that employees in this classification serve in a confidential capacity to an individual who formulates or effectuates management policies in the field of labor relations. 16/ Thus, even though the incumbents type labor relations materials, in my judgment, standing alone, the typing of such materials does not warrant the exclusion of an employee from a bargaining unit. 17/ Accordingly, I find that employees classified as Clerk-Typist, GS-4 (Secondary Clerk) are not confidential employees and, therefore, should be included in the unit.

13/ Cf. Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69. With regard to the Clerk (Typing), GS-5 (District Clerk) classification, also see U.S. Department of Agriculture, Forest Service, Mark Twain National Forest, Springfield, Missouri, A/SLMR No. 303; U.S. Department of Agriculture, Forest Service, Francis Marion and Sumter National Forest, A/SLMR No. 227.

14/ In view of the foregoing, it is considered unnecessary to decide whether employees in the Clerk (Typing), GS-5 (District Clerk) classification should be excluded from the unit on any other basis.

15/ The parties stipulated that the testimony of Gretta Brunt should be considered applicable to two other employees of the Activity in this classification.

16/ Cf. Virginia National Guard Headquarters, cited above.

17/ See Department of Health, Education and Welfare, U.S. Office of Education, Headquarters, A/SLMR No. 803.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the National Federation of Federal Employees, Local 796, was certified on October 31, 1974, be, and it hereby is, clarified by excluding from the said unit those job classifications set forth in group A, and by including in said unit those job classifications set forth in group B.

Group A

Clerk (Typing), GS-4 (Technical Services)
Computer Operator, GS-6
Criminal Investigator, GS-11
Supervisory Forestry Technician, GS-11 (Tree Improvement)
Supervisory Surveying Technician, GS-9
Clerk (Typing), GS-5 (District Clerk)
Clerk-Typist, GS-2 (Management Services)

Group B

Civil Engineering Technician, GS-7
Forestry Technician, GS-5 (Timber Stand Improvement)
Forestry Technician, GS-6 (Timber Marking)
Forestry Technician, GS-7 (Timber Marking and Sales Administration)
Forestry Technician, GS-7 (Recreation Area Maintenance)
Forestry Technician, GS-9 (Timber Sales Administration)
Supervisory Forestry Technician, GS-5 (Sale Area Betterment)
Supervisory Forestry Technician, GS-6 (Sale Area Betterment)
Supervisory Forestry Technician, GS-11 (Fire Management)
Surveying Technician, GS-7
Clerk-Typist, GS-4 (Secondary Clerk)

Dated, Washington, D. C.
August 10, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

August 15, 1977

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

PUGET SOUND NAVAL SHIPYARD,
U.S. DEPARTMENT OF THE NAVY,
BREMERTON, WASHINGTON
A/SLMR No. 880

This case involved a petition for clarification of unit (CU) filed by the International Federation of Professional and Technical Engineers, Local 12, AFL-CIO seeking to include approximately 70 GS-12 project engineers employed in the Activity's Combat Systems Office, Planning Department and Production Department in its exclusively recognized unit of professional employees. The Activity contended that these employees are ineligible for inclusion in the unit inasmuch as they are supervisors and, in one case, a management official.

Based on the record developed at the hearing, the Assistant Secretary concluded that certain of the disputed employees are supervisors within the meaning of the Executive Order and should be excluded from the exclusively recognized unit, and certain others are not supervisors within the meaning of the Executive Order, and should be included in the unit. As to the one employee alleged to be a management official, the Assistant Secretary found the evidence insufficient to support this contention, and concluded that this employee should also be included in the unit. Accordingly, the Assistant Secretary clarified the unit consistent with his findings.

A/SLMR No. 880

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PUGET SOUND NAVAL SHIPYARD,
U.S. DEPARTMENT OF THE NAVY,
BREMERTON, WASHINGTON

Activity

and

Case No. 71-3800(CU)

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, LOCAL 12, AFL-CIO

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 Scanlon. 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:

The Petitioner, International Federation of Professional and Technical Engineers, Local 12, AFL-CIO, hereinafter referred to as the Union, is the exclusive representative of a unit of all graded professional employees in the field of engineering and related physical sciences at the Puget Sound Naval Shipyard, Bremerton, Washington. In this proceeding the Union seeks to clarify the status of approximately 70 GS-12 project engineers who work in the Activity's Combat Systems Office, Production Department and Design Division, of the Planning Department. The Union contends that the disputed employees should be included in its exclusively recognized unit, while the Activity takes the position that the disputed project engineers are supervisors and, in one case, a management official and, thus, should be excluded from the unit.

The mission of the Activity is to provide logistic support for assigned ships and service craft; to perform authorized construction, conversion, overhaul, repair, alteration, drydocking, and outfitting of surface ships and submarines; and other duties as assigned.

Supervisory General Engineer, GS-801-12, Technical Publications Unit, Code 244.82; Supervisory Physicist (Sound), GS-1310-12, Acoustic Range Branch, Code 246.1, 246.2, and 246.3; Supervisory General Engineer, GS-801-12, Acoustic Range Branch, Code 246.4; Supervisory Naval Architect, GS-871-12, Stability and Preservation Branch, Code 250.1; Supervisory

Naval Architect (Arrangements), GS-871-12, Arrangement and Access Branch, Code 250.2; Supervisory Naval Architect, GS-871-12, Stowage and Fittings Branch, Code 250.3; Supervisory Naval Architect (Structures), GS-871-12, Structual (Hull) Branch, Code 250.4; Supervisory Naval Architect (Structures), GS-871-12, Structural (FDNS) Branch, Code 250.5

It was stipulated by both parties that George R. Wing, a Supervisory Naval Architect, was sufficiently similarly situated to other GS-12 project engineers in the above codes and job titles as to make any decision made as to Mr. Wing's supervisory status applicable to all the above listed GS-12 project engineers.

In his capacity as a Supervisory Naval Architect, Mr. Wing is responsible, among other things, for the performance of his section, including the supervision of his crew. In this regard, the evidence establishes that Wing assigns and directs the work of his crew utilizing independent judgment and that he effectively recommends quality step increases for the employees of his section.

Under these circumstances, I find that Wing, and all the other GS-12 project engineers in the subject classifications, are supervisors as defined in Section 2(c) of the Order and should be excluded from the exclusively recognized unit.

Supervisory General Engineer, GS-801-12, Main Propulsion Machinery (Propulsion Machinery and Fuels) Branch, Code 260.1; Supervisory Mechanical Engineer, GS-830-12, Main Propulsion Machinery (Propulsion Machinery and Fuels) Branch, Code 260.1; Supervisory Mechanical Engineer, GS-830-12, Main Propulsion Machinery (Steam Generation) Branch, Code 260.2; Supervisory Mechanical Engineer, GS-830-12, Auxiliary Machinery (Hull Machinery) Branch, Code 260.3; Supervisory Mechanical Engineer, GS-830-12, Auxiliary Machinery (Catapult and Compressed Gas), Branch Code 260.4; Supervisory Mechanical Engineer, GS-830-12, Auxiliary Machinery (Fluid Power) Branch, Code 260.5; Supervisory Mechanical Engineer, GS-830-12, Service Piping Branch, Code 260.6; Supervisory Mechanical Engineer, GS-830-12, Environmental Services Branch, Code 260.7

It was stipulated by both parties that James Jolin, a Supervisory Mechanical Engineer, was sufficiently similarly situated to other GS-12 project engineers in the above codes and job titles as to make any decision as to Mr. Jolin's supervisory status applicable to all the above listed GS-12 project engineers.

The record reveals that Mr. Jolin's duties include, among other things, the analysis and assignment of engineering work to individual members of his crew. In this regard, the evidence establishes that Jolin assigns and directs the work of his crew utilizing independent judgment.

Under these circumstances, I find that Jolin, and all the other GS-12 project engineers in the subject classifications, are supervisors as defined by Section 2(c) of the Order and should be excluded from the exclusively recognized unit.

Supervisory Electrical Engineer, GS-850-12, Electrical Control Systems Branch, Code 270.1; Supervisory Electrical Engineer, GS-850-12, Electrical Application Branch, Code 270.2; Supervisory Electronics Engineer, GS- 855-12, Electronics Application Branch, Code 270.3; Supervisory Electrical Engineer GS-850-12, Electrical Installation and Special Project Branch, Code 270.4

It was stipulated by both parties that Frank Mapes, a Supervisory Electrical Engineer, was sufficiently similarly situated to other GS-12 project engineers in the above codes and job titles so as to make any decision made as to Mr. Mapes' supervisory status applicable to all the above listed GS-12 project engineers.

In this regard the record reveals that Mr. Mapes assigns and directs the work of his crew utilizing independent judgment and that he effectively recommends incentive awards for his crew.

Under these circumstances, I find that Mapes, and the GS-12 project engineers stipulated to be similarly situated, are supervisors as defined by the Order and should be excluded from the exclusively recognized unit.

Supervisory Electrical Engineer, GS-830-12, New System Development Design, Electrical Design and Documentation Branch, Code 280.1 and Supervisory Mechanical Engineer, GS-830-12, Mechanical Design, Production Engineering and System Analysis Branch, Code 280.2

It was stipulated by both parties that Michael A. Hattamer, a Supervisory Mechanical Engineer, GS-12, was sufficiently similarly situated to all other project engineers in the aforementioned job titles and codes as to make any decision made as to Mr. Hattamer's supervisory status applicable to all the above-listed GS-12 project engineers. 1/

The record does not contain sufficient evidence to establish that Mr. Hattamer, in his role as a GS-12 project engineer, had been vested with supervisory authority. Particularly noted was the fact that Mr. Hattamer does not possess the authority to hire, transfer, suspend, layoff, recall, discharge, promote, adjust grievances or effectively discipline employees. While the record reveals that he can recommend such actions, it does not clearly show that such recommendations are effective. Further, the record reveals that Mr. Hattamer is monitored and directed by his immediate supervisor in his assignment and direction of work to his crew, and that such direction as he does give is routine in nature, within established guidelines and dictated by established procedures.

Under these circumstances, I find that Mr. Hattamer, and all the other GS-12 project engineers in the above subject classifications, are not supervisors as defined by Section 2(c) of the Order and should be included in the exclusively recognized unit.

1/ Testimony regarding Mr. Hattamer's duties related to his detail to a GS-13 project engineer's position, an acknowledged supervisory position, was not considered in the evaluation of his supervisory status as a GS-12.

Electronics Engineer, GS-855-12, FBM Fire Control Branch, Code 191.21; Supervisory Electronics Engineer, GS-850-12, Navigation NTD/COMM Branch, Code 191.31; Supervisory Electronics Engineer, GS-855-12, ECM/COMM Branch, Code 191.33; Supervisory Electronics Engineer, GS-855-12, Digital Systems Branch, Code 191.51; Supervisory Electronics Engineer, GS-855-12, Fire Control Systems Branch, Code 191.52; Supervisory General Engineer, GS-801-12, Ships Planning and Coordination Branch, Code 191.53

It was stipulated by both parties that Henry Horn, Electronics Engineer, GS-12, Code 191.21, was sufficiently similarly situated to other project engineers in the subject classifications so that any decision made as to Mr. Horn's supervisory status would be applicable to all of them.

The record reveals that Mr. Horn's duties include the analysis and assignment of engineering work to individual members of his crew. The evidence establishes that these assignments and the concurrent direction of crew members' performance require the use of independent judgment.

Under these circumstances I find that Mr. Horn, and the other GS-12 project engineers in the subject classification, are supervisors as defined by Section 2(c) of the Order and should be excluded from the exclusively recognized unit.

Supervisory Industrial Engineer, GS-896-12, Refueling Facilities Section, Code 381.1; Supervisory Industrial Engineer, GS-896-12, Support Services Section A, Support Services Section B, Support Services Section C, Codes 381.2A, 381.2B, 381.2C; Supervisory Industrial Engineer, GS-896-12, Advance Planning and Arrangements Section, Code 381.3; Supervisory Industrial Engineer, GS-896-12, Methods and Preventive Maintenance Section, Code 385.2; Supervisory Industrial Engineer, GS-896-12, Production Facilities Engineering Section, Code 385.3; Supervisory Industrial Engineer, GS-896-12, Facilities Program Management Section, Code 385.4; Supervisory Industrial Engineer, GS-896-12, Waterfront Support Engineering Section, Code 385.5; Supervisory Industrial Engineer, GS-896-12, Trident Support Section, Code 386.1

It was stipulated by both parties that David W. Curley, Supervisory Industrial Engineer, GS-12, Code 385.2, was sufficiently similarly situated to other project engineers in Codes 381.1 - 386.1 listed above so as to make any determination as to Mr. Curley's supervisory status applicable to all.

The record reveals that Mr. Curley's duties include the analysis and assignment of engineering work to individual members of his crew through the use of independent judgment and that, in addition, he is the first step supervisor authorized to resolve grievances under the parties' negotiated agreement.

Under these circumstances, I shall exclude Mr. Curley, and the other GS-12 project engineers stipulated to be similarly situated, from the exclusively recognized unit as supervisors.

Supervisory General Engineer, GS-801-12, Test Coordination Division, Code 365

Two persons testified concerning this position: George Hutchison, Branch Head (GS-13) of the Submarine Test Planning Branch, Code 365.2, and Merlin Embree, a GS-12 project engineer within Code 365.2. Both parties stipulated that Mr. Embree was sufficiently similarly situated to other project engineers in Code 365 so that any determination made as to Mr. Embree's supervisory status would be appliable to all. It was further stipulated that the testimony of Mr. Embree and Mr. Hutchison was representative of Code 365.

Upon review of the record with respect to the above noted classification, with particular emphasis on the evidence developed concerning the alleged supervisory status of Mr. Embree, I find insufficient basis upon which to make a determination of the eligibility of employees classified as Supervisory General Engineers, GS-12, Test Coordination Division, Code 365. Under these circumstances, I make no finding as to the eligibility of these employees.

General Engineer, GS-801-12, Quality Control Program Manager, Code 191.54

The Quality Control Program Manager, Code 191.54 is a position presently filled by Alvin V. Jensen. The record discloses that Mr. Jensen's assignments come directly from the Combat Systems Superintendent, a naval officer. Among others, Mr. Jensen's functions include insuring the accuracy of data collections, and the monitoring of projects to insure the use of proper procedures and scheduled completion. Mr. Jensen also represents the Combat Systems Office in managerial meetings and furnishes the Combat System Officer's interpretation of new Navy regulations and suggestions as to the best and most cost effective method for their implementation. Mr. Jensen's duties further entail the preparation of the Combat Systems Procedures Manual. The record discloses that Jensen's proposals and recommendations require the independent evaluation and approval of his Combat Systems Officer, and there is no evidence to establish that Jensen's recommendations are effective in the formulation of the Combat Systems Office's policies.

Under these circumstances, I find that Mr. Jensen is not a management official within the meaning of the Order. The record reveals that Jensen is a highly trained employee providing expert resource information or recommendations with respect to policy, rather than an active participant in the ultimate determination as to what policy in fact will be. 2/ Accordingly, I find that the employee in the subject classification should be included in the exclusively recognized unit.

2/ Cf. Department of the Air Force, Arnold Engineering Center, Air Force Systems Command, Arnold Air Force Station, Tennessee, A/SLMR No. 135.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the International Federation of Professional and Technical Engineers, Local 12, AFL-CIO, on September 18, 1974, be, and it hereby is, clarified by including in such unit employees in the following classifications and codes:

Supervisory Electrical Engineer, GS-830-12, New System Development Design Electrical Design and Documentation Branch, Code 290.1; Supervisory Mechanical Engineer, GS-830-12, Mechanical Design, Production Engineering and System Analysis Branch, Code 280.2; and General Engineer, GS-801-12, Quality Control Program Manager, Code 191.54;

and by excluding from such unit employees in the following classifications and codes;

Supervisory General Engineer, GS-801-12, Technical Publications Unit, Code 244.82; Supervisory Physicist (Sound), GS-1310-12, Acoustic Range Branch, Codes 246.1, 246.2, and 246.3; Supervisory General Engineer, GS-801-12, Acoustic Range Branch, Code 246.4; Supervisory Naval Architect, GS-871-12, Stability and Preservation Branch, Code 250.1; Supervisory Naval Architect (Arrangements), GS-871-12, Arrangements and Access Branch, Code 250.2; Supervisory Naval Architect, GS-871-12, Stowage and Fitting Branch, Code 250.3; Supervisory Naval Architect (Structures), GS-871-12, Structural (Hull) Branch, Code 250.4; Supervisory Naval Architect (Structures), GS-871-12, Structural (FDNS) Branch, Code 250.5; Supervisory General Engineer, GS-801-12, Main Propulsion Machinery (Propulsion Machinery and Fuels) Branch, Code 260.1; Supervisory Mechanical Engineer, GS-830-12, Main Propulsion Machinery (Propulsion Machinery and Fuels) Branch, Code 260.1; Supervisory Mechanical Engineer, GS-830-12, Main Propulsion Machinery (Steam Generation) Branch, Code 260.2; Supervisory Mechanical Engineer, GS-830-12, Auxiliary Machinery (Hull Machinery) Branch, Code 260.3; Supervisory Mechanical Engineer, GS-830-12, Auxiliary Machinery (Catapult and Compressed Gas) Branch, Code 260.4; Supervisory Mechanical Engineer, GS-830-12, Auxiliary Machinery (Fluid Power) Branch, Code 260.5; Supervisory Mechanical Engineer, GS-830-12, Service Piping

Branch, Code 260.6; Supervisory Mechanical Engineer, GS-830-12, Environmental Services Branch, Code 260.7; Supervisory Electrical Engineer, GS-850-12, Electrical Control Systems Branch, Code 270.1; Supervisory Electrical Engineer, GS-850-12, Electrical Application Branch, Code 270.2; Supervisory Electronics Engineer, GS-855-12, Electronics Application Branch, Code 270.3; Supervisory Electrical Engineer, GS-850-12, Electrical Installation and Special Project Branch, Code 270.4; Electronics Engineer, GS-855-12, FBM Fire Control Branch, Code 191.21; Supervisory Electronics Engineer, GS-850-12, Navigation NTDS/COMM Branch, Code 191.31; Supervisory Electronics Engineer, GS-855-12, ECM/COMM Branch, Code 191.33; Supervisory Electronics Engineer, GS-855-12, Digital Systems Branch, Code 191.51; Supervisory Electronics Engineer, GS-855-12, Fire Control Systems Branch, Code 191.52; Supervisory General Engineer, GS-801-12, Ships Planning and Coordination Branch, Code 191.53; Supervisory Industrial Engineer, GS-896-12, Refueling Facilities Section, Code 381.1; Supervisory Industrial Engineer, GS-896-12, Support Services Section A, Support Services Section B, Support Services Section C, Codes 381.2A, 381.2B, 381.2C; Supervisory Industrial Engineer, GS-896-12, Advance Planning and Arrangements Section, Code 381.3; Supervisory Industrial Engineer, GS-896-12, Methods and Preventive Maintenance Section, Code 385.2; Supervisory Industrial Engineer, GS-896-12, Production Facilities Engineering Section, Code 385.3; Supervisory Industrial Engineer, GS-896-12, Facilities Program Management Section, Code 385.4; Supervisory Industrial Engineer, GS-896-12, Waterfront Support Engineering Section, Code 385.5; Supervisory Industrial Engineer, GS-896-12, Trident Support Section, Code 386.1.

Dated, Washington, D.C.
August 15, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

August 26, 1977

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,
NATIONAL PERSONNEL RECORDS CENTER,
ST. LOUIS, MISSOURI
A/SLMR No. 881

This case involved an amended unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 900 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by not informing the Complainant of its decision to disestablish the Congressional Correspondence Office until after written instructions were sent to the supervisors and by approving the changes before any notice was sent to the Complainant. The Respondent took the position that the Complainant was given reasonable notification and ample opportunity to comment on the impact of the decision prior to its effective date and that it was willing to delay implementing the decision if the Complainant had presented any alternative proposals. The Complainant, on the other hand, maintained that bargaining over impact and implementation did not occur.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. In this regard, he found that there was opportunity for the Complainant to request bargaining concerning the impact of the decision prior to its implementation; that the Respondent met with the Complainant and explained its plan, but the Complainant offered no adverse criticism or alternative suggestions; and that the Respondent did not refuse to negotiate with respect to the impact of its decision. Nor did the Respondent's actions constitute an improper bypass or undermine the Complainant's status as the employees' collective bargaining representative.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 881

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
NATIONAL PERSONNEL RECORDS CENTER,
ST. LOUIS, MISSOURI

Respondent

and

Case No. 62-5131(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 900

Complainant

DECISION AND ORDER

On May 4, 1977, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 62-5131(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 26, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ At footnote 4 on page 6 of his Recommended Decision and Order the Administrative Law Judge inadvertently cited U.S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341 as A/SLMR No. 34. This inadvertence is hereby corrected.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
General Services Administration National Personnel Records Center, St. Louis, Missouri Respondent		
and	:	Case No. 62-5131(CA)
American Federation of Government Employees, AFL-CIO, Local Union 900 Complainant		

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For the Respondent

William Martin, Jr.
National Representative
American Federation of
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St. Louis, Missouri 63113
For the Complainant

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint and amendements filed on August 11, 23, and November 9, 1976, respectively, under Executive Order 11491, as amended, by the American Federation of Government Employees, AFL-CIO, Local Union 900, (hereinafter called the Union and/or Complainant), against the General Services Administration National Personnel Records Center, St. Louis, Missouri, (hereinafter called the Respondent and/or Activity), a Notice of Hearing to be held on January 18, 1977 was issued by the Assistant Regional Director for the Kansas City Region on November 12, 1976.

The Complaint, as amended, alleges that the Respondent violated Section 19(a)(1) and (6) of the Executive Order 11491 (herein called the Order) by reason of the following: "On May 25, 1976, Mr. J. D. Kilgore, Assistant Director for Military Records, and then Acting Director, National Personnel Records Center, provided the Union with a copy of a memorandum subject: Disestablishment of Congressional Correspondence Office dated May 25, 1976. The Union was never officially informed of the change until written instructions were sent to all supervisors. Further, the changes were approved by Mr. Kilgore before any notice was sent to the Union."

A hearing was held on January 18, 1977 on the captioned matter 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 witnesses and their demeanor and memoranda and/or briefs submitted by counsel or representative for the respective parties, I make the following findings, conclusions and recommendation:

Background Information

At the General Services Records Center in St. Louis, Missouri on July 12, 1973 there was a disastrous fire that destroyed some 17 or 18 million military personnel records. Before the fire, Congressional inquiries and correspondence were handled in the various record center branches by employees at the GS-6 level based on the level of difficulty that had been established for this type of work. 1/

Because of the voluminous increase of congressional inquiries and correspondence following the fire a Congressional Liasion Staff Office was established on April 15, 1974. Congressional inquiries and Correspondence previously handled by the various branches was done in the Congressional Correspondence Office at the National Personnel Records Center. Employees at the GS-6 level or above including those who had previously handled congressional inquiries and correspondence were transferred into the new Congressional Correspondence Office to handle the work load. When the emergency situation which prompted the establishment of the Correspondence Office as a part of NCPM ceased there was a decision made on May 10, 1976, to disestablish it effective June 7, 1976. All personnel handling the inquiries were transferred to the respective branches that had handled the work before the emergency Congressional Correspondence Office was established. It is the circumstances leading to and surrounding the decision to disestablish the Congressional Correspondence Office that lead to the Unfair Labor Practice Complaint.

Findings of Fact

1. The Complainant Local Union AFGE No. 900, is and was at all times material herein, the exclusive representative for the unit comprised of all non-supervisory employees working at the National Records Center, GSA, 9700 Page Boulevard, St. Louis, Missouri. 2/

1/ The various branches included the Air Force Reference Branch, Army Reference Branch, Navy Reference Branch and Military Operations Branch.

2/ Certain exceptions indicated not relevant to this decision.

2. On May 10, 1976, a decision to disestablish the Congressional Correspondence Office was made by Warren B. Griffin, Director, National Personnel Center after discussing the matter with the Assistant Director and other members of the staff.

3. A draft copy of a proposed directive to the staff announcing that the emergency situation which prompted establishment of the Correspondence Office as a part of NCPM no longer existed and the Congressional Correspondence Office would be disestablished effective June 7, 1976 was forwarded to the Complainant Union with a covering memorandum on May 25, 1976. The memorandum stated in part:

> "Request your comments, together with any suggestions you may care to offer by close of business June 4, 1976."

4. The Complainant Union President in a letter dated May 26, 1976 subject: Disestablishment of Congressional Correspondence Office, NCPM and NPRG Mail Routing Guide (MPR and CPR) both dated May 25, 1976 Requested "that the effective date for implementation be deferred," and suggested June 7, 1976 as an appropriate date for a meeting and discussion.

5. The Respondent's Acting Director on May 27, 1976 replied that: "The disestablishment of the Congressional Correspondence Office is a matter that we must proceed with immediately." He suggested June 1 or 2 as optional dates to "discuss procedures to be followed in reassignment of employees currently in the Congressional Correspondence Office." He further stated that as to the case working level in the proposed change to the NPRC Mail Routing Guide, the discussion of that matter can be deferred as requested. June 8, 1976 was suggested as an appropriate meeting date regarding this subject. The latter change is an issue separate and apart from the disestablishment of the Congressional Correspondence Office involved in this proceeding.

6. The consultation meeting as to the disestablishment of the Congressional Correspondence Office was arranged and held between Complainant and Respondent representatives on June 4, 1976.

7. The procedures to be followed in reassignment of employees in the Congressional Correspondence Office were discussed at the June 4, 1976 consultation meeting as well as matters of anticipated impact. 3/ It was announced at the meeting that all employees in the Congressional Correspondence Office would be transferred to other units at their current grade.

8. At the hearing, oral and documentary evidence was presented that employees in the Congressional Correspondence Office had been transferred to other branches in grade, and had continued to work in the same building and during the same hours as they previously worked. They continued to handle Congressional Correspondence on their new assignment, although they served in various branches. No adverse actions as to any of the employees who had previously worked in the Congressional Correspondence was claimed or shown.

9. The record establishes that the Complainant was afforded a reasonable opportunity at the June 4, 1976 meeting with Respondent to make meaningful input as to impact of the decision to disestablish the Congressional Correspondence Office. Further, the record establishes that the Complainant did in fact discuss impact as to the affected employees but after hearing the plan offered no comment or any alternative to management for consideration.

10. Initially, disestablishment of the Congressional Office was contemplated to occur on May 31, 1976, but was postponed to June 7, 1976 to allow time for Complainant to discuss implementation plans and impact affecting the employees.

11. The plan of implementation discussed between Respondent and Complainant at the June 4, 1976 meeting was sufficiently flexible to accommodate reasonable change had such been requested.

3/ See Respondent's Exhibit 8 relating to Memorandum of the Consultation meeting held on June 4, 1975. The memorandum was not referred to the Union but detail of events were brought out at the hearing. In this connection see Transcript pages 32, 33, 93, 94 and 95.

Discussion and Evaluation

The Complainant charges that the Respondent violated Sections 19(a)(1) and (6) of the Order by its action in disestablishing the Congressional Correspondence Unit Office without notifying the Union and not affording the Union an opportunity to make its input before written instructions were sent to Respondent's supervisors.

Section 19(a)(1) and (6) of Executive Order 11491 provides that " Agency management shall not (1) interfere with, restrain or coerce an employee in the exercise of rights assured by this Order; and (6) refuse to consult, confer or negotiate with a labor organization as required by this Order.

Section 11(a) of the Order, as amended imposes upon any Agency the obligation to meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions of unit employees.

Section 11(b) of the Order, however, makes it clear that the obligation to meet and confer (imposed by Section 11(a)) does not include matters with respect to the mission of the Agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions of employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices.

The above exception contained in Section 11(b) with respect to those normally categorized as "management perogatives" is applicable only to the initial decision or action of an Agency. Thus, as noted in the last sentence of Section 11(b) and as interpreted by the Assistant Secretary and Federal Labor Relations Council, the Agency or activity is obligated, however, to consult and confer with respect to the impact of any such "initial decision" or action on unit personnel. 4/

4/ Immigration and Naturalization Service, FLRC No. 70-A-10 (April 15, 1971); Plum Island Animal Disease Laboratory, FLRC No. 71-A-11. (July 9, 1971); Griffis Air Force Base, FLRC No. 71-A-30 (April 19, 1973); Norton Air Base A/SLMR 261 (April 30, 1973); U.S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 34 (January 9, 1974); New Mexico Air National Guard, A/SLMR No. 362 (February 28, 1974); Army Air Force Exchange Service, A/SLMR No. 451 (October 31, 1974); Federal Railroad Administration, A/SLMR No. 418 (July 31, 1974).

The Respondent had the right under Section 11(b) of the Executive Order unilaterally to close the Congressional Correspondence Office Unit in furtherance of performing its work projects and the technology utilized in performing such work. Nevertheless, an agency or activity is obligated to afford the exclusive representative a reasonable opportunity to meet and confer concerning the impact and implementation of decisions taken with respect to subjects within the ambit of Section 11(b) of the Executive Order. United States Air Force Electronics System Division (AFSC) Hanson Air Force Base and Local 975, National Federation of Federal Employees, A/SLMR No. 571 (1975). The covering memorandum to the Union attached to the May 25, 1976 announcement of the disestablishment of the Congressional Correspondence office requested comments and suggestions by the close of business on June 4, 1976. There was opportunity for the Complainant to request bargaining or consultation concerning the impact of the decision prior to implementation. The Complainant did in fact meet with the Respondent on June 4, 1976, but after Respondents plan was explained concerning the affected employees prospective assignments it offered no adverse criticism or alternative suggestions. Therefore, Respondent did not refuse to consult, confer or negotiate with respect to impact of its decision in violation of Section 19(a)(6) of the Executive Order nor did the Respondents action constitute an improper bypass or undermining of the status of its employee's collective bargaining representative in violation of Sections 19(a)(1) and (6) of the Order. Internal Revenue Service, Philadelphia Service Center, A/SLMR No. 771.

Despite the retention rights provided by Section 12(b) of the Order, 5/ management cannot escape an obligation to

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5/ Section 12(b) 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; (3) to relieve employees from duties because of lack of work or other legitimate reasons; (4) to maintain the efficiency of 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 action may be necessary to carry out the mission of the agency in situations of emergency.

bargain with a union as to procedures to be followed in disestablishing a Congressional Correspondence Office unit when employees are adversely affected or their working conditions changed or impaired. The Federal Labor Council stated in Veterans Administration Research Hospital, Chicago Illinois, 74-A-31 that the reservation of decision making and agency authority is not intended to bar negotiations of procedures to the extent consonant with law and regulations. 6/ The Assistant Secretary followed and applied this principle in Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289. 7/ In the latter case reduction in force notices had been issued by the agency without notification to the union. While conceding that the employer was not obliged to consult on the RIF decision, it was held that consultation was mandatory as to the procedures management intended to observe in choosing which employees were to be subject to the RIF action.

In this case, the announcement of the disestablishment of the Congressional Correspondence Office unit was given to the Union at about the same time as Activity staff officials were informed; the union was asked for its comments and suggestions and met with the Respondent on June 4, 1976, when procedures and impact as to the decision were outlined and discussed. The Congressional Correspondence Office which had been established in April 1974 to handle an emergency situation had served its purpose and its functions were transferred back to the branch offices that had handled such before the disastrous fire. All employees in the unit were transferred in grade and continue to handle Congressional correspondence as a part of their current duties. They continue to work the same hours and in the same building.

The evidence adduced at the hearing and the documentary exhibits submitted, in my opinion support the position of the Respondent that it afforded the Complainant the opportunity for meaningful exploration regarding impact as to disestablishment of the Congressional Correspondence Office and procedures that were to be followed as a result of the decision.

6/ See Naval Public Works Center, FLRC, 71-A-56.

7/ Also see Federal Aviation Administration, National Aviation Facilities, Experimental Center, Atlantic City, New Jersey A/SLMR No. 329.

Conclusion

In view of the foregoing, I conclude that the Complainant has not met its burden of proving by a preponderance of the evidence that the Respondent violated Sections 19(a)(1) and (6) of the Order, as alleged.

Recommendation

Upon the basis of the above findings and conclusions, I recommend that the Complaint herein against the Respondent be dismissed.

Rhea M. Burrow

RHEA M. BURROW
Administrative Law Judge

Dated: May 4, 1977
Washington, D.C.

August 26, 1977

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 HEALTH, EDUCATION, AND
WELFARE, SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS, REGION IV
A/SLMR No. 882

This case involved a petition for clarification of unit (CU) filed by the American Federation of Government Employees, AFL-CIO, Local 3627, (AFGE) seeking to clarify the status of employees designated as the Secretary to the Administrative Law Judge In Charge (ALJIC) located in each of the Activity's 28 field offices. The Activity contended that employees in said position were confidential employees and should be excluded from the AFGE's exclusively recognized unit. The AFGE contended that the position in question should remain in the unit.

The Assistant Secretary found that the Secretary to the ALJIC was a confidential employee and should be excluded from the unit. In this regard, the evidence established that the ALJICs were involved in the effectuation of the Activity's labor relations policies and that the Secretaries to the ALJICs acted as their principal secretary and, in this capacity, had custodial responsibility for labor relations files containing union-management correspondence; typed confidential memoranda from the ALJICs to the Activity concerning labor relations matters; and would be required to prepare material in connection with grievances and other labor relations matters in accordance with the directions of the ALJICs.

Accordingly, the Assistant Secretary ordered that the unit be clarified consistent with his findings.

A/SLMR No. 882

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION, AND
WELFARE, SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS, REGION IV

Activity

and Case No. 40-07640(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3627

Labor Organization-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 Robert F. Woodland, 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, American Federation of Government Employees, AFL-CIO, Local 3627, herein called AFGE, seeks to clarify the status of employees designated as the Secretary to the Administrative Law Judge In Charge (ALJIC) at 28 field offices located within the Activity. The AFGE contends that the employees involved are not confidential employees and should be included within its exclusively recognized unit. The Activity contends, on the other hand, that employees in the disputed position assist and act in a confidential capacity to the ALJIC who formulates and effectuates management policies in the field of labor relations and, therefore, they should be excluded from the exclusively recognized unit as confidential employees.

The record reveals that the AFGE was certified as the exclusive representative for all nonprofessional employees of the Activity's field offices on May 26, 1976. 1/ The mission of the Activity is to conduct hearings and to render appeals decisions for the Social Security Administration pursuant to Title II of the Social Security Act. The Bureau of Hearings and Appeals (Bureau) is a component of the Social Security Administration, which is, in turn, a component of the Department of Health, Education, and Welfare. The Bureau is headed by a Director, and is organized into ten Regions, including the Activity, each headed by a Regional Administrator. The Activity, headquartered in Atlanta, Georgia, encompasses eight states and has 28 field offices. Each of the field offices is headed by an ALJIC, and has one employee designated as the Secretary to the ALJIC. The field offices vary in size from nine Administrative Law Judges and 30 staff personnel, to two Administrative Law Judges and six staff personnel.

The evidence establishes that the ALJICs effectuate management policies in the field of labor relations. Thus, they are authorized to adjust grievances at the second step; they have overall personnel and administrative responsibilities for their field offices; they have been consulted by the Activity on collective bargaining agreement provisions proposed by the AFGE; they are the reviewing officials in the field offices for performance appraisals; and they establish certain working conditions for their respective field offices.

The record reveals that the secretaries to the ALJICs perform a variety of administrative and clerical duties for the ALJICs including acting as their principal secretary. In this regard, among other things, the record reveals that the secretaries have custodial responsibility for labor relations files containing union-management correspondence; they type confidential memoranda from the ALJICs to the Activity concerning labor relations matters; they prepare correspondence concerning employee performance and discipline; and they would be required to prepare material in connection with grievances and other labor relations matters in accordance with the directions of the ALJICs.

Under these circumstances, I find that employees designated as the Secretary to the ALJIC at each of the 28 field offices herein are confidential employees inasmuch as they assist and act in a confidential capacity to officials who are involved in effectuating management policies in the field of labor relations. 2/ Thus, as noted above, employees in this classification type confidential memoranda concerning labor relations matters for the ALJICs and would be required to prepare material in connection with the ALJICs' handling of employee grievances and other labor relations matters. It has been held previously that an employee who is the principal secretary and acts in a confidential capacity to a person who is involved in the formulation and/or effectuation of management policies in the field of labor-management relations is a confidential employee. 3/ In the instant case, the evidence establishes that the

1/ The certified unit is described as: "All nonprofessional employees employed at field offices of Region IV, Bureau of Hearings and Appeals excluding professional employees, employees engaged in Federal personnel work in other than a clerical capacity, confidential employees, management officials, and supervisors as defined in the Order."

2/ Cf. Department of Housing and Urban Development, Federal Housing Administration, Fargo Insuring Office, Fargo, North Dakota, A/SLMR No. 645, and Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

3/ See Federal Aviation Administration, Airway Facilities Sector 37, Tampa, Florida, A/SLMR No. 647; Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, (Continued)

ALJICs are involved in the effectuation of the Activity's labor-management relations policies, and that the secretaries to the ALJICs act as their principal secretary and perform confidential duties for them with respect to labor relations matters. Accordingly, I shall exclude the Secretary to the ALJIC in each of the Activity's 28 field offices from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, AFL-CIO, Local 3627, was certified on May 26, 1976, be, and it hereby is, clarified by excluding from said unit the employees designated as the Secretary to the Administrative Law Judge In Charge in each field office of Region IV of the Bureau of Hearings and Appeals.

Dated, Washington, D.C.
August 26, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

3/ Boston Region, District and Branch Offices, A/SLMR No. 562; and Department of Health, Education and Welfare, Social Security Administration, Bureau of Hearings and Appeals, Puerto Rico, A/SLMR No. 625.

August 26, 1977

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,
CANTEEN SERVICE, VA HOSPITAL,
PHOENIX, ARIZONA
A/SLMR No. 883

This case involved an unfair labor practice complaint filed by Local 2382, American Federation of Government Employees, AFL-CIO, (AFGE) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by discrimination and harrassment of Marie Whitecotton because of her union activities and participation in the bargaining unit as Steward and Women's Coordinator for the AFGE.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (2) of the Order. In this regard, the Administrative Law Judge found, based on the record and pursuant to his credibility resolutions, that there was no evidence of anti-union animus by management and that, although Whitecotton's discharge did not appear to be free from unfairness, her union activities did not appear to have had a part in the Respondent's actions toward her.

The Assistant Secretary, citing his policy of not disturbing credibility resolutions of Administrative Law Judges unless the preponderance of all the relevant evidence established that such resolutions clearly are incorrect, adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed.

A/SLMR No. 883

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
CANTEEN SERVICE, VA HOSPITAL,
PHOENIX, ARIZONA

Respondent

and Case No. 72-6081(CA)

LOCAL 2382, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On April 4, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order 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, 1/ conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that, the complaint in Case No. 72-6081(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 26, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ The Respondent excepted to certain credibility findings made by the Administrative Law Judge. In Navy Exchange, U.S. Naval Air Station, Quonset Point, Rhode Island, A/SLMR No. 180, the Assistant Secretary held that as a matter of policy he would not overrule an Administrative Law Judge's resolution with respect to credibility unless the preponderance of all the relevant evidence established that such resolution clearly was incorrect. Based on a review of the record in this case, I find no basis for reversing the Administrative Law Judge's credibility findings.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

VETERANS ADMINISTRATION
CANTEEN SERVICE, VA HOSPITAL,
PHOENIX, ARIZONA
Respondent : Case No. 72-6081

and

LOCAL 2382, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
Complainant

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For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISON AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated May 5, 1976 and filed May 10, 1976. The complaint alleged that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order by discrimination and harassment of Marie Whitecotton "because of her Union activities and participation in the bargaining unit as Steward and Women's Coordinator for AFGE Local 2382 -- but not limited thereto." On June 2, 1976 the Respondent responded to the complaint. It denied any violations, made a number of affirmative allegations, and asserted that the complaint should be dismissed for lack of sufficiency.

On September 22, 1976 the Regional Administrator issued a Notice of Hearing to be held November 18, 1976 in Phoenix, Arizona. No action was taken on the motion to dismiss. Hearings were held in Phoenix on November 18 and 19, 1976. Both parties were represented by counsel who examined and cross-examined witnesses and introduced exhibits. Both parties made closing arguments and filed timely briefs.

Preliminary Matter

Accompanying the Regional Administrator's Notice of Hearing was his "scope letter", setting forth to the parties his personal advice and suggestions on the issues to which he suggested the parties should adduce evidence. The "scope letter" in this case is not in the record but the typical such letter, probably all such letters, conclude with the statement that his advice was not meant to be all inclusive of the evidence that might be introduced and that the parties could develop other relevant evidence.

On September 29, 1976 the Respondent wrote to the Regional Administrator. It stated that while it understood the scope letter was not determinative of what the issues were, it was disturbed by the Regional Administrator including two issues in the scope letter because they were not raised by the complaint, and to prepare to defend on those issues would generate additional costs in time and money. It therefore moved that the Regional Administrator reconsider his letter and delete his reference to the two issues mentioned in his letter that were not within the ambit of the complaint.

On October 15, 1976 the Regional Administrator referred that Motion to the Administrative Law Judge. 1/

At the hearing the Respondent again urged its motion. I denied the motion on the ground that the Regional Administrator's scope letter set forth his personal views and I could not by my fiat declare that the Regional Administrator's views were changed. 2/

Facts 3/

The Complainant, Local 2382, has been since 1964 the certified exclusive representative of two units of the V.A. Hospital in Phoenix. One of the units consists of the professional employees of that Hospital and the other consists of the non-professional employees; both units have the usual exclusions. The Canteen Service is a Facility of the Hospital. There are about 500 employees in the non-professional unit. About 14 of them are employed in the Facility.

On September 14, 1975 Marie Whitecotton began employment as a probationary employee as a Sales Clerk in the Canteen Service, and remained a probationary employee throughout her employment to April 9, 1976. Her principal duty was to operate a cash register but she also had other duties. 4/ There were two cash registers in the canteen, one mechanical and the other manual. The manual register did not add the prices; the drawer opened when a single item was registered and the highest price it could register was $5.99; if more than one item was purchased through that counter the various prices were added with pencil and paper and only the total registered. Mrs. Whitecotton preferred working on the manual register even though the cash drawer frequently stuck and the register sometimes had to be banged for the drawer to open and there was sometimes difficulty in closing the drawer. Because she preferred working on it, she was usually assigned to that register. Mrs. Whitecotton never complained that the register malfunctioned although she was supposed to report any defective equipment.

1/ Exhibit ALJ-1.
2/ Tr. 13, 15, 16.
3/ An unusually large proportion of the factual matters in this case was sharply controverted. In addition, about three of the numerous witnesses were not entirely credible, and about an equal number were somewhat confused.
4/ Exh. C-1B.

After working in the canteen a while Whitecotton asked Carol Schiefelbein, a clerk in the office of the Canteen Officer, by telephone from her home, about the union and Schiefelbein advised her to stay away from it because it was trouble. Nevertheless, in November 1975, Whitecotton became a member of the Complainant. Later, on December 10, 1975, Schiefelbein was promoted to the position of Administrative Assistant to the Canteen Officer, a supervisory position. In December 1975 Whitecotton became the Complainant's Women's Educational Director. Her activities as such were entirely intra-union and did not involve any contacts with the Respondent.

On December 18, 1975 Whitecotton attended a one-day conference of union Women's Educational Directors in Scottsdale, Arizona, a suburb of Phoenix. On her return she planned to attend a similar conference scheduled to be held February 13-15, 1976 in Tucson and asked for annual leave for that period. She was told she could have such leave if nothing intervened to prevent it. (She did not attend that conference because of a disabling injury sustained in January 1976.)

Late in December, 1975 Whitecotton was made the union steward for the Canteen Service. She did not in that capacity have any dealings with the Respondent; nothing arose from then until her termination that called for her to take up anything with management nor does the record indicate she did anything else in that capacity. Although the collective agreement of the parties called for the Complainant formally to notify the Respondent of the appointment of a steward within three days of the appointment, the Complainant did not give such notification with respect to Whitecotton until April 5, 1976, more than three months later, after she had been given notice that her employment was terminated effective April 9, 1976. In February, 1976 the President of the Complainant told an Employment-Relations Specialist in the Personnel Office that Whitecotton had become a steward. There is no evidence, and I do not find, that such information was communicated by the Specialist to the Personnel Officer or to the Canteen Officer or to anyone else.

Michael LeMeire was the Respondent's Canteen Officer from June, 1974, to July, 1976 when he was transferred to a similar position in the Los Angeles V.A. Hospital. He was absent on extended sick leave from February 1, 1975 to about September 9, 1975. During that period he was a patient in the Hospital and maintained some intermittent contact with the Canteen Service. On his return he employed Whitecotton as a Sales Clerk. A couple of days after Whitecotton began her employment on September 14, 1975, Le Meire called a meeting of all employees

in the Service so that he could meet the new employees and try to explain how the operation was run. Whitecotton testified that at that meeting LeMeire suggested that if any employee had a labor relations problem he would appreciate it if the employee came to him before going to "the little red building" which suggestion, Whitecotton understood to mean, before going to the union with it. The President of Local 2382, Basil Reynolds, worked in research in a one-story red brick building; the Hospital building is white. LeMeire denied having made such statement. None of the other witnesses, regardless of whether they testified on behalf of the Complainant or the Respondent, had ever heard, prior to the hearing in this case, the expression "the little red building" as a reference to the union President or the place he worked. I do not find that LeMeire made that statement.

When Whitecotton began her employment she first received on-the-job training in operation of the cash registers, with an experienced employee running the register with Whitecotton observing and then Whitecotton performing the sales clerk's duties with the experienced employee observing. This was done for several days a few hours each day. On October 2, 1975 a formal training session was held on the functions and duties of a sales clerk, and training sessions were held thereafter from time to time, generally weekly.

The accepted, tolerable range of inaccuracy in operating the cash registers was to have a discrepancy in the amount rung on a register and the cash received of $3.00 per week, either under or over. The procedure for determining errors in cash-register operation, and for attributing discrepancies to a particular employee, was substantially less than necessary to assure that blame for discrepancies was properly placed. For example, the operation of a register might change hands during the day, as on lunch breaks and other breaks, but no check was made at such times and the employee primarily responsible for operation during a particular period was considered solely responsible for discrepancies during that period. Thus an employee might have operated a register only 70% or 80% of the time during a period yet was considered responsible for all the discrepancy during that period. Also, the method of checking on the accuracy of the checker was not always reliable. During LeMeire's long absence on sick leave the Personnel Department had made a study of the operation of the canteen because of complaints by employees and the union and had found that improvement should be made in individual accountability, but on LeMeire's return he made no change in procedure. He saw no need for change.

Almost from the beginning of Whitecotton's employment LeMeire, applying the method of determining accuracy and reliability described above, was dissatisfied with Whitecotton's performance. On October 16, 1975 he found her to have been in error by $11.82, far beyond tolerable limits, and counselled her on cash-register operation. On December 17 he found a shortage of $19.10. There were other discrepancies of more that $3.00 in a week, either over or under the correct amounts.

In November 1975 Whitecotton was injured on the job but managed to keep working with the help of medication. In January 1976 she was again injured by straining her back while performing non-register duties and was disabled and went on leave.

In February 1976 Whitecotton returned but worked only four and a half hours and went back on sick leave. Since her January disability she had contracted a bladder infection and had need to go to the restroom more often that was normally necessary. She told Schiefelbein her problem. She testified that Schiefelbein told her she could go to the restroom only during her two coffee breaks and her lunch break. I find that Whitecotton believed that that was Schiefelbein's instruction but that she misunderstood Schiefelbein. Schiefelbein denied having given such instructions. There had been a problem of operators of cash registers leaving the register unattended without telling anyone where they were going. Schiefelbein testified that upon Whitecotton's telling her of her need for frequent use of the restroom she told her that apart from her regular breaks she should not leave the register unattended without telling someone where she was going. Although Schiefelbein was not entirely credible on some other matters, with respect to this matter I credit Schiefelbein's testimony.

Whitecotton returned to work on March 15, 1976. She was told by LeMeire and Schiefelbein not to do any heavy lifting because of her previous back injury but just to work at the check-out counter. On March 16 her register was checked and a discrepancy of $10.22 was found. The next day a discrepancy of $2.00 was found. On March 17 LeMeire issued a memorandum to Whitecotton advising her of the foregoing with respect to the cash register for which she was "primarily responsible", that such operation "will not be tolerated", and that if Whitecotton needed assistance in improving her cash register operation she should come to LeMeire for help. The memorandum advised Whitecotton also that she did not cooperate sufficiently with the other employees of the canteen and was not a member of the team; that such had been the situation before her extended sick leave

but it had become worse upon her return. 5/ Whitcotton spoke to LeMeire about the memorandum and asked him who had complained about her lack of cooperation, but he did not tell her.

The next day, March 18, LeMeire issued another memorandum to Whitecotton. It recounted the previous day's memorandum. It stated also that at the beginning of the day on March 18 her cash register was $4.10 over, at closeout at noon it was $7.99 over, that a discrepancy of $3.00 in a week was the limit of tolerance, that a discrepancy of $3.89 in three hours was "unimaginable", and that if her cash register operation did not "drastically improve immediately" he would be forced to terminate her government service. 6/ The memorandum stated also that another employee had complained about her attitude and that her attitude "will be tolerated no longer", and that if it did not improve she would be removed from government service.

When Whitecotton was appointed a steward in December she was given a steward's badge showing that she was a steward, but she did not wear it until March 19, after she had been issued the two warnings.

On March 23, 1976, after several more spot checkouts of her cash register, Whitecotton was given a memorandum recounting her prior cash register performance, and reminding her that to be retained as a probationary employee her job performance must be satisfactory. It stated that subsequent checkouts had shown additional large discrepancies, that her performance was unsatisfactory, and that because of her inability to operate a cash register satisfactorily her appointment would be terminated April 9, 1976. 7/ No mention was contained in this memorandum of Whitecotton's lack of cooperation with her fellow employees.

On March 26, after the letter of termination and before its effective date, the Complainant, in accordance with Section 203.2(a)(1) of the Regulations, served an unfair-labor-practice charge on the Respondent. Two conferences were held on the charge. At both of them the Complainant asked LeMeire for the names of the employees who complained of Whitecotton's lack of cooperation but LeMeire did not respond.

5/ Exh. C-2
6/ Exh. C-3
7/ Exh. C-4

Discussion and Conclusions

The ultimate question in this case is not whether Whitecotton's performance on the job merited or did not merit the termination of her probationary appointment. The critical question is whether she was discriminated against, as alleged, because of her union activities.

The Complainant correctly states that to find a violation of Sections 19(a)(1) and (2) in this case it must be found that (1) Whitecotton was engaging in union activity, (2) the Respondent had knowledge of her union activity, (3) the Respondent showed animus against her union activity or against union activity in general, and (4) the Respondent took action against her because of her union activity. 8/ There can be little doubt that the Respondent's method of checking the cash registers and attributing responsibility for discrepancies to individual employees left much to be desired and could unfairly attribute responsibility to the wrong employee, and that the Respondent's Personnel Office was aware of this deficiency, but any such unfairness is unrelated to union activities. Let us take up the four elements of the violation alleged in this case as the Complainant sets them forth.

1. There is no doubt that Whitecotton engaged in union activities. At the very least she was a member. Later she also became Women's Educational Director. Her only activity in that capacity shown by the record is attendance at a one-day conference on a Saturday in Scottsdale, Arizona, a suburb of Phoenix. Even if she engaged in other activities in that capacity the parties agree that it was entirely intra-union and involved no contacts with management. Still later she became a steward. The record does not indicate any activity at all in that capacity; at least it is agreed by the parties that in that capacity she had no dealings or contacts with management. Such "activities" are not likely to incur the displeasure of management although it is conceivable that they might.

2. I conclude, although the evidence is conflicting, that Schiefelbein knew that Whitecotton had become a member of the union. I conclude also that Schiefelbein knew that Whitecotton was going to attend the Scottsdale conference. It is more doubtful that LeMeire knew, at any time prior to

8/ Complainant's Brief, p. 1.

March 19, 1976, that Whitecotton engaged in her union "activities" but I conclude, on the basis of tenuous and contradictory evidence, that he did. I do not mean that he gave false testimony. Some of his answers were carefully couched to conform to literal truth in response to the literal question, one of the factors that leads me to the conclusion that he knew before March 19 that Whitecotton was a union steward and hence a union member. No one else in management was shown to have known of Whitecotton's union "activities" except that, as I have found above, in February 1976 an Employment-Relations Specialist in the Personnel Office was told in the course of a conversation that Whitecotton had become a steward. However, I expressly did not find that the Specialist communicated that information to anybody.

3. With respect to anti-union animus by management, the evidence is quite skimpy. Before Schiefelbein became part of management as Administrative Assistant to LeMeire, when she was only a clerk in LeMeire's office, on two separate occasions, when asked by another employee in the canteen whether the union was worth joining, she advised the fellow employee who made the inquiry to stay away from the union, that it was trouble. There is no evidence that her attitude continued after she became Administrative Assistant and no evidence that it changed. In the absence of evidence that it changed, I conclude that it continued.

With respect to LeMeire, the evidence concerning any union animus is not only contradictory but even if the union's evidence is believed is too tenuous to find animus on his part. Whitecotton testified, and LeMeire denied, that when Whitecotton, in December 1975 asked LeMeire for leave in February 1976, LeMeire asked what it was for, she told him it was because of a meeting of Educational Directors, and he asked what kind of education she was teaching. When her counsel asked her what was derogatory to the union in such a remark she testified it was because he had a smirk on his face when he said it. 9/ LeMeire denied having had that exchange. But even if we accept Whitecotton's version, a conclusion of union animus on the part of LeMeire can hardly be predicated on Whitecotton's interpretation of an expression on LeMeire's face when he uttered words otherwise innocuous, especially when that is the only incident that could even be construed to show animus on the part of LeMeire. Even if he

9/ Tr. 40

in fact smirked it could have been for innumerable reasons other than harboring anti-union animus.

4. I do not conclude that the termination of Whitecotton's employment was motivated by her union activity or that she was harassed because of her union activity.

The only person in management shown to have union animus was Schiefelbein, but she was shown only to have had it before she became part of management and she did not have firing authority. Whitecotton's "union activity", so far as management was concerned, was minimal. There is nothing to indicate she was a militant member or that if she was that management knew it. As Women's Educational Director her activities did not bring her in conflict or even in contact with management; it was a purely intra-union activity. There was no evidence of any activity at all by Whitecotton as a union steward after she accepted her appointment as such in December 1975; the witnesses on both sides testified that she had no dealings or contact with management as a union steward, and there was no contradictory evidence. I necessarily conclude that there were no such dealings or contact. Rather than terminating her employment because of such activity one would suppose management, even a management hostile to unionism, would welcome such a quiescent union steward. In any event, it certainly does not indicate that her union acitvity played any part in the decision to terminate her employment.

Furthermore, there is no evidence that any other members of the union were discriminated against. There were other members, at least one in the canteen, and she did not even allegedly suffer discrimination. That other employee in the canteen who was a union member had her dues checked off; Whitecotton did not.

In sum, although Whitecotton's discharge does not appear to be free from unfairness, her union activities do not appear to have had a part in such unfairness or her subsequent termination. I reach this conclusion for the reasons stated above but primarily because her activities for the union did not cause her to have any dealings or contact with management and so far as the record shows consisted exclusively of attending a one-day conference on a weekend in a suburb of the City in which she was employed. The unfair treatment of an employee who is a union adherent and steward gives rise to suspicion,

but suspicion is not enough to support a violation of the Executive Order. 10/ Here the unfairness seems to have been uniformly imposed and to have had no relationship to union activity. The Complaint should be dismissed.

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: April 4, 1977
Washington, D.C.

10/ Interstate Commerce Commission, A/SLMR No. 773, pp. 16-17 of ALJ Decision.

August 29, 1977

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF SECOND SUPPLEMENTAL DECISION AND ORDER
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. 884

On July 29, 1976, the Assistant Secretary issued a Supplemental Decision in A/SLMR No. 687, pursuant to the Federal Labor Relations Council's (Council) Decision on Appeal in FLRC No. 74A-41, finding, in essence, that the separately petitioned for units were appropriate for the purpose of exclusive recognition under the Order.

On July 20, 1977, the Council issued its Decision on Appeal of the Assistant Secretary's Supplemental Decision in FLRC No. 76A-97, finding, in essence, that neither of the petitioned for units are appropriate for the purpose of exclusive recognition under the Order.

Based on the Council's holding in FLRC No. 76A-97 and the rationale contained therein, the Assistant Secretary ordered that the Certifications of Representative previously issued to Local 73, National Federation of Federal Employees, and Local 3426, American Federation of Government Employees, AFL-CIO, be revoked, and that the petitions be dismissed.

A/SLMR No. 884

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(RO),
A/SLMR Nos. 372 and 687,
FLRC Nos. 74A-41 and
76A-97

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

Activity

and

Case No. 53-6733(RO),
A/SLMR Nos. 372 and 687,
FLRC Nos. 74A-41 and
76A-97

LOCAL 3426, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

SECOND SUPPLEMENTAL DECISION AND ORDER

On July 29, 1976, the Assistant Secretary issued a Supplemental Decision in the above-captioned cases in A/SLMR No. 687, pursuant to the Federal Labor Relations Council's (Council) Decision on Appeal of

1/ Subsequent to the filing of the appeal in FLRC No. 76A-97, the name of the Agency involved was changed to Defense Logistics Agency.

the subject cases in FLRC No. 74A-41. In his Supplemental Decision, the Assistant Secretary found, in essence, that the separately petitioned for units were appropriate for the purpose of exclusive recognition under the Order. 2/

Thereafter, on July 20, 1977, the Council issued its Decision on Appeal of the Assistant Secretary's Supplemental Decision in the subject cases in FLRC No. 76A-97. In essence, the Council concluded that neither of the petitioned for units involved herein are appropriate for the purpose of exclusive recognition under the Order, and it remanded the cases to the Assistant Secretary for action consistent with its decision.

Based on the Council's holding in the instant case and the rationale contained therein, I shall order that the Certifications of Representative previously issued to the Petitioners involved herein be revoked, and that the petitions herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the Certifications of Representative issued in Case Nos. 53-6652(RO) and 53-6733(RO) be, and they hereby are, revoked, and that the petitions in Case Nos. 53-6652(RO) and 53-6733(RO) be, and they hereby are, dismissed.

Dated, Washington, D.C.
August 29, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

2/ Pursuant to the Decision and Direction of Elections in A/SLMR No. 372, I have been administratively advised that Certifications of Representative were issued by the Area Administrator to the Petitioners involved herein.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio, and Columbus, Ohio

and

Local 3426, American Federation of Government Employees, AFL-CIO

A/SLMR No. 687
FLRC No. 76A-97

and

Local 73, National Federation of Federal Employees

DECISION ON APPEAL FROM
ASSISTANT SECRETARY SUPPLEMENTAL DECISION

Background of Case

This appeal arose from a supplemental decision of the Assistant Secretary in which he found that two proposed bargaining units in the Defense Supply Agency,1/ Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, were appropriate and left undisturbed certifications previously issued to Local 3426, American Federation of Government Employees (AFGE) and Local 73, National Federation of Federal Employees (NFFE), respectively.

The Assistant Secretary's decision and supplemental decision herein grew out of separate petitions filed by AFGE and NFFE seeking to represent units of certain employees of field activities of the Cleveland DCASR located in Akron and Columbus, respectively. The Cleveland DCASR is one of nine regions of the Defense Supply Agency (DSA or the agency), all of which provide contract administration services and support for the Department of Defense, as well as other Federal agencies. The Cleveland DCASR covers Ohio, Kentucky, Michigan, western Pennsylvania, and Canada. It consists of a headquarters organization and field activities which are divided into five Defense Contract Administration Services Districts (DCASD's)—Detroit, Cincinnati, Grand Rapids, Dayton, and Cleveland—and nine Defense Contract Administration Services Offices (DCASO's) located in Toledo, Akron, Columbus, Ottawa and at five privately owned manufacturing plants. The field activities perform basic mission functions of the region

1/ Subsequent to the filing of this appeal, the name of the agency was changed to Defense Logistics Agency.

in their respective geographic areas. Generally, the DCASD's have administrative responsibility for the activities of the DCASO's. Approximately 2,000 civilian employees are employed throughout the Cleveland DCASR. All of the employees of the region are subject to uniform personnel policies and practices established at regional headquarters. In addition to units of 69 and 65 nonprofessionals respectively in the Akron and Columbus DCASO's, which are the subject of the instant case, there were, at the time of the Assistant Secretary's supplemental decision, five other exclusive bargaining units within the region: a unit composed of nonprofessional employees in headquarters and a plant DCASO in Cleveland; a unit of DCASR employees in three counties in the states of Ohio and Pennsylvania; a unit of employees in the Cincinnati DCASD; a unit in the Toledo DCASO; and a unit composed of employees assigned to the Detroit DCASD, the Grand Rapids DCASD, and the Ottawa DCASO.

In March 1974, the Assistant Secretary found appropriate the separate units in the Akron, Ohio DCASO and in the Columbus, Ohio DCASO sought by AFGE and NFFE, respectively.[2/] (Elections were thereafter conducted in the units involved and certifications of representative were issued to AFGE and NFFE.) The Council subsequently set aside that decision, concluding that in reaching his decision the Assistant Secretary had relied on an erroneous interpretation and application of Merchant Marine,[3/] and remanded the case to him for reconsideration and disposition consistent with its decision. Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80. In that decision, the Council further stated that the Assistant Secretary, upon reconsideration, should carefully examine the existing regulatory framework of DSA, including the DCASR's, and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) of the Order[4/] could be properly applied. Moreover, the Council stated that in

2/ Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Columbus, Ohio, and Akron, Ohio, A/SLMR No. 372 (Mar. 25, 1974).

3/ United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 210 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30].

4/ Section 10(b) provides, in pertinent part, that:

> A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations.

so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838[5/] "were not designed to render fragmented units appropriate."

In this regard, the Council referred to section V.1. of the Report accompanying E.O. 11838 for the proposition that the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units.[6/] The Council stated that those recommendations (which were adopted by the President) had as their principal purpose "to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program." The Council quoted from section IV of the Report accompanying E.O. 11838 which concluded:[7/]

> We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.

Upon reconsideration, the Assistant Secretary found, based on the entire record, "consistent with the earlier determination herein, that the units sought are appropriate for the purpose of exclusive recognition under the Order." In so ruling, the Assistant Secretary determined that the employees in each of the claimed units share a clear and identifiable

5/ Section 11(a) provides, in pertinent part, as follows:

> Sec. 11. Negotiation of agreements. (a) 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 for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. [Emphasis indicates material added by E.O. 11838, February 6, 1975.]

6/ Labor-Management Relations in the Federal Service (1975), at 38.

7/ Id. at 37.

community of interest separate and distinct from other employees of DCASR Cleveland. Further, noting the Council's previous decision in these cases (FLRC No. 74A-41, supra) as well as the Council's Tulsa AFS decision,[8/] the Assistant Secretary found that the claimed units would promote effective dealings and efficiency of agency operations, and that agency management's contentions to the contrary were "at best, conjectural and speculative and . . . not supported by the record herein."

In finding that the units sought would promote efficiency of agency operations, the Assistant Secretary, citing his decision in Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559 (Sept. 16, 1975), rejected the agency's argument that such units would result in fragmentation of the region and increased costs and inconvenience because the administration of personnel and labor relations policies was centralized at region headquarters. In so ruling, he stated that the agency's argument "related more to the appropriateness of the broader unit, rather than to the potential adverse impact resulting from the establishment of the claimed units upon the efficiency of agency operations," and noted further the absence of any countervailing evidence that the already-existing less than regionwide units in the Cleveland DCASR have failed to promote the efficiency of the agency's operations. Similarly, in finding that the claimed units would promote effective dealings, the Assistant Secretary again cited the absence of countervailing evidence regarding any lack of effective dealings experienced in the other, less than regionwide units already in existence in the Cleveland DCASR, and noted further that, subsequent to the Assistant Secretary's initial decision herein (A/SLMR No. 372), the chief of the Akron DCASO negotiated a complete agreement which was approved by the Regional Commander, and that the chief of the Columbus DCASO was in the process of negotiating a complete agreement.

In conclusion, the Assistant Secretary, again citing and relying upon his decision in Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, supra, stated that, in his view, the foregoing determination was not inconsistent with the expressed policy of the Report accompanying Executive Order 11838:

> When Section 11(a) of the Order is considered in conjunction with the principle set forth . . . in the Preamble to the Order that efficient administration of the Government is benefited by employee participation in the formulation and implementation of personnel policies and practices affecting conditions of employment, it is evident that the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to

8/ Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

> these matters, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

Accordingly, the Assistant Secretary left undisturbed the certifications previously issued to AFGE Local 3426 in Akron and to NFFE Local 73 in Columbus.

The Defense Supply Agency appealed this decision to the Council. Upon consideration of the agency's petition for review, the Council determined that a major policy issue is presented by the supplemental decision of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). None of the parties filed a brief on the merits. Pursuant to section 2411.16(b) of the Council's rules, the Assistant Secretary intervened in the case, becoming a party to the proceedings, and filed a brief. The Council, pursuant to section 2411.52 of its rules, granted the agency and unions leave to file supplemental arguments in response to the brief of the Assistant Secretary. The agency filed supplemental arguments.

Opinion

As previously described, the Assistant Secretary found in his supplemental decision that separate units of 69 and 65 nonprofessional employees at two DCASO's within the Cleveland DCASR were appropriate for the purpose of exclusive recognition, relying substantially upon his reasoning and conclusion in Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559. The major policy issue raised herein is whether the instant decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b).

On December 30, 1976, the Council issued its consolidated decision in 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, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, FLRC No. 75A-128; Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, FLRC No. 76A-4 (Dec. 30, 1976), Report No. 119, which presented, in a similar factual setting, the identical major policy issue involved in the instant case. In its consolidated decision, herein referred to as the consolidated DCASR decision or cases, the Council set aside and remanded the decisions of the Assistant Secretary. The Council concluded that the Assistant Secretary's decisions therein

finding appropriate and directing an election in each of three separate units in the San Francisco DCASR were inconsistent with the purposes of the Order and, further, that equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order would dictate a finding that none of the units sought constituted a unit appropriate for purposes of exclusive recognition under the Order.

The Assistant Secretary, as intervenor in the instant case, requests that the Council reconsider its decision in the consolidated DCASR decision and urges that the Council let stand the two disputed unit certifications previously issued in the Cleveland DCASR. The Council has carefully considered the entire record in the case, including the brief of the Assistant Secretary and the views of the agency in response thereto. The Council hereby reaffirms the principles enunciated in the consolidated DCASR decision and, for the reasons fully explicated by the Council in that decision, which are equally applicable herein, finds that the Assistant Secretary's supplemental decision in the instant case is inconsistent with and fails to promote the purposes and policies of the Order, especially those reflected in section 10(b) and, further, that neither of the units sought by the unions is appropriate for purposes of exclusive recognition under the Order.9/

The Council, in response to matters discussed by the Assistant Secretary in his brief, wishes to amplify in a number of respects the policies and principles enunciated in the consolidated DCASR decision and applied in the present case:

1. Responsibility of the Assistant Secretary to develop a complete evidentiary record.

In Tulsa AFS, the Council stated (at 7-8):

9/ In so concluding, the Council must disagree with the Assistant Secretary's reliance in his supplemental decision upon the course of the parties' negotiations since his original decision and direction of elections in A/SLMR No. 372 as a factor to support his finding that the claimed units will promote effective dealings. Apart from other considerations, it is contrary to the purposes of the Order, in the Council's opinion, to require agency management to meet and confer in good faith with the unions certified as a result of the Assistant Secretary's decision and direction of elections and then to use the product of such negotiations to support the original appropriate unit determination, particularly where agency management's only recourse would be to refuse to meet and confer with the unions in good faith and thereby risk an unfair labor practice finding. See Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, 1 FLRC 473 [FLRC No. 72A-30 (July 25, 1973), Report No. 42].

> The appropriate unit determination process is non-adversary in nature. It is designed to ensure that any unit found appropriate will provide a clear and identifiable community of interest among the employees involved, and will promote effective dealings and efficiency of agency operations. Before making a final decision concerning the appropriateness of a particular unit, therefore, the Assistant Secretary must develop as complete an evidentiary record as possible regarding each of the three criteria and must carefully consider and evaluate that evidence. The integrity and fairness of the process under the Order demands no less.
>
> Where the Assistant Secretary believes that the evidence furnished by the parties is not sufficient to enable him to affirmatively determine that a particular unit will satisfy the three appropriate unit criteria of section 10(b), the Assistant Secretary must actively solicit such evidence from the parties in order to develop the requisite record. Where the parties fail or are unable to respond to the Assistant Secretary's solicitation, the Assistant Secretary will have to base his decision on the information available to him, making the best-informed judgment he can under the circumstances, keeping in mind, of course, the requirement that any unit found appropriate must meet the tests of section 10(b) of the Order.

Thus, the Council noted that parties to a representation proceeding are responsible for providing the Assistant Secretary with all information relevant to the appropriate unit criteria that is within their knowledge and possession, but emphasized that the Assistant Secretary must actively solicit such evidence as necessary to enable him to make a fully-informed judgment as to whether a particular unit will satisfy each of the three 10(b) criteria. In this regard, the Council further stated in Tulsa AFS (at 10 n. 8):

> [T]here is a need for a sharper degree of definition of the criteria of effective dealings and efficiency of agency operations to facilitate both the development and presentation of evidence pertaining to those criteria by agencies and labor organizations, and the qualitative appraisal of such evidence by the Assistant Secretary in appropriate unit determinations. As he has done with the community of interest criterion, therefore, the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. In this way, each of the policy goals to be achieved in unit determinations will have an equal degree of precision and, hopefully, will receive the necessary and desirable equality of emphasis in representation proceedings.

The Assistant Secretary, in finding appropriate one of the units sought in the consolidated DCASR cases, had particularly noted:

> . . . the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements . . . .

In its consolidated DCASR decision, the Council dealt with this statement by relying on the requirements articulated in Tulsa AFS and found (at 22-23) that:

> [A] review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations." While the testimony and arguments advanced by the activity as to why the proposed unit would not promote effective dealings and efficiency of agency operations may not have provided the Assistant Secretary with a sufficient basis on which to make a determination, as we have indicated, the development of such evidence does not stop with the parties. It is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; he did not do so here.
>
> [T]he Assistant Secretary may not rely upon "the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations" in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit. Rather, as we have previously emphasized, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each of the 10(b) criteria. Reliance upon a lack of evidence fails to satisfy the requirement in the Order that the Assistant Secretary make such an affirmative determination.[10/] [Footnote omitted and footnote added.]

10/ The Council's decision in Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region and Weather Service Offices (Bismarck, North Dakota; Fargo, North Dakota; St. Cloud, Minnesota; and International Falls, Minnesota), A/SLMR No. 331, FLRC No. 74A-16 (July 21, 1975), Report No. 77 [hereinafter referred to as National Weather Service] is not to the contrary. In National Weather

(Continued)

Accordingly, in making an appropriate unit determination, the Assistant Secretary is not required to develop evidence on behalf of either party Rather, the decisions of the Council, including the consolidated DCASR decision, emphasize the nonadversary nature of the Assistant Secretary's proceedings to determine the appropriateness of units and stress the affirmative role of the Assistant Secretary to develop as complete a record as possible in order to render an informed judgment with regard to each of the three section 10(b) criteria.[11/]

2. Responsibility of the Assistant Secretary to give equal weight to each criterion of section 10(b).

The Council has clearly stated that, in making an appropriate unit determination, the Assistant Secretary must give equal weight to each

(Continued)

Service, the Assistant Secretary found four separate units within a single region of the agency appropriate, relying in part on a lack of any specific countervailing evidence as to whether the proposed unit would promote effective dealings and efficiency of agency operations. Upon review, the Council applied the principles enunciated in Tulsa AFS and determined, in contrast with its decision in the consolidated DCASR cases, that the Assistant Secretary's decision met the essential requirements of section 10(b). The difference in result is based on at least one significant factual distinction: Unlike in the consolidated DCASR cases, the union representative in National Weather Service, as noted by the Council, testified that the separate units would, if the union were certified, fall under an existing multi-unit agreement. Thus, viewing the small units as part of a multi-unit bargaining structure, the Council was of the opinion in National Weather Service that the decision of the Assistant Secretary did not conflict with the requirements of section 10(b) of the Order. (See National Weather Service n. 7 and accompanying text.)

11/ It should be noted that in the consolidated DCASR decision, the Council did not reach the question as to responsibility of the Assistant Secretary in the event that, after active solicitation by him, there is still insufficient evidence upon which he might make an affirmative determination as to effective dealings and efficiency of agency operations. In the consolidated DCASR decision the Council found that the Assistant Secretary had failed to actively solicit such evidence. Moreover, a situation in which the Assistant Secretary's active solicitation of evidence would fail to produce sufficient results should be rare indeed, since the Council's consolidated DCASR decision provided the Assistant Secretary with guidance with regard to subsidiary factors or indicators of effective dealings and efficiency of agency operations. See consolidated DCASR decision at 13.

criterion of section 10(b).[12] Therefore, a unit, in order to be appropriate under the Order, must clearly, convincingly and equally satisfy each of the 10(b) criteria; that is, only units which not only ensure a clear and identifiable community of interest among the employees concerned but also promote effective dealings and efficiency of agency operations are appropriate under the Order. Expressed another way: no greater reliance may be placed on one criterion, e.g., community of interest, than another, e.g., efficiency of agency operations. Further, where a proposed unit satisfies two of the criteria, e.g., community of interest and effective dealings, but does not satisfy the third criterion, namely, efficiency of agency operations, that unit may not be found appropriate. Thus, "equal weight" does not mean that evidence going to each criterion must be equal in amount and quality; it does mean that no one criterion or two criteria may be accorded greater weight, i.e. importance, than the other(s) in the appropriate unit determination.

Moreover, the requirement that the Assistant Secretary give equal weight to each criterion in section 10(b) does not compel the Assistant Secretary, as he put it, "to search for the most perfect conceivable bargaining unit." The Council's consolidated DCASR decision does not suggest that the Assistant Secretary is required to do so. In the consolidated DCASR decision, the Council found, among other things, that equal application of the three section 10(b) criteria would dictate a finding that the units sought were not appropriate for purposes of exclusive recognition under the Order. Furthermore, the Council stated that a regionwide unit would meet all of the section 10(b) criteria and would also be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. The Council did not hold that, of several appropriate units, the regionwide one would be "most" or "more" appropriate. The Council's consolidated DCASR decision reflects the basic policy that an appropriate unit must meet the three criteria of section 10(b) and that, in applying the three criteria, due consideration must be given to the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. Clearly, the proper application of the three criteria requires the Assistant Secretary to exercise considerable judgment, but it does not require him to find "the most perfect conceivable bargaining unit."

3. Responsibility of the Assistant Secretary regarding the Order's policy of reducing fragmentation in the bargaining unit structure.

In its consolidated DCASR decision, the Council specifically rejected the Assistant Secretary's interpretation of the Order to the effect that negotiations at the local level are to be encouraged to the maximum extent

12/ E.g., Labor-Management Relations in the Federal Service (1975), at 29; Tulsa AFS at 6.

possible. The Assistant Secretary had relied upon language in the Preamble[13] and in the revised section 11(a).[14]

It is beyond question that the Order, as evidenced by this Preamble language, encourages the participation of employees in the formulation and implementation of personnel policies and practices affecting conditions of their employment; however, the Order provides for this participation through exclusive recognition in an "appropriate" unit under section 10. Moreover, the Report accompanying E.O. 11838 clearly states that the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of existing units which would thereby reduce unit fragmentation.[15]

Further in the above regard, it is important to remember that the Order reflects a dual policy: not only to reduce existing fragmentation through unit consolidations but also to prevent further fragmentation through new appropriate unit determinations, thereby promoting a more comprehensive bargaining unit structure. The Council acknowledges that this dual policy may have the effect in some situations of forestalling the representation of some employees; however, these employees need not be denied the opportunity for representation altogether. Rather, as is customary in cases such as here involved, representation can be achieved by expanding organizational efforts to include those employees who would constitute an appropriate unit.[16] As the Council said in the consolidated DCASR decision (at 20):

> [W]hile a unit at a lower organizational level may provide a temporary vehicle to address certain localized problems, in the long run, units broader in scope will facilitate consideration and resolution of a greater range of concerns common to employees and will better serve the interests of both the employees and the agencies. It was to achieve this end that the policies of the Order were adopted.

13/ "[T]he well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment . . . ."

14/ See note 5 supra and accompanying text.

15/ See note 6 supra and accompanying text.

16/ It should be noted in this regard that section 10(b) provides in pertinent part: "A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized . . . ."

4. Council review of Assistant Secretary decisions.

Decisions of the Assistant Secretary are subject to a limited right of appeal to the Council.[17] In accordance with its rules, the Council reviews only those Assistant Secretary decisions in which major policy issues are present or where it appears that the decision was arbitrary and capricious.[18] Further, the Council will sustain a decision of the Assistant Secretary on review unless it is arbitrary and capricious or inconsistent with the purposes of the Order.[19] Where the Council finds that a decision of the Assistant Secretary is inconsistent with the purposes and policies of the Order, it customarily has set aside and remanded the decision.[20] Only in the most exceptional circumstances will the Council substitute its judgment for that of the Assistant Secretary in applying policy to the facts of a particular case. The consolidated DCASR cases presented such circumstances. In those cases, the Council was of the opinion that extraordinary measures, beyond setting aside and remanding the decisions of the Assistant Secretary, were required in order to insure the effectuation of the Order's unit structure policy. Therefore, the Council, in addition to setting aside the Assistant Secretary's decisions, determined that none of the units sought was appropriate for purposes of exclusive recognition under the Order.

The Council is likewise of the opinion that the instant case presents exceptional circumstances and warrants extraordinary action by the Council —because of its history of having once been remanded, because of the reasoning relied upon by the Assistant Secretary, and because of the close factual similarity of this case to the consolidated DCASR cases. Therefore, as concluded above at page 6, the Council here not only has set aside the Assistant Secretary's decision but also has determined that the units sought are not appropriate under the Order for purposes of exclusive recognition.

17/ The Study Committee Report and Recommendations, August 1969, which led to the issuance of Executive Order 11491, stated:

> The Assistant Secretary should be authorized to issue decisions to agencies and labor organizations in all cases, subject to a limited right of appeal on major policy issues by either party to the Federal Labor Relations Council . . . . Labor-Management Relations in the Federal Service (1975), at 69.

18/ 5 CFR § 2411.12.

19/ 5 CFR § 2411.18(a).

20/ See e.g., Tulsa AFS; Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88.

Conclusion

For the reasons set forth above, and pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's supplemental decision and remand the case to him for action consistent with our decision herein.[21]

By the Council.

Henry B. Frazier III
Executive Director

Issued: July 20, 1977

21/ In this regard, we have been administratively advised that the Assistant Secretary currently has under consideration a petition for consolidation of units represented by AFGE within the Defense Logistics Agency, including the Akron DCASO unit involved herein. Should the Assistant Secretary determine that a consolidated unit is appropriate, it would not be inconsistent with this decision to include this unit involved herein in such a consolidated unit by reason of the special circumstances here involved, including the fact that the employees in this unit have previously indicated through the election process that they wish AFGE to serve as their exclusive representative and the length of time which has elapsed since the election. Of course, if a consolidation election should be held to determine whether the employees in the proposed consolidated unit wish to be represented in that unit, the employees in the Akron DCASO unit involved herein would have the options only of being represented in the consolidated unit or being unrepresented—unless, of course, AFGE files a separate petition seeking to represent the employees involved herein in a unit determined to be appropriate. See consolidated DCASR decision at 23.

August 29, 1977

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

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, SAN FRANCISCO
A/SLMR No. 885

On September 16, 1975, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 559, finding that the petitioned for unit in the subject case was appropriate for the purpose of exclusive recognition under Section 10 of the Order.

On December 30, 1976, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 75A-128, in which it found that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the Order.

Based on the Council's holding in FLRC No. 75A-128 and the rationale contained therein, the Assistant Secretary ordered that the Certification of Representative previously issued to the American Federation of Government Employees, Local 2723, AFL-CIO, be revoked and that the petition in the subject case be dismissed.

A/SLMR No. 885

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, SAN FRANCISCO 1/

Activity

and

Case No. 70-4524(RO),
A/SLMR No. 559,
FLRC No. 75A-128

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2723, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND ORDER

On September 16, 1975, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 559, finding that the petitioned for unit was appropriate for the purpose of exclusive recognition under the Order. 2/ Thereafter, on December 30, 1976, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals involving, among others, the subject case. The Council concluded, in essence, that the petitioned for unit in the subject case was not appropriate for the purpose of exclusive recognition under the Order. 3/

Based on the Council's holding in the instant case and the rationale contained therein, I shall order that the Certification of Representative previously issued to the Petitioner involved herein, be revoked and that the subject petition be dismissed.

1/ Subsequent to the issuance of the Decision on Appeals in FLRC No. 75A-128, the name of the Agency involved was changed to Defense Logistics Agency.

2/ I have been administratively advised that pursuant to the Decision and Direction of Election in A/SLMR No. 559, a Certification of Representative was issued to the Petitioner involved herein.

3/ Further processing of the subject case was held in abeyance pending the Council's disposition of an appeal in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, etc., FLRC No. 76A-97 (July 20, 1977).

ORDER

IT IS HEREBY ORDERED that the Certification of Representative issued in Case No. 70-4524(RO) be, and it hereby is, revoked, and that the petition in Case No. 70-4524(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 29, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah

and

American Federation of Government Employees, Local 3540, AFL-CIO

A/SLMR No. 461
FLRC No. 75A-14

Defense Supply Agency, Defense Contract Administration Services Region, San Francisco

and

American Federation of Government Employees, Local 2723, AFL-CIO

A/SLMR No. 559
FLRC No. 75A-128

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington

and

American Federation of Government Employees, Local 3204, AFL-CIO

A/SLMR No. 564
FLRC No. 76A-

DECISION ON APPEALS FROM
ASSISTANT SECRETARY DECISIONS

Background of Cases

These appeals arose from three separate decisions of the Assistant Secretary in which he found that three proposed bargaining units in the Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, were appropriate and directed an

election in each. Inasmuch as the three appeals arise out of the same basic circumstances and factual background, involve the same agency and national labor organization, and present the same major policy issue, the Council here consolidates them for decision on the merits.

All three of the decisions of the Assistant Secretary grew out of petitions filed by locals of the American Federation of Government Employees (AFGE) seeking to represent units of employees of the San Francisco DCASR. The San Francisco DCASR is one of 11 regions of the Defense Supply Agency (DSA), all of which provide contract administration services and support for the Department of Defense, as well as other Federal agencies. The San Francisco DCASR covers the States of Utah, Montana, Idaho, Washington, Oregon, Alaska, Hawaii; most of Nevada; northern California; and the Mariana Islands. It consists of a headquarters organization and field activities which are divided into two Defense Contract Administration Services Districts (DCASD's), Seattle and Salt Lake City, as well as six Defense Contract Administration Services Offices (DCASO's) located in Portland, Oregon, and at five contractors' offices in the San Francisco Bay area and a Hawaii Residency Office. The field activities perform basic mission functions of the region in their respective geographic areas. With the exception of the DCASO in Portland, Oregon, 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 employees located in northern California. All of the employees of the region are subject to uniform personnel policies and practices established at regional headquarters. Prior to the filing of the subject representation petitions, none of the employees of the DCASR were in units of exclusive recognition.

FLRC No. 75A-14 (A/SLMR No. 461)

In June 1974, AFGE Local 3540 sought an election in a districtwide unit composed of the 77 eligible professional and nonprofessional employees of the Salt Lake City DCASD. The San Francisco DCASR contended that the claimed unit was not appropriate because it excluded employees who share a community of interest with the employees in the unit sought and, further, that the unit sought would not promote effective dealings and efficiency of agency operations. The DCASR contended that the only appropriate unit was one composed of all eligible employees of the DCASR, San Francisco.

The Assistant Secretary, in a decision dated November 27, 1974, determined that the Salt Lake City DCASD unit was appropriate for the purposes of exclusive recognition under the Order. After noting particularly that the petitioned-for employees share common districtwide supervision, perform their duties within the assigned geographical locality of the DCASD, and do not interchange or have job contact with other employees of the region, and that generally transfers to or from the District Office occur only in situations involving promotions or reduction-in-force procedures, the

Assistant Secretary found that the employees in the petitioned-for unit share a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. The Assistant Secretary went on to add: "Further, based on the foregoing considerations, I find that such a unit will promote effective dealings and efficiency of agency operations." In making this finding with respect to effective dealings and efficiency of agency operations, the Assistant Secretary rejected the agency's contentions that 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, and thus would not result in effective dealings between the parties or promote the efficiency of agency operations.

FLRC No. 75A-128 (A/SLMR No. 559)

In November 1974, AFGE Local 2723 sought an election in a unit composed of all eligible nonprofessional employees in DCASR headquarters. DCASR officials contended that the claimed unit was not appropriate because it would result in unit fragmentation and would not promote effective dealings and efficiency of agency operations. They maintained that only a single regionwide unit would be appropriate. At the hearing, the union indicated a willingness to include the five DCASO's, all of which are located in the San Francisco Bay area, and the Hawaii Residency Office in the unit. The Assistant Secretary, on September 16, 1975, found that a unit encompassing the employees in DCASR headquarters, the five DCASO's in the San Francisco Bay area, and the Hawaii Residency Office was appropriate for the purpose of exclusive recognition in that the employees in such unit shared a clear and identifiable community of interest with each other, that such a unit would promote effective dealings and efficiency of agency operations, and that the agency contentions to the contrary were "at best, speculative and conjectural."

More particularly, with regard to efficiency of agency operations, the Assistant Secretary observed that more than cost factors should be involved in making such a determination, citing and quoting extensively from the Council's negotiability determination in the Little Rock case.[1/] The Assistant Secretary found it:

> [E]vident that a determination of efficiency of agency operations is dependent upon a complex of factors and that . . . tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of operations despite increased cost factors. [Footnote omitted.]

1/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].

He noted:

> . . . that in unit determination proceedings the parties are obligated to come forward, for the use of the Assistant Secretary, with all relevant information including any contrary evidence with respect to efficiency of agency operations; that information related to efficiency of agency operations may well be within the special knowledge and possession of the agency involved; and that where agencies fail or are unable to respond to the solicitation of such information by the Assistant Secretary, the Assistant Secretary should base his decision on the information available to him, making the best informed judgment he can under the circumstances.

He found that the unit "could result in actual economic savings and increased productivity due to the homogeneity of its composition." Noting that "the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being," the Assistant Secretary found that "standing alone, such speculation as to what might be helpful or desirable [was] insufficient to establish that the proposed unit is inappropriate within the meaning of section 10(b) of the Order."

With regard to effective dealings, the Assistant Secretary, observing that the principal or ultimate authority within the region involved in the negotiation and approval of negotiated agreements and in the resolution of grievances and other personnel matters is located in the DCASR Headquarters, concluded that the unit found appropriate would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations "are located organizationally with the unit found appropriate." The Assistant Secretary went on to state, however, that, in his view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations "even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters." Relying on the amendments to section 11(a) of the Order in E.O. 11838,[2/] the

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2/ Section 11(a) provides in pertinent part:

> 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,

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Assistant Secretary stated that "it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate." Further, he went on to say that:

> . . . the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to personnel policies and practices and matters affecting working conditions, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

The Assistant Secretary concluded:

> Thus, in my view, the Order, while recognizing the appropriateness of broadly based units under certain circumstances, is also, as reflected by the amendment to Section 11(a), supportive of the concept that bargaining units at lower levels may in certain instances, promote effective dealings, as well as result in the increased efficiency of agency operations. [Footnote omitted.]

FLRC No. 76A-4 (A/SLMR No. 564)

In October 1974, AFGE Local 3204 sought an election in a districtwide unit of all eligible General Schedule and professional employees in the Seattle, Washington DCASD. The proposed unit included, in addition to the employees of the Seattle District, employees of the Portland, Oregon DCASO which, organizationally, reports to regional headquarters through Seattle. The region contended that the unit sought was not appropriate because, among other things, it would not promote effective dealings and efficiency of agency operations. In the activity's view, only a single DCASR-wide unit would be appropriate.

The Assistant Secretary found the petitioned-for unit appropriate in September 1975. In doing so, he determined that the approximately 180

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> including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. . . . [Emphasis indicates material added by E.O. 11838, February 6, 1975.]

employees sought to be included within the proposed unit of the Seattle DCASD and the Portland DCASO share a clear and identifiable community of interest separate and distinct from other employees of the region. In disagreement with the claims of regional officials, the Assistant Secretary determined that the proposed unit would promote effective dealings and the efficiency of agency operations. In this regard, he again noted, as in his decision in A/SLMR No. 559 supra, that a determination of effective dealings and efficiency of agency operations is dependent on a complex of factors, including tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization which can result in improved efficiency of agency operations despite increased cost factors and that a claimed unit may promote effective dealings and efficiency of operations even though it does not include all employees directly under the area or regional head, or the activity officials who have final initiating authority with respect to personnel, fiscal, and programmatic matters. He was not persuaded by the region's arguments that the negotiating authority of the District Commander would be extremely limited, noting certain areas of responsibility that the District Commander does have. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

Following each of the Assistant Secretary's decisions in these cases, separate elections were conducted in each of the three separate units which had been found appropriate and AFGE was certified as the exclusive representative in each unit. Thereafter, in each case, DSA appealed the Assistant Secretary's decision to the Council. Upon consideration of the petitions for review, the Council determined that the same major policy issue is presented by each of the decisions of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). Neither party filed a brief on the merits.

Opinion

Section 6(a)(1) of the Order assigns to the Assistant Secretary the responsibility for deciding questions as to units appropriate for the purposes of exclusive recognition. The Council, pursuant to section 2411.18(a) of its regulations, will sustain such decisions unless they are arbitrary and capricious or inconsistent with the purposes of the

Order. In the opinion of the Council, the decision of the Assistant Secretary in each of these cases is inconsistent with the purposes of the Order, specifically the language and intent of section 10(b).

Section 10(b) provides, in pertinent part, that:

> A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations.

The Council on several occasions has considered the meaning and application of section 10(b) in the establishment of appropriate units for the purposes of exclusive recognition. In particular, the Council has addressed the requirement that any proposed unit of exclusive recognition must meet all three appropriate unit criteria prescribed in section 10(b), that is, a unit must (1) ensure a clear and identifiable community of interest among the employees concerned, (2) promote effective dealings, and (3) promote efficiency of agency operations.

In the report accompanying E.O. 11838, the Council, in discussing its belief "that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program," stated:

> We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.3/

Thus, the Council concluded that the appropriate application of the three criteria will facilitate the reduction of fragmentation in bargaining unit structure in the Federal labor-management relations program and thereby promote the policy of creating more comprehensive units.

In its decision in Tulsa AFS, the Council discussed at length the obligations of the Assistant Secretary in applying the three 10(b) criteria.4/ The Council reviewed the history of the development of exclusive recognition of appropriate units in the Federal labor-management relations program and concluded:

3/ Labor-Management Relations in the Federal Service (1975), at 37.

4/ Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

> It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate. This conclusion is amply supported by the purpose of the provision, as evidenced by its "legislative history" . . . especially wherein the criterion of community of interest of the employees involved was explicitly balanced with other considerations important to management and protection of the public interest in the promulgation of E.O. 11491 in 1969, i.e., that units found appropriate must also promote effective dealings and efficiency of agency operations.

Further, after quoting those passages of the Council's Report to the President which led to the issuance of Executive Order 11838 wherein the three criteria were discussed, the Council stated as to the required findings under section 10(b) of the Order:

> Thus, the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate.

In Tulsa AFS, the Council also discussed the responsibility of the Assistant Secretary in unit determination proceedings to develop and consider evidence concerning the appropriate unit criteria in section 10(b) of the Order. The Council stressed that it is the obligation of the Assistant Secretary to "develop as complete a record as possible with regard to each of the three criteria . . . and . . . give full and careful consideration to all relevant evidence in the record in reaching his decision." In this regard, the Council noted that parties to a representation proceeding are responsible for providing the Assistant Secretary with all information relevant to the appropriate unit criteria that is within their knowledge and possession, but emphasized that the Assistant Secretary must actively solicit such evidence as necessary to enable him to make a fully-informed judgment as to whether a particular unit will satisfy each of the three 10(b) criteria. In this regard, the Council stated:

> [T]here is a need for a sharper degree of definition of the criteria of effective dealings and efficiency of agency operations to facilitate both the development and presentation of evidence pertaining to those criteria by agencies and labor organizations, and the qualitative appraisal of such evidence by the Assistant Secretary in appropriate unit determinations. As he has done with the community of interest criterion, therefore, the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. In this way, each of the policy goals to be achieved in unit determinations will have an equal degree of precision and, hopefully, will receive the necessary and desirable equality of emphasis in representation proceedings.

Summarizing the responsibilities of the Assistant Secretary which flow from section 10(b) of the Order: Before the Assistant Secretary may find that a proposed unit is appropriate for purposes of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by section 10(b), find appropriate only units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations. In making the affirmative determination that a proposed bargaining unit satisfies each of the three criteria, the Assistant Secretary must first develop as complete a record as possible, soliciting evidence from the parties as necessary, and then ground his decision upon a careful, thorough analysis of subsidiary factors or evidentiary considerations which provide a sharp degree of definition and precision to each of the three criteria. Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. We turn now to the application of these principles to the three cases before the Council. They will be treated seriatim.

A/SLMR No. 461

As outlined above, in this case the Assistant Secretary found that a unit of one geographic element of the San Francisco DCASR, namely the Salt Lake City DCASD, was an appropriate unit for purposes of exclusive recognition under the Order. In so finding, he reviewed the evidence relating to certain subsidiary factors or indicators of community of interest and based upon these evidentiary considerations found that the employees in the petitioned-for unit shared a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. Additionally, as required, the Assistant Secretary found that such a unit will promote effective dealings and efficiency of agency operations. However, this latter conclusion was "based on the foregoing considerations," that is, the evidentiary considerations which supported a finding that the employees had community of interest, rather than on any evidence directly bearing on the promotion of effective dealings and efficiency of agency operations.

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet his obligations under the Order. In this regard, as we have indicated, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each of the 10(b) criteria. Finally, and most importantly, the Assistant Secretary must decide appropriate unit questions consistent with the purposes of the Order, including the policy of preventing and reducing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

In this case, while the Assistant Secretary clearly met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that criterion, we conclude that he failed to meet these responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an intensive effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations," soliciting evidence from the parties as necessary.5/ While the testimony and arguments advanced by the activity as to why the proposed DCASD unit would not promote effective dealings and efficiency of agency operations may not, in the Assistant Secretary's view, have provided him with a sufficient basis on which to make a determination,6/ the development of such evidence does not

5/ A review of the record indicates that, as to effective dealings and efficiency of agency operations, the Hearing Officer asked a few questions concerning the delegated authority of certain management officials to negotiate and sign a collective bargaining agreement and asked an agency witness only three insubstantial questions concerning whether the proposed unit would impair efficiency of agency operations.

6/ In testimony before the Assistant Secretary's Hearing Officer and in its posthearing brief to the Assistant Secretary, the agency presented evidence regarding effective dealings and efficiency of agency operations as well as evidence regarding community of interest of the employees involved. The San Francisco Region Civilian Personnel Officer testified at the hearing, among other things, in effect, that it would be more efficient for the region to negotiate and deal with the exclusive representative of employees in a single regionwide unit rather than with

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stop with the presentation by the parties. Although, as we stated in Tulsa AFS, the parties are responsible for providing the Assistant Secretary with all relevant information within their knowledge and possession, we emphasized in that decision that the Assistant Secretary, in carrying out his responsibility to decide appropriate unit questions, must actively solicit such information and develop the evidence necessary to enable him to make a fully-informed judgment as to whether the proposed unit will satisfy each of the three 10(b) criteria. We conclude that the Assistant Secretary did not meet that responsibility in A/SLMR No. 461. Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such contentions and evidence full and careful consideration. Indeed, his only consideration was in a footnote wherein he rejected the activity's contention that a less than regionwide unit would limit the scope of negotiations solely to those matters within the delegated authority of the Commander of the District Office.7/

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representatives of employees in a multiplicity of units within the region. In this regard, he testified in effect that the smaller Salt Lake City unit would, by creating the possibility of multiple units in the region, impair efficiency by exceeding the capacities of the agency's limited labor-management relations staff. In its posthearing brief to the Assistant Secretary, the agency argued, among other things, that the size and composition of the proposed unit, the potential for meaningful negotiations, and the availability of personnel management resources all demonstrate that one regionwide unit would more likely promote efficiency of agency operations and effective dealings.

7/ In rejecting the agency's contention 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, the Assistant Secretary relied on his decision in A/SLMR No. 372 wherein he had, in turn, relied on the Council's decision in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 211 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30]. However, A/SLMR No. 372 was subsequently reviewed by the Council in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80. The Council set aside the Assistant Secretary's decision therein and remanded the case to him. In doing so, the Council stated, as to the Assistant Secretary's reliance upon Merchant Marine and as to the relationship of the amendments to section 11(a) of the Order to the principles enunciated in Merchant Marine:

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Second, the Assistant Secretary's decision was not based upon a careful, thorough analysis of evidentiary considerations or factors which provide

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> Turning to the instant case [DSA, Cleveland], it is clear that the Assistant Secretary has misinterpreted and misapplied the Merchant Marine decision. For under the Order, as presently effective, labor relations and personnel policies as established (and, of course, published) by the DCASR headquarters may properly serve to bar the matter concerned from the scope of bargaining under section 11(a) of the Order. Since these matters would thus be outside the scope of bargaining at the DCASO level, DCASR, under the Merchant Marine decision, would be under no obligation to provide representatives to negotiate and enter into agreement on such matters at the DCASO level.
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> Thus, as the Assistant Secretary, in finding the separate DCASO units appropriate in the present case, relied in part on an erroneous interpretation and application of the Merchant Marine decision, we shall remand the case to him for reconsideration and disposition consistent with our opinion.
>
> We are mindful in the above regard that under the amendments to section 11(a), adopted in E.O. 11838 and to become effective 90 days after the Council issues the criteria for determining "compelling need," DCASR directives as such would not thereafter serve to limit the scope of bargaining at the DCASO level—because DCASR appears to be a subdivision below the level of "agency headquarters" or "the level of a primary national subdivision." However, the Assistant Secretary should carefully examine the regulatory framework of DSA, including the DCASR's, which prevails at the time of his reconsideration and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) can be properly applied. Moreover, in so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838 were not designed to render fragmented units appropriate.
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> In the above regard, as indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnotes omitted.]

a sharp degree of definition and precision to the "effective dealings" and "efficiency of agency operations" criteria. Indeed, there was no discussion of such evidentiary considerations or factors. Instead, the treatment of these two criteria amounted to little more than a conclusionary statement based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest.

While we realize that certain considerations traditionally discussed in the context of community of interest can also be relevant in ascertaining whether a proposed unit would promote effective dealings or efficiency of agency operations (e.g., supervisory hierarchy and uniformity of personnel policies), other, quite different considerations also apply. As we stated in Tulsa AFS,[8/] there is a need for a sharper degree of definition to the criteria of effective dealings and efficiency of agency operations and the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. Rather than relying solely on the "foregoing considerations," the Assistant Secretary was required to examine the very kind of testimony and contentions put forward by the agency (e.g., more efficient use of negotiation resources derived from single regionwide negotiations rather than a multiplicity of negotiations in segments of the region), as well as the wide range of other considerations raised by the facts of the case. In developing such subsidiary factors or evidentiary considerations, which more precisely define what is meant by promoting effective dealings, the Assistant Secretary might well consider in the circumstances of this case such matters as the locus and scope of authority of the responsible personnel office; the limitations on the negotiation of matters of critical concern to employees because the concerns of Salt Lake City DCASO employees may be inseparable from those of other employees in the region; the likelihood that people with greater expertise in negotiations will be available in a larger unit; the actual experience of this agency in other bargaining units; and the level at which labor relations policy is set in the agency and the effectuation of agency training in the implementation of a number of negotiated agreements and grievance procedures covering employees performing essentially the same duties. As to "efficiency of agency operations" among those factors which should be considered would be the benefits to be derived from a unit structure which bears some rational relationship to the operational and organizational structure of the agency. This is certainly not to say that section 10(b) requires that each bargaining unit always be coextensive with the agency's view of how it can best organize to carry out its mission, but the relationship between the proposed bargaining unit and the operational and organizational structure of the agency should be given substantial weight in ascertaining whether the unit will promote efficiency of agency operations. In the instant case, for example, while the Assistant Secretary relied in part on the fact that the

8/ See page 7 supra.

Salt Lake City DCASD employees share districtwide supervision, he appears to have given no weight to the fact that those employees share a common supervisory structure with all employees in the region and enjoy a commonality of mission, personnel policies and practices and matters affecting working conditions with all employees of the region.

Third, in simply concluding that the proposed unit will promote effective dealings and efficiency of operations based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest, the Assistant Secretary failed to give equal weight to all three criteria.

Finally, there is the requirement that the Assistant Secretary decide appropriate unit questions consistent with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. The Assistant Secretary's decision finding appropriate a unit limited to the Salt Lake City DCASD is clearly contrary to that policy in that his decision tends to foster and promote fragmentation. The San Francisco DCASR is a single organizational element of the agency with a chain of command headed by the Regional Commander, running down through all of the component elements. With the exception of the DCASO in Portland which reports through the DCASD in Seattle, all elements of the region report directly to DCASR headquarters. All employees of the region perform their duties pursuant to policies and procedures established by the regional headquarters staff, and the employees within the region are subject to uniform personnel policies and job benefits. The DCASR's Civilian Personnel Office, located at headquarters, has the responsibility for servicing all components within the region. The region encompasses an organizational structure of an agency which is functionally integrated. It has been established in this manner to accomplish its mission. Its employees thus share a commonality of mission, organization and personnel policies and practices and matters affecting working conditions.

There is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Against this backdrop, the AFGE petitioned for a single portion of the organizational and functional whole, the Salt Lake City DCASD, a unit of approximately 77 employees out of a total of approximately 1,250 eligible employees in the region. In concluding that these employees shared a community of interest with each other, the Assistant Secretary relied upon those factors which, in his view, reflected some degree of separation between these employees and the remaining employees in the DCASR. In doing so, he failed to give proper recognition to the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office within the DCASR. As a result, the unit structure which his decision promotes within the San Francisco DCASR results in artificial distinctions between groups

of employees whose mission and functions, supervisory structure and conditions of employment are identical. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occured herein.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order would dictate a finding that a unit limited to the Salt Lake City DCASD is not an appropriate unit for purposes of exclusive recognition under the Order.[9/]

A/SLMR No. 559

The Assistant Secretary, as outlined above, in this case found appropriate a unit composed of the employees in DCASR headquarters and the five DCASO's, all in the San Francisco Bay area, along with the Hawaii Residency Office. After reviewing at length the organizational and work environment of the region and its component parts, he found that there was a clear and identifiable community of interest among the employees in the unit found appropriate, noting specifically that such employees share a common mission and are covered by the same personnel and labor relations policies; that there are similar job classifications in each of the components within the headquarters, the five DCASO's and the Hawaii Residency Office; that there have been reassignments to and from the Regional Headquarters and the DCASO's; and that there is employee contact between headquarters and the DCASO's.

While the Assistant Secretary again made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. In this case, while the Assistant Secretary met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that

9/ In this regard, we note, as did the agency in testimony and brief before the Assistant Secretary, that the Assistant Secretary earlier considered and rejected as inappropriate various less-than-regionwide units in the San Francisco DCASR ranging in size from 18 to 686 employees. He found such units "would artifically [sic] divide and fragment . . . operations, and cannot be reasonably expected to promote effective dealings or efficiency of operations." Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, A/SLMR No. 112 (Nov. 30, 1971), decision by the then Assistant Secretary. This precedential decision was neither discussed nor even adverted to in the instant case.

criterion,[10] we conclude that he failed to meet those responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."[11] Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such testimony appropriate and adequate consideration.

As to whether the unit sought in A/SLMR No. 559 would promote efficiency of agency operations, the Assistant Secretary, relying on Council negotiability decisions[12] on the meaning of section 12(b)(4),[13] concluded that more than cost factors should be involved in making such determinations. As previously indicated, he stated:

10/ We do not here decide that the factors relied upon by the Assistant Secretary establish a separate community of interest for the employees in the unit found appropriate. Indeed, many of the factors relied upon by the Assistant Secretary indicate a community of interest that is regionwide in scope rather than limited to the employees in the unit sought by the union.

11/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

12/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30]; American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (June 10, 1975), Report No. 73 [aff'd National Broiler Council, Inc. v. Federal Labor Relations Council, Civil Action No. 147-47-A (E.D. Va., Sept. 5, 1975)].

13/ Section 12(b)(4) provides in pertinent part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

(Continued)

> From the foregoing, it is evident that a determination of efficiency of agency operations is dependent on a complex of factors and that it has been recognized that the tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of agency operations despite increased cost factors. [Footnote omitted.]

Based on these considerations, the Assistant Secretary concluded that the proposed unit would promote efficiency of agency operations, stressing that the unit would encompass the employees within the same commuting area and would include the Hawaii Residency Office which otherwise might be fragmented.[14] The Assistant Secretary concluded that the establishment of such a unit "could result" in actual economic savings and increased productivity due to the homogeneity of its composition.

While the Assistant Secretary reached a conclusion as to whether the proposed unit would promote the efficiency of agency operations, in our view, he failed properly to consider the relevant testimony and arguments advanced by the agency and, in effect, thereby failed to give the required equal weight to this criterion. At the outset, the Assistant Secretary found that the agency's views as to both this criterion and the criterion of promoting effective dealings to be "at most, speculative and conjectural." Such a rejection of the agency's views was inappropriate and a misconception of the nature of these criteria. We believe that inherent in determining whether or not a proposed unit will promote the efficiency of agency operations is the need to anticipate the impact of a given unit structure on the agency's operations. Just as the Assistant Secretary considered economic savings and increased productivity which "could result," the Assistant Secretary must also consider the costs and inefficient use of resources that, in management's opinion, "could result" from such a unit structure. The speculative and conjectural nature of a contention, in these circumstances, does not in and of itself render the contention without merit.

As to the specifics of the agency's contentions, the Assistant Secretary stated:

(Continued)

. . . . . .

> (4) to maintain the efficiency of the Government operations entrusted to them.

14/ In this regard, the same concern about fragmentation might have been expressed about any unrepresented portion of the region, for example, the Seattle DCASD, which in all significant respects had the same relationship with the DCASR headquarters as the Hawaii Residency Office.

> In addition, it was noted that the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being, which . . . are relevant factors in making such an assessment. Thus, the Activity's position in this regard was reflected in the testimony of its Civilian Personnel Officer that "it was reasonable" to infer that a region-wide unit would do more to promote efficiency of agency operations (and effective dealings) than the originally petitioned for unit of the DCASR Headquarters, Burlingame, and that it would be a hardship on his office if several agreements were required because this would require expenditure of both manpower and financial resources "that might not be necessary if there were a single unit throughout the Region." I find that, standing alone, such speculation as to what might be helpful or desirable to be insufficient to establish that the proposed unit is inappropriate within the meaning of Section 10(b) of the Order. [Footnote omitted.]

In our view, rather than being rejected, in part, as "speculative," the contentions of the agency were valid considerations to be weighed in determining whether the proposed unit would promote efficiency of agency operations. As we have indicated, a policy of the Order is the promotion of more comprehensive bargaining units. Hence, the activity's contention that a regionwide unit of employees performing the same jobs in an organization with the same mission and subject to the same personnel policies and supervision would do more to promote efficiency of agency operations was consistent with the purposes of the Order. Similarly, while not dispositive, the efficient use of agency labor-management relations and financial resources is a valid factor in determining efficiency of agency operations.

We do not disagree with either the Assistant Secretary's conclusion that more than cost factors are involved in a determination of the promotion of efficiency of agency operations, or his conclusion that the benefits resulting from employee representation by a labor organization can result in improved efficiency of agency operations. However, the according of equal weight to the efficiency of agency operations criteria requires careful consideration of the agency's reasoned view of the impact of the proposed unit on the efficiency of its operations.[15/]

In finding that the alternative unit sought would promote effective dealings, the Assistant Secretary noted that the unit would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations are located organizationally within the unit found appropriate. Thereafter,

15/ In this regard, agency testimony concerning the efficiencies in agency operations experienced in other units would be relevant, as would testimony concerning the effectiveness of dealings in such units.

relying on the amendments to section 11(a) of the Order in E.O. 11838,[16/] the Assistant Secretary stated:

> Moreover, in my view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters. Thus, it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate.

The Assistant Secretary's reliance on the recent amendments to section 11(a) to support his finding that the unit would promote effective dealings is in error. As stated above in footnote 7, the Council, in its decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80, emphasized:

> [A]s indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnote omitted.][17/]

While the changes in section 11(a) were intended to expand the scope of bargaining by eliminating unnecessary constrictions on meaningful negotiations which had been imposed by higher level agency regulations not critical to effective agency management or the public interest, the changes in section 11(a) were also intended, as stated in FLRC No. 74A-41, to complement the recommendations of the Council relating to reduction of unit fragmentation, which reduction would also serve to expand the scope of bargaining. The Assistant Secretary's reliance on the 11(a) changes to support a finding of a less comprehensive unit is therefore totally inappropriate. While the changes to section 11(a) were intended to lessen the impact of certain agency regulations upon the scope of bargaining,

16/ Note 2 supra.

17/ In the subject decision, A/SLMR No. 559, the Assistant Secretary took note of this language in FLRC No. 74A-41, but concluded that he did not find this concept to be inconsistent with the continued existence or establishment of units less comprehensive than region or districtwide, which otherwise meet the tests of appropriateness under the Order.

contrary to the conclusions of the Assistant Secretary, they were not intended to reflect a policy of encouraging the establishment of bargaining units at lower organizational levels within an agency.

While it is true that units may promote effective dealings and be appropriate under section 10(b) even if established at lower agency organizational levels, in our view it is clear that, generally, effective dealings can be better achieved in more comprehensive units. As we have indicated, negotiations covering more comprehensive units permit the parties to address a wider range of matters of critical concern to greater numbers of employees. For example, employees of the entire region herein would have identical concerns as to such matters as merit staffing procedures, areas of consideration, reduction-in-force procedures, and competitive areas. Moreover, negotiations in less fragmented bargaining unit structures established at higher organizational levels permit unions and agencies to allocate their manpower resources and send to the bargaining table more experienced and skilled negotiators who should do a more efficient job of reaching a satisfactory agreement.

The instant decision of the Assistant Secretary clearly reflects a desire that negotiations be conducted at the lowest organizational levels possible and, hence, as close as possible to the particular employees who will be affected by the outcome of the negotiations; however, such a desire cannot be used as a rationale for creating units in a manner inconsistent with the purposes of the Order. Such reasoning, carried to an extreme as here, results in the fragmentation of units contrary to the policies sought to be served by the Order. Moreover, we do not agree that the resolution of local concerns is sacrificed by the creation of more comprehensive units. To the extent that there may be concerns unique to some employees which are not shared by an entire broader unit, there are obvious, well-recognized ways that these concerns may be addressed within the parameters of the bargaining relationship. And while a unit at a lower organizational level may provide a temporary vehicle to address certain localized problems, in the long run, units broader in scope will facilitate consideration and resolution of a greater range of concerns common to employees and will better serve the interests of both the employees and the agencies. It was to achieve this end that the policies of the Order were adopted. Thus, the Assistant Secretary's contrary unit determination was inconsistent with these purposes of the Order.

As previously stated with respect to A/SLMR No. 461, the Assistant Secretary must decide appropriate unit questions consonant with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. In finding appropriate the alternative unit sought in this case, the Assistant Secretary's decision plainly contravenes that policy since his decision tends to foster and promote fragmentation. On the other hand, for the reasons previously detailed at page 14 above, there is no question that a regionwide unit, if alone sought, would meet all of the section 10(b) criteria.

While the employees in the San Francisco Bay area may have, as discussed by the Assistant Secretary, a community of interest with each other and possibly some degree of separation from other elements because of separate local supervision and geographic dispersion, the petitioned-for unit would be inconsistent with the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office. The unit structure, which his decision promotes within the San Francisco DCASR, results in artificial distinctions between employees whose mission and functions, supervisory structure and conditions of employment are identical. Further, as noted with regard to A/SLMR No. 461, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occurred herein.

In conclusion, the Assistant Secretary's finding that the alternative unit sought would promote effective dealings and efficiency of agency operations was based upon considerations which did not properly provide a sharp degree of definition and precision to these two criteria. Indeed, the considerations upon which the Assistant Secretary relied were not implementive of and were not consistent with those criteria. As a result, the Assistant Secretary failed properly to give equal weight to these criteria in his decision.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the alternative unit sought herein is not an appropriate unit for the purposes of exclusive recognition under the Order.

A/SLMR No. 564

In this case, the Assistant Secretary found that the employees in the petitioned-for unit, the Seattle DCASD, including the Portland DCASO, share a clear and identifiable community of interest separate and distinct from other employees of the region. In response to the activity's claim that such a unit would not promote effective dealings or efficiency of agency operations, the Assistant Secretary found that the activity took the identical position that it took in A/SLMR No. 461; he rejected the activity's position partly on the basis of the circumstances recited in A/SLMR No. 559 and his reasoning therein. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in

> those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned-for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must again conclude that in doing so he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. Specifically, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."18/ While the testimony and arguments advanced by the activity as to why the proposed unit would not promote effective dealings and efficiency of agency operations may not have provided the Assistant Secretary with a sufficient basis on which to make a determination, as we have indicated, the development of such evidence does not stop with the parties. It is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; he did not do so here.

With regard to the circumstances which he particularly noted in finding that the unit sought would promote effective dealings and efficiency of agency operations, the Assistant Secretary plainly failed to make an affirmative determination that the unit equally satisfied each of the 10(b) criteria. As we indicated previously, the experience of an agency and labor organization under a given unit structure may be considered in determining whether a petitioned-for unit satisfies the three criteria set forth in section 10(b) of the Order. However, the Assistant Secretary may not rely upon "the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations" in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit. Rather, as we have previously emphasized, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each

18/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

of the 10(b) criteria. Reliance upon a lack of evidence fails to satisfy the requirement in the Order that the Assistant Secretary make such an affirmative determination.

Accordingly, for the reasons fully discussed above in regard to the Assistant Secretary's decision in A/SLMR No. 559, we must likewise reject the Assistant Secretary's reliance upon that decision in reaching his decision in A/SLMR No. 564. In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the unit sought herein is not an appropriate unit for purposes of exclusive recognition under the Order. However, as noted with regard to both A/SLMR No. 461 and A/SLMR No. 559, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive unit structure.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's Decision and Direction of Election in each of the above-entitled cases is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decisions and remand the cases to him for action consistent with our decision herein.

In this regard, we have been administratively advised that the Assistant Secretary currently has under consideration a petition for consolidation of units represented by AFGE within the Defense Supply Agency, including the units involved herein. (Assistant Secretary Case No. 22-07578-UC). Should the Assistant Secretary determine that a consolidated unit is appropriate, it would not be inconsistent with this decision to include the units involved herein in such a consolidated unit by reason of the special circumstances here involved, including the fact that the employees in these units have previously indicated through the election process that they wish AFGE to serve as their exclusive representative and the length of time which has elapsed since the elections. Of course, if a consolidation election should be held to determine whether the employees in the proposed consolidated unit wish to be represented in that unit, the employees in the three units involved herein would have the options only of being represented in the consolidated unit or being unrepresented--unless, of course, AFGE files a separate petition seeking to represent the employees involved herein in a regionwide unit which, as already indicated, would be appropriate.

By the Council.

Henry B. Frazier III
Executive Director

Issued: December 30, 1976

August 30, 1977

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

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. 886

On November 27, 1974, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 461, finding that the petitioned for unit in the subject case was appropriate for the purpose of exclusive recognition under Section 10 of the Order.

On December 30, 1976, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 75A-14, in which it found that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the Order.

Based on the Council's holding in FLRC No. 75A-14 and the rationale contained therein, the Assistant Secretary ordered that the Certification of Representative previously issued to the American Federation of Government Employees, Local 3540, AFL-CIO, be revoked, and that the petition in the subject case be dismissed.

A/SLMR No. 886

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

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),
A/SLMR No. 461,
FLRC No. 75A-14

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3540, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND ORDER

On November 27, 1974, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 461, finding that the petitioned for unit was appropriate for the purpose of exclusive recognition under the Order. 2/ Thereafter, on December 30, 1976, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals involving, among others, the subject case. The Council concluded, in essence, that the petitioned for unit in the subject case was not appropriate for the purpose of exclusive recognition under the Order. 3/

Based on the Council's holding in the instant case and the rationale contained therein, I shall order that the Certification of Representative previously issued to the Petitioner be revoked and that the subject petition be dismissed.

1/ Subsequent to the issuance of the Decision on Appeal in FLRC No. 75A-14, the name of the Agency involved was changed to Defense Logistics Agency.

2/ I have been administratively advised that pursuant to the Decision and Direction of Election in A/SLMR No. 461, a Certification of Representative was issued to the Petitioner involved herein.

3/ Further processing of the subject case was held in abeyance pending the Council's disposition of an appeal in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, etc., FLRC No. 76A-97 (July 20, 1977).

ORDER

IT IS HEREBY ORDERED that the Certification of Representative issued in Case No. 61-2341(RO) be, and it hereby is, revoked, and that the petition in Case No. 61-2341(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 30, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah

and

A/SLMR No. 461
FLRC No. 75A-14

American Federation of Government Employees, Local 3540, AFL-CIO

Defense Supply Agency, Defense Contract Administration Services Region, San Francisco

and

A/SLMR No. 559
FLRC No. 75A-128

American Federation of Government Employees, Local 2723, AFL-CIO

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington

and

A/SLMR No. 564
FLRC No. 76A-4

American Federation of Government Employees, Local 3204, AFL-CIO

DECISION ON APPEALS FROM
ASSISTANT SECRETARY DECISIONS

Background of Cases

These appeals arose from three separate decisions of the Assistant Secretary in which he found that three proposed bargaining units in the Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, were appropriate and directed an

election in each. Inasmuch as the three appeals arise out of the same basic circumstances and factual background, involve the same agency and national labor organization, and present the same major policy issue, the Council here consolidates them for decision on the merits.

All three of the decisions of the Assistant Secretary grew out of petitions filed by locals of the American Federation of Government Employees (AFGE) seeking to represent units of employees of the San Francisco DCASR. The San Francisco DCASR is one of 11 regions of the Defense Supply Agency (DSA), all of which provide contract administration services and support for the Department of Defense, as well as other Federal agencies. The San Francisco DCASR covers the States of Utah, Montana, Idaho, Washington, Oregon, Alaska, Hawaii; most of Nevada; northern California; and the Mariana Islands. It consists of a headquarters organization and field activities which are divided into two Defense Contract Administration Services Districts (DCASD's), Seattle and Salt Lake City, as well as six Defense Contract Administration Services Offices (DCASO's) located in Portland, Oregon, and at five contractors' offices in the San Francisco Bay area and a Hawaii Residency Office. The field activities perform basic mission functions of the region in their respective geographic areas. With the exception of the DCASO in Portland, Oregon, 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 employees located in northern California. All of the employees of the region are subject to uniform personnel policies and practices established at regional headquarters. Prior to the filing of the subject representation petitions, none of the employees of the DCASR were in units of exclusive recognition.

FLRC No. 75A-14 (A/SLMR No. 461)

In June 1974, AFGE Local 3540 sought an election in a districtwide unit composed of the 77 eligible professional and nonprofessional employees of the Salt Lake City DCASD. The San Francisco DCASR contended that the claimed unit was not appropriate because it excluded employees who share a community of interest with the employees in the unit sought and, further, that the unit sought would not promote effective dealings and efficiency of agency operations. The DCASR contended that the only appropriate unit was one composed of all eligible employees of the DCASR, San Francisco.

The Assistant Secretary, in a decision dated November 27, 1974, determined that the Salt Lake City DCASD unit was appropriate for the purposes of exclusive recognition under the Order. After noting particularly that the petitioned-for employees share common districtwide supervision, perform their duties within the assigned geographical locality of the DCASD, and do not interchange or have job contact with other employees of the region, and that generally transfers to or from the District Office occur only in situations involving promotions or reduction-in-force procedures, the

Assistant Secretary found that the employees in the petitioned-for unit share a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. The Assistant Secretary went on to add: "Further, based on the foregoing considerations, I find that such a unit will promote effective dealings and efficiency of agency operations." In making this finding with respect to effective dealings and efficiency of agency operations, the Assistant Secretary rejected the agency's contentions that 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, and thus would not result in effective dealings between the parties or promote the efficiency of agency operations.

FLRC No. 75A-128 (A/SLMR No. 559)

In November 1974, AFGE Local 2723 sought an election in a unit composed of all eligible nonprofessional employees in DCASR headquarters. DCASR officials contended that the claimed unit was not appropriate because it would result in unit fragmentation and would not promote effective dealings and efficiency of agency operations. They maintained that only a single regionwide unit would be appropriate. At the hearing, the union indicated a willingness to include the five DCASO's, all of which are located in the San Francisco Bay area, and the Hawaii Residency Office in the unit. The Assistant Secretary, on September 16, 1975, found that a unit encompassing the employees in DCASR headquarters, the five DCASO's in the San Francisco Bay area, and the Hawaii Residency Office was appropriate for the purpose of exclusive recognition in that the employees in such unit shared a clear and identifiable community of interest with each other, that such a unit would promote effective dealings and efficiency of agency operations, and that the agency contentions to the contrary were "at best, speculative and conjectural."

More particularly, with regard to efficiency of agency operations, the Assistant Secretary observed that more than cost factors should be involved in making such a determination, citing and quoting extensively from the Council's negotiability determination in the Little Rock case.[1/] The Assistant Secretary found it:

> [E]vident that a determination of efficiency of agency operations is dependent upon a complex of factors and that . . . tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of operations despite increased cost factors. [Footnote omitted.]

1/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].

He noted:

> . . . that in unit determination proceedings the parties are obligated to come forward, for the use of the Assistant Secretary, with all relevant information including any contrary evidence with respect to efficiency of agency operations; that information related to efficiency of agency operations may well be within the special knowledge and possession of the agency involved; and that where agencies fail or are unable to respond to the solicitation of such information by the Assistant Secretary, the Assistant Secretary should base his decision on the information available to him, making the best informed judgment he can under the circumstances.

He found that the unit "could result in actual economic savings and increased productivity due to the homogeneity of its composition." Noting that "the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being," the Assistant Secretary found that "standing alone, such speculation as to what might be helpful or desirable [was] insufficient to establish that the proposed unit is inappropriate within the meaning of section 10(b) of the Order."

With regard to effective dealings, the Assistant Secretary, observing that the principal or ultimate authority within the region involved in the negotiation and approval of negotiated agreements and in the resolution of grievances and other personnel matters is located in the DCASR Headquarters, concluded that the unit found appropriate would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations "are located organizationally with the unit found appropriate." The Assistant Secretary went on to state, however, that, in his view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations "even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters." Relying on the amendments to section 11(a) of the Order in E.O. 11838,[2/] the

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2/ Section 11(a) provides in pertinent part:

> 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,

(Continued)

Assistant Secretary stated that "it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate." Further, he went on to say that:

> . . . the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to personnel policies and practices and matters affecting working conditions, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

The Assistant Secretary concluded:

> Thus, in my view, the Order, while recognizing the appropriateness of broadly based units under certain circumstances, is also, as reflected by the amendment to Section 11(a), supportive of the concept that bargaining units at lower levels may in certain instances, promote effective dealings, as well as result in the increased efficiency of agency operations. [Footnote omitted.]

FLRC No. 76A-4 (A/SLMR No. 564)

In October 1974, AFGE Local 3204 sought an election in a districtwide unit of all eligible General Schedule and professional employees in the Seattle, Washington DCASD. The proposed unit included, in addition to the employees of the Seattle District, employees of the Portland, Oregon DCASO which, organizationally, reports to regional headquarters through Seattle. The region contended that the unit sought was not appropriate because, among other things, it would not promote effective dealings and efficiency of agency operations. In the activity's view, only a single DCASR-wide unit would be appropriate.

The Assistant Secretary found the petitioned-for unit appropriate in September 1975. In doing so, he determined that the approximately 180

(Continued)

> including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. . . . [Emphasis indicates material added by E.O. 11838, February 6, 1975.]

employees sought to be included within the proposed unit of the Seattle DCASD and the Portland DCASO share a clear and identifiable community of interest separate and distinct from other employees of the region. In disagreement with the claims of regional officials, the Assistant Secretary determined that the proposed unit would promote effective dealings and the efficiency of agency operations. In this regard, he again noted, as in his decision in A/SLMR No. 559 supra, that a determination of effective dealings and efficiency of agency operations is dependent on a complex of factors, including tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization which can result in improved efficiency of agency operations despite increased cost factors and that a claimed unit may promote effective dealings and efficiency of operations even though it does not include all employees directly under the area or regional head, or the activity officials who have final initiating authority with respect to personnel, fiscal, and programmatic matters. He was not persuaded by the region's arguments that the negotiating authority of the District Commander would be extremely limited, noting certain areas of responsibility that the District Commander does have. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

Following each of the Assistant Secretary's decisions in these cases, separate elections were conducted in each of the three separate units which had been found appropriate and AFGE was certified as the exclusive representative in each unit. Thereafter, in each case, DSA appealed the Assistant Secretary's decision to the Council. Upon consideration of the petitions for review, the Council determined that the same major policy issue is presented by each of the decisions of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). Neither party filed a brief on the merits.

Opinion

Section 6(a)(1) of the Order assigns to the Assistant Secretary the responsibility for deciding questions as to units appropriate for the purposes of exclusive recognition. The Council, pursuant to section 2411.18(a) of its regulations, will sustain such decisions unless they are arbitrary and capricious or inconsistent with the purposes of the

Order. In the opinion of the Council, the decision of the Assistant Secretary in each of these cases is inconsistent with the purposes of the Order, specifically the language and intent of section 10(b).

Section 10(b) provides, in pertinent part, that:

> A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations.

The Council on several occasions has considered the meaning and application of section 10(b) in the establishment of appropriate units for the purposes of exclusive recognition. In particular, the Council has addressed the requirement that any proposed unit of exclusive recognition must meet all three appropriate unit criteria prescribed in section 10(b), that is, a unit must (1) ensure a clear and identifiable community of interest among the employees concerned, (2) promote effective dealings, and (3) promote efficiency of agency operations.

In the report accompanying E.O. 11838, the Council, in discussing its belief "that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program," stated:

> We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.3/

Thus, the Council concluded that the appropriate application of the three criteria will facilitate the reduction of fragmentation in bargaining unit structure in the Federal labor-management relations program and thereby promote the policy of creating more comprehensive units.

In its decision in Tulsa AFS, the Council discussed at length the obligations of the Assistant Secretary in applying the three 10(b) criteria.4/ The Council reviewed the history of the development of exclusive recognition of appropriate units in the Federal labor-management relations program and concluded:

3/ Labor-Management Relations in the Federal Service (1975), at 37.

4/ Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

> It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate. This conclusion is amply supported by the purpose of the provision, as evidenced by its "legislative history" . . . especially wherein the criterion of community of interest of the employees involved was explicitly balanced with other considerations important to management and protection of the public interest in the promulgation of E.O. 11491 in 1969, i.e., that units found appropriate must also promote effective dealings and efficiency of agency operations.

Further, after quoting those passages of the Council's Report to the President which led to the issuance of Executive Order 11838 wherein the three criteria were discussed, the Council stated as to the required findings under section 10(b) of the Order:

> Thus, the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate.

In Tulsa AFS, the Council also discussed the responsibility of the Assistant Secretary in unit determination proceedings to develop and consider evidence concerning the appropriate unit criteria in section 10(b) of the Order. The Council stressed that it is the obligation of the Assistant Secretary to "develop as complete a record as possible with regard to each of the three criteria . . . and . . . give full and careful consideration to all relevant evidence in the record in reaching his decision." In this regard, the Council noted that parties to a representation proceeding are responsible for providing the Assistant Secretary with all information relevant to the appropriate unit criteria that is within their knowledge and possession, but emphasized that the Assistant Secretary must actively solicit such evidence as necessary to enable him to make a fully-informed judgment as to whether a particular unit will satisfy each of the three 10(b) criteria. In this regard, the Council stated:

> [T]here is a need for a sharper degree of definition of the criteria of effective dealings and efficiency of agency operations to facilitate both the development and presentation of evidence pertaining to those criteria by agencies and labor organizations, and the qualitative appraisal of such evidence by the Assistant Secretary in appropriate unit determinations. As he has done with the community of interest criterion, therefore, the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. In this way, each of the policy goals to be achieved in unit determinations will have an equal degree of precision and, hopefully, will receive the necessary and desirable equality of emphasis in representation proceedings.

Summarizing the responsibilities of the Assistant Secretary which flow from section 10(b) of the Order: Before the Assistant Secretary may find that a proposed unit is appropriate for purposes of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by section 10(b), find appropriate only units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations. In making the affirmative determination that a proposed bargaining unit satisfies each of the three criteria, the Assistant Secretary must first develop as complete a record as possible, soliciting evidence from the parties as necessary, and then ground his decision upon a careful, thorough analysis of subsidiary factors or evidentiary considerations which provide a sharp degree of definition and precision to each of the three criteria. Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. We turn now to the application of these principles to the three cases before the Council. They will be treated seriatim.

A/SLMR No. 461

As outlined above, in this case the Assistant Secretary found that a unit of one geographic element of the San Francisco DCASR, namely the Salt Lake City DCASD, was an appropriate unit for purposes of exclusive recognition under the Order. In so finding, he reviewed the evidence relating to certain subsidiary factors or indicators of community of interest and based upon these evidentiary considerations found that the employees in the petitioned-for unit shared a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. Additionally, as required, the Assistant Secretary found that such a unit will promote effective dealings and efficiency of agency operations. However, this latter conclusion was "based on the foregoing considerations," that is, the evidentiary considerations which supported a finding that the employees had community of interest, rather than on any evidence directly bearing on the promotion of effective dealings and efficiency of agency operations.

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet his obligations under the Order. In this regard, as we have indicated, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each of the 10(b) criteria. Finally, and most importantly, the Assistant Secretary must decide appropriate unit questions consistent with the purposes of the Order, including the policy of preventing and reducing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

In this case, while the Assistant Secretary clearly met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that criterion, we conclude that he failed to meet these responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an intensive effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations," soliciting evidence from the parties as necessary.5/ While the testimony and arguments advanced by the activity as to why the proposed DCASD unit would not promote effective dealings and efficiency of agency operations may not, in the Assistant Secretary's view, have provided him with a sufficient basis on which to make a determination,6/ the development of such evidence does not

5/ A review of the record indicates that, as to effective dealings and efficiency of agency operations, the Hearing Officer asked a few questions concerning the delegated authority of certain management officials to negotiate and sign a collective bargaining agreement and asked an agency witness only three insubstantial questions concerning whether the proposed unit would impair efficiency of agency operations.

6/ In testimony before the Assistant Secretary's Hearing Officer and in its posthearing brief to the Assistant Secretary, the agency presented evidence regarding effective dealings and efficiency of agency operations as well as evidence regarding community of interest of the employees involved. The San Francisco Region Civilian Personnel Officer testified at the hearing, among other things, in effect, that it would be more efficient for the region to negotiate and deal with the exclusive representative of employees in a single regionwide unit rather than with

(Continued)

stop with the presentation by the parties. Although, as we stated in Tulsa AFS, the parties are responsible for providing the Assistant Secretary with all relevant information within their knowledge and possession, we emphasized in that decision that the Assistant Secretary, in carrying out his responsibility to decide appropriate unit questions, must actively solicit such information and develop the evidence necessary to enable him to make a fully-informed judgment as to whether the proposed unit will satisfy each of the three 10(b) criteria. We conclude that the Assistant Secretary did not meet that responsibility in A/SLMR No. 461. Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such contentions and evidence full and careful consideration. Indeed, his only consideration was in a footnote wherein he rejected the activity's contention that a less than regionwide unit would limit the scope of negotiations solely to those matters within the delegated authority of the Commander of the District Office.7/

(Continued)

representatives of employees in a multiplicity of units within the region. In this regard, he testified in effect that the smaller Salt Lake City unit would, by creating the possibility of multiple units in the region, impair efficiency by exceeding the capacities of the agency's limited labor-management relations staff. In its posthearing brief to the Assistant Secretary, the agency argued, among other things, that the size and composition of the proposed unit, the potential for meaningful negotiations, and the availability of personnel management resources all demonstrate that one regionwide unit would more likely promote efficiency of agency operations and effective dealings.

7/ In rejecting the agency's contention 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, the Assistant Secretary relied on his decision in A/SLMR No. 372 wherein he had, in turn, relied on the Council's decision in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 211 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30]. However, A/SLMR No. 372 was subsequently reviewed by the Council in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80. The Council set aside the Assistant Secretary's decision therein and remanded the case to him. In doing so, the Council stated, as to the Assistant Secretary's reliance upon Merchant Marine and as to the relationship of the amendments to section 11(a) of the Order to the principles enunciated in Merchant Marine:

(Continued)

Second, the Assistant Secretary's decision was not based upon a careful, thorough analysis of evidentiary considerations or factors which provide

(Continued)

> Turning to the instant case [DSA, Cleveland], it is clear that the Assistant Secretary has misinterpreted and misapplied the Merchant Marine decision. For under the Order, as presently effective, labor relations and personnel policies as established (and, of course, published) by the DCASR headquarters may properly serve to bar the matter concerned from the scope of bargaining under section 11(a) of the Order. Since these matters would thus be outside the scope of bargaining at the DCASO level, DCASR, under the Merchant Marine decision, would be under no obligation to provide representatives to negotiate and enter into agreement on such matters at the DCASO level.
>
> Thus, as the Assistant Secretary, in finding the separate DCASO units appropriate in the present case, relied in part on an erroneous interpretation and application of the Merchant Marine decision, we shall remand the case to him for reconsideration and disposition consistent with our opinion.
>
> We are mindful in the above regard that under the amendments to section 11(a), adopted in E.O. 11838 and to become effective 90 days after the Council issues the criteria for determining "compelling need," DCASR directives as such would not thereafter serve to limit the scope of bargaining at the DCASO level—because DCASR appears to be a subdivision below the level of "agency headquarters" or "the level of a primary national subdivision." However, the Assistant Secretary should carefully examine the regulatory framework of DSA, including the DCASR's, which prevails at the time of his reconsideration and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) can be properly applied. Moreover, in so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838 were not designed to render fragmented units appropriate.
>
> In the above regard, as indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnotes omitted.]

a sharp degree of definition and precision to the "effective dealings" and "efficiency of agency operations" criteria. Indeed, there was no discussion of such evidentiary considerations or factors. Instead, the treatment of these two criteria amounted to little more than a conclusionary statement based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest.

While we realize that certain considerations traditionally discussed in the context of community of interest can also be relevant in ascertaining whether a proposed unit would promote effective dealings or efficiency of agency operations (e.g., supervisory hierarchy and uniformity of personnel policies), other, quite different considerations also apply. As we stated in Tulsa AFS,[8/] there is a need for a sharper degree of definition to the criteria of effective dealings and efficiency of agency operations and the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. Rather than relying solely on the "foregoing considerations," the Assistant Secretary was required to examine the very kind of testimony and contentions put forward by the agency (e.g., more efficient use of negotiation resources derived from single regionwide negotiations rather than a multiplicity of negotiations in segments of the region), as well as the wide range of other considerations raised by the facts of the case. In developing such subsidiary factors or evidentiary considerations, which more precisely define what is meant by promoting effective dealings, the Assistant Secretary might well consider in the circumstances of this case such matters as the locus and scope of authority of the responsible personnel office; the limitations on the negotiation of matters of critical concern to employees because the concerns of Salt Lake City DCASO employees may be inseparable from those of other employees in the region; the likelihood that people with greater expertise in negotiations will be available in a larger unit; the actual experience of this agency in other bargaining units; and the level at which labor relations policy is set in the agency and the effectuation of agency training in the implementation of a number of negotiated agreements and grievance procedures covering employees performing essentially the same duties. As to "efficiency of agency operations" among those factors which should be considered would be the benefits to be derived from a unit structure which bears some rational relationship to the operational and organizational structure of the agency. This is certainly not to say that section 10(b) requires that each bargaining unit always be coextensive with the agency's view of how it can best organize to carry out its mission, but the relationship between the proposed bargaining unit and the operational and organizational structure of the agency should be given substantial weight in ascertaining whether the unit will promote efficiency of agency operations. In the instant case, for example, while the Assistant Secretary relied in part on the fact that the

8/ See page 7 supra.

Salt Lake City DCASD employees share districtwide supervision, he appears to have given no weight to the fact that those employees share a common supervisory structure with all employees in the region and enjoy a commonality of mission, personnel policies and practices and matters affecting working conditions with all employees of the region.

Third, in simply concluding that the proposed unit will promote effective dealings and efficiency of operations based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest, the Assistant Secretary failed to give equal weight to all three criteria.

Finally, there is the requirement that the Assistant Secretary decide appropriate unit questions consistent with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. The Assistant Secretary's decision finding appropriate a unit limited to the Salt Lake City DCASD is clearly contrary to that policy in that his decision tends to foster and promote fragmentation. The San Francisco DCASR is a single organizational element of the agency with a chain of command headed by the Regional Commander, running down through all of the component elements. With the exception of the DCASO in Portland which reports through the DCASD in Seattle, all elements of the region report directly to DCASR headquarters. All employees of the region perform their duties pursuant to policies and procedures established by the regional headquarters staff, and the employees within the region are subject to uniform personnel policies and job benefits. The DCASR's Civilian Personnel Office, located at headquarters, has the responsibility for servicing all components within the region. The region encompasses an organizational structure of an agency which is functionally integrated. It has been established in this manner to accomplish its mission. Its employees thus share a commonality of mission, organization and personnel policies and practices and matters affecting working conditions.

There is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Against this backdrop, the AFGE petitioned for a single portion of the organizational and functional whole, the Salt Lake City DCASD, a unit of approximately 77 employees out of a total of approximately 1,250 eligible employees in the region. In concluding that these employees shared a community of interest with each other, the Assistant Secretary relied upon those factors which, in his view, reflected some degree of separation between these employees and the remaining employees in the DCASR. In doing so, he failed to give proper recognition to the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office within the DCASR. As a result, the unit structure which his decision promotes within the San Francisco DCASR results in artificial distinctions between groups

of employees whose mission and functions, supervisory structure and conditions of employment are identical. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occured herein.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order would dictate a finding that a unit limited to the Salt Lake City DCASD is not an appropriate unit for purposes of exclusive recognition under the Order.9/

A/SLMR No. 559

The Assistant Secretary, as outlined above, in this case found appropriate a unit composed of the employees in DCASR headquarters and the five DCASO's, all in the San Francisco Bay area, along with the Hawaii Residency Office. After reviewing at length the organizational and work environment of the region and its component parts, he found that there was a clear and identifiable community of interest among the employees in the unit found appropriate, noting specifically that such employees share a common mission and are covered by the same personnel and labor relations policies; that there are similar job classifications in each of the components within the headquarters, the five DCASO's and the Hawaii Residency Office; that there have been reassignments to and from the Regional Headquarters and the DCASO's; and that there is employee contact between headquarters and the DCASO's.

While the Assistant Secretary again made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. In this case, while the Assistant Secretary met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that

9/ In this regard, we note, as did the agency in testimony and brief before the Assistant Secretary, that the Assistant Secretary earlier considered and rejected as inappropriate various less-than-regionwide units in the San Francisco DCASR ranging in size from 18 to 686 employees. He found such units "would artifically [sic] divide and fragment . . . operations, and cannot be reasonably expected to promote effective dealings or efficiency of operations." Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, A/SLMR No. 112 (Nov. 30, 1971), decision by the then Assistant Secretary. This precedential decision was neither discussed nor even adverted to in the instant case.

criterion,[10] we conclude that he failed to meet those responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."[11] Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such testimony appropriate and adequate consideration.

As to whether the unit sought in A/SLMR No. 559 would promote efficiency of agency operations, the Assistant Secretary, relying on Council negotiability decisions[12] on the meaning of section 12(b)(4),[13] concluded that more than cost factors should be involved in making such determinations. As previously indicated, he stated:

10/ We do not here decide that the factors relied upon by the Assistant Secretary establish a separate community of interest for the employees in the unit found appropriate. Indeed, many of the factors relied upon by the Assistant Secretary indicate a community of interest that is regionwide in scope rather than limited to the employees in the unit sought by the union.

11/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

12/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30]; American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (June 10, 1975), Report No. 73 [aff'd National Broiler Council, Inc. v. Federal Labor Relations Council, Civil Action No. 147-47-A (E.D. Va., Sept. 5, 1975)].

13/ Section 12(b)(4) provides in pertinent part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

(Continued)

> From the foregoing, it is evident that a determination of efficiency of agency operations is dependent on a complex of factors and that it has been recognized that the tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of agency operations despite increased cost factors. [Footnote omitted.]

Based on these considerations, the Assistant Secretary concluded that the proposed unit would promote efficiency of agency operations, stressing that the unit would encompass the employees within the same commuting area and would include the Hawaii Residency Office which otherwise might be fragmented.[14] The Assistant Secretary concluded that the establishment of such a unit "could result" in actual economic savings and increased productivity due to the homogeneity of its composition.

While the Assistant Secretary reached a conclusion as to whether the proposed unit would promote the efficiency of agency operations, in our view, he failed properly to consider the relevant testimony and arguments advanced by the agency and, in effect, thereby failed to give the required equal weight to this criterion. At the outset, the Assistant Secretary found that the agency's views as to both this criterion and the criterion of promoting effective dealings to be "at most, speculative and conjectural." Such a rejection of the agency's views was inappropriate and a misconception of the nature of these criteria. We believe that inherent in determining whether or not a proposed unit will promote the efficiency of agency operations is the need to anticipate the impact of a given unit structure on the agency's operations. Just as the Assistant Secretary considered economic savings and increased productivity which "could result," the Assistant Secretary must also consider the costs and inefficient use of resources that, in management's opinion, "could result" from such a unit structure. The speculative and conjectural nature of a contention, in these circumstances, does not in and of itself render the contention without merit.

As to the specifics of the agency's contentions, the Assistant Secretary stated:

(Continued)

. . . . . .

> (4) to maintain the efficiency of the Government operations entrusted to them.

14/ In this regard, the same concern about fragmentation might have been expressed about any unrepresented portion of the region, for example, the Seattle DCASD, which in all significant respects had the same relationship with the DCASR headquarters as the Hawaii Residency Office.

> In addition, it was noted that the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being, which . . . are relevant factors in making such an assessment. Thus, the Activity's position in this regard was reflected in the testimony of its Civilian Personnel Officer that "it was reasonable" to infer that a region-wide unit would do more to promote efficiency of agency operations (and effective dealings) than the originally petitioned for unit of the DCASR Headquarters, Burlingame, and that it would be a hardship on his office if several agreements were required because this would require expenditure of both manpower and financial resources "that might not be necessary if there were a single unit throughout the Region." I find that, standing alone, such speculation as to what might be helpful or desirable to be insufficient to establish that the proposed unit is inappropriate within the meaning of Section 10(b) of the Order. [Footnote omitted.]

In our view, rather than being rejected, in part, as "speculative," the contentions of the agency were valid considerations to be weighed in determining whether the proposed unit would promote efficiency of agency operations. As we have indicated, a policy of the Order is the promotion of more comprehensive bargaining units. Hence, the activity's contention that a regionwide unit of employees performing the same jobs in an organization with the same mission and subject to the same personnel policies and supervision would do more to promote efficiency of agency operations was consistent with the purposes of the Order. Similarly, while not dispositive, the efficient use of agency labor-management relations and financial resources is a valid factor in determining efficiency of agency operations.

We do not disagree with either the Assistant Secretary's conclusion that more than cost factors are involved in a determination of the promotion of efficiency of agency operations, or his conclusion that the benefits resulting from employee representation by a labor organization can result in improved efficiency of agency operations. However, the according of equal weight to the efficiency of agency operations criteria requires careful consideration of the agency's reasoned view of the impact of the proposed unit on the efficiency of its operations.[15/]

In finding that the alternative unit sought would promote effective dealings, the Assistant Secretary noted that the unit would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations are located organizationally within the unit found appropriate. Thereafter,

15/ In this regard, agency testimony concerning the efficiencies in agency operations experienced in other units would be relevant, as would testimony concerning the effectiveness of dealings in such units.

relying on the amendments to section 11(a) of the Order in E.O. 11838,[16/] the Assistant Secretary stated:

> Moreover, in my view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters. Thus, it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate.

The Assistant Secretary's reliance on the recent amendments to section 11(a) to support his finding that the unit would promote effective dealings is in error. As stated above in footnote 7, the Council, in its decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80, emphasized:

> [A]s indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnote omitted.][17/]

While the changes in section 11(a) were intended to expand the scope of bargaining by eliminating unnecessary constrictions on meaningful negotiations which had been imposed by higher level agency regulations not critical to effective agency management or the public interest, the changes in section 11(a) were also intended, as stated in FLRC No. 74A-41, to complement the recommendations of the Council relating to reduction of unit fragmentation, which reduction would also serve to expand the scope of bargaining. The Assistant Secretary's reliance on the 11(a) changes to support a finding of a less comprehensive unit is therefore totally inappropriate. While the changes to section 11(a) were intended to lessen the impact of certain agency regulations upon the scope of bargaining,

16/ Note 2 supra.

17/ In the subject decision, A/SLMR No. 559, the Assistant Secretary took note of this language in FLRC No. 74A-41, but concluded that he did not find this concept to be inconsistent with the continued existence or establishment of units less comprehensive than region or districtwide, which otherwise meet the tests of appropriateness under the Order.

contrary to the conclusions of the Assistant Secretary, they were not intended to reflect a policy of encouraging the establishment of bargaining units at lower organizational levels within an agency.

While it is true that units may promote effective dealings and be appropriate under section 10(b) even if established at lower agency organizational levels, in our view it is clear that, generally, effective dealings can be better achieved in more comprehensive units. As we have indicated, negotiations covering more comprehensive units permit the parties to address a wider range of matters of critical concern to greater numbers of employees. For example, employees of the entire region herein would have identical concerns as to such matters as merit staffing procedures, areas of consideration, reduction-in-force procedures, and competitive areas. Moreover, negotiations in less fragmented bargaining unit structures established at higher organizational levels permit unions and agencies to allocate their manpower resources and send to the bargaining table more experienced and skilled negotiators who should do a more efficient job of reaching a satisfactory agreement.

The instant decision of the Assistant Secretary clearly reflects a desire that negotiations be conducted at the lowest organizational levels possible and, hence, as close as possible to the particular employees who will be affected by the outcome of the negotiations; however, such a desire cannot be used as a rationale for creating units in a manner inconsistent with the purposes of the Order. Such reasoning, carried to an extreme as here, results in the fragmentation of units contrary to the policies sought to be served by the Order. Moreover, we do not agree that the resolution of local concerns is sacrificed by the creation of more comprehensive units. To the extent that there may be concerns unique to some employees which are not shared by an entire broader unit, there are obvious, well-recognized ways that these concerns may be addressed within the parameters of the bargaining relationship. And while a unit at a lower organizational level may provide a temporary vehicle to address certain localized problems, in the long run, units broader in scope will facilitate consideration and resolution of a greater range of concerns common to employees and will better serve the interests of both the employees and the agencies. It was to achieve this end that the policies of the Order were adopted. Thus, the Assistant Secretary's contrary unit determination was inconsistent with these purposes of the Order.

As previously stated with respect to A/SLMR No. 461, the Assistant Secretary must decide appropriate unit questions consonant with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. In finding appropriate the alternative unit sought in this case, the Assistant Secretary's decision plainly contravenes that policy since his decision tends to foster and promote fragmentation. On the other hand, for the reasons previously detailed at page 14 above, there is no question that a regionwide unit, if alone sought, would meet all of the section 10(b) criteria.

While the employees in the San Francisco Bay area may have, as discussed by the Assistant Secretary, a community of interest with each other and possibly some degree of separation from other elements because of separate local supervision and geographic dispersion, the petitioned-for unit would be inconsistent with the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office. The unit structure, which his decision promotes within the San Francisco DCASR, results in artificial distinctions between employees whose mission and functions, supervisory structure and conditions of employment are identical. Further, as noted with regard to A/SLMR No. 461, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occurred herein.

In conclusion, the Assistant Secretary's finding that the alternative unit sought would promote effective dealings and efficiency of agency operations was based upon considerations which did not properly provide a sharp degree of definition and precision to these two criteria. Indeed, the considerations upon which the Assistant Secretary relied were not implementive of and were not consistent with those criteria. As a result, the Assistant Secretary failed properly to give equal weight to these criteria in his decision.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the alternative unit sought herein is not an appropriate unit for the purposes of exclusive recognition under the Order.

A/SLMR No. 564

In this case, the Assistant Secretary found that the employees in the petitioned-for unit, the Seattle DCASD, including the Portland DCASO, share a clear and identifiable community of interest separate and distinct from other employees of the region. In response to the activity's claim that such a unit would not promote effective dealings or efficiency of agency operations, the Assistant Secretary found that the activity took the identical position that it took in A/SLMR No. 461; he rejected the activity's position partly on the basis of the circumstances recited in A/SLMR No. 559 and his reasoning therein. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in

those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned-for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must again conclude that in doing so he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. Specifically, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."18/ While the testimony and arguments advanced by the activity as to why the proposed unit would not promote effective dealings and efficiency of agency operations may not have provided the Assistant Secretary with a sufficient basis on which to make a determination, as we have indicated, the development of such evidence does not stop with the parties. It is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; he did not do so here.

With regard to the circumstances which he particularly noted in finding that the unit sought would promote effective dealings and efficiency of agency operations, the Assistant Secretary plainly failed to make an affirmative determination that the unit equally satisfied each of the 10(b) criteria. As we indicated previously, the experience of an agency and labor organization under a given unit structure may be considered in determining whether a petitioned-for unit satisfies the three criteria set forth in section 10(b) of the Order, However, the Assistant Secretary may not rely upon "the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations" in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit. Rather, as we have previously emphasized, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each

18/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

of the 10(b) criteria. Reliance upon a lack of evidence fails to satisfy the requirement in the Order that the Assistant Secretary make such an affirmative determination.

Accordingly, for the reasons fully discussed above in regard to the Assistant Secretary's decision in A/SLMR No. 559, we must likewise reject the Assistant Secretary's reliance upon that decision in reaching his decision in A/SLMR No. 564. In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the unit sought herein is not an appropriate unit for purposes of exclusive recognition under the Order. However, as noted with regard to both A/SLMR No. 461 and A/SLMR No. 559, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive unit structure.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's Decision and Direction of Election in each of the above-entitled cases is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decisions and remand the cases to him for action consistent with our decision herein.

In this regard, we have been administratively advised that the Assistant Secretary currently has under consideration a petition for consolidation of units represented by AFGE within the Defense Supply Agency, including the units involved herein. (Assistant Secretary Case No. 22-07578-UC). Should the Assistant Secretary determine that a consolidated unit is appropriate, it would not be inconsistent with this decision to include the units involved herein in such a consolidated unit by reason of the special circumstances here involved, including the fact that the employees in these units have previously indicated through the election process that they wish AFGE to serve as their exclusive representative and the length of time which has elapsed since the elections. Of course, if a consolidation election should be held to determine whether the employees in the proposed consolidated unit wish to be represented in that unit, the employees in the three units involved herein would have the options only of being represented in the consolidated unit or being unrepresented--unless, of course, AFGE files a separate petition seeking to represent the employees involved herein in a regionwide unit which, as already indicated, would be appropriate.

By the Council.

Henry B. Frazier III
Executive Director

Issued: December 30, 1976

August 30, 1977

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

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
SAN FRANCISCO, CALIFORNIA,
DEFENSE CONTRACT ADMINISTRATION
SERVICES DISTRICT (DCASD),
SEATTLE, WASHINGTON
A/SLMR No. 887

On September 30, 1975, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 564, finding that the petitioned for unit in the subject case was appropriate for the purpose of exclusive recognition under the Order.

On December 30, 1976, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 76A-4, in which it found that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the Order.

Based on the Council's holding in FLRC No. 76A-4 and the rationale contained therein, the Assistant Secretary ordered that the Certifications of Representative previously issued to the American Federation of Government Employees, Local 3204, AFL-CIO, be revoked, and that the petition in the subject case be dismissed.

A/SLMR No. 887

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION (DCASR),
SAN FRANCISCO, CALIFORNIA,
DEFENSE CONTRACT ADMINISTRATION
SERVICES DISTRICT (DCASD),
SEATTLE, WASHINGTON 1/

Activity

and

Case No. 71-3140(RO),
A/SLMR No. 564,
FLRC No. 76A-4

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3204, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND ORDER

On September 30, 1975, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 564, finding that the petitioned for unit was appropriate for the purpose of exclusive recognition under the Order. 2/ Thereafter, on December 30, 1976, the Federal Labor Relations Council (Council) issued its consolidated Decision on Appeals involving, among others, the subject case. The Council concluded, in essence, that the petitioned for unit in the subject case was not appropriate for the purpose of exclusive recognition under the Order. 3/

Based on the Council's holding in the instant case and the rationale contained therein, I shall order that the Certifications of Representative previously issued to the Petitioner be revoked, and that the subject petition be dismissed.

1/ Subsequent to the issuance of the Decision on Appeal in FLRC No. 76A-4, the name of the Agency involved was changed to Defense Logistics Agency.

2/ I have been administratively advised that pursuant to the Decision and Direction of Election in A/SLMR No. 564, Certifications of Representative were issued to the Petitioner involved herein encompassing separate units of professional and nonprofessional employees.

3/ Further processing of the subject case was held in abeyance pending the Council's disposition of an appeal in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, etc., FLRC No. 76A-97 (July 20, 1977).

ORDER

IT IS HEREBY ORDERED that the Certifications of Representative issued in Case No. 71-3140(RO) be, and they hereby are, revoked, and that the petition in Case No. 71-3140(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
August 30, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah

and

A/SLMR No. 461
FLRC No. 75A-14

American Federation of Government Employees, Local 3540, AFL-CIO

Defense Supply Agency, Defense Contract Administration Services Region, San Francisco

and

A/SLMR No. 559
FLRC No. 75A-128

American Federation of Government Employees, Local 2723, AFL-CIO

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington

and

A/SLMR No. 564
FLRC No. 76A-4

American Federation of Government Employees, Local 3204, AFL-CIO

DECISION ON APPEALS FROM
ASSISTANT SECRETARY DECISIONS

Background of Cases

These appeals arose from three separate decisions of the Assistant Secretary in which he found that three proposed bargaining units in the Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, were appropriate and directed an

election in each. Inasmuch as the three appeals arise out of the same basic circumstances and factual background, involve the same agency and national labor organization, and present the same major policy issue, the Council here consolidates them for decision on the merits.

All three of the decisions of the Assistant Secretary grew out of petitions filed by locals of the American Federation of Government Employees (AFGE) seeking to represent units of employees of the San Francisco DCASR. The San Francisco DCASR is one of 11 regions of the Defense Supply Agency (DSA), all of which provide contract administration services and support for the Department of Defense, as well as other Federal agencies. The San Francisco DCASR covers the States of Utah, Montana, Idaho, Washington, Oregon, Alaska, Hawaii; most of Nevada; northern California; and the Mariana Islands. It consists of a headquarters organization and field activities which are divided into two Defense Contract Administration Services Districts (DCASD's), Seattle and Salt Lake City, as well as six Defense Contract Administration Services Offices (DCASO's) located in Portland, Oregon, and at five contractors' offices in the San Francisco Bay area and a Hawaii Residency Office. The field activities perform basic mission functions of the region in their respective geographic areas. With the exception of the DCASO in Portland, Oregon, 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 employees located in northern California. All of the employees of the region are subject to uniform personnel policies and practices established at regional headquarters. Prior to the filing of the subject representation petitions, none of the employees of the DCASR were in units of exclusive recognition.

FLRC No. 75A-14 (A/SLMR No. 461)

In June 1974, AFGE Local 3540 sought an election in a districtwide unit composed of the 77 eligible professional and nonprofessional employees of the Salt Lake City DCASD. The San Francisco DCASR contended that the claimed unit was not appropriate because it excluded employees who share a community of interest with the employees in the unit sought and, further, that the unit sought would not promote effective dealings and efficiency of agency operations. The DCASR contended that the only appropriate unit was one composed of all eligible employees of the DCASR, San Francisco.

The Assistant Secretary, in a decision dated November 27, 1974, determined that the Salt Lake City DCASD unit was appropriate for the purposes of exclusive recognition under the Order. After noting particularly that the petitioned-for employees share common districtwide supervision, perform their duties within the assigned geographical locality of the DCASD, and do not interchange or have job contact with other employees of the region, and that generally transfers to or from the District Office occur only in situations involving promotions or reduction-in-force procedures, the

Assistant Secretary found that the employees in the petitioned-for unit share a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. The Assistant Secretary went on to add: "Further, based on the foregoing considerations, I find that such a unit will promote effective dealings and efficiency of agency operations." In making this finding with respect to effective dealings and efficiency of agency operations, the Assistant Secretary rejected the agency's contentions that 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, and thus would not result in effective dealings between the parties or promote the efficiency of agency operations.

FLRC No. 75A-128 (A/SLMR No. 559)

In November 1974, AFGE Local 2723 sought an election in a unit composed of all eligible nonprofessional employees in DCASR headquarters. DCASR officials contended that the claimed unit was not appropriate because it would result in unit fragmentation and would not promote effective dealings and efficiency of agency operations. They maintained that only a single regionwide unit would be appropriate. At the hearing, the union indicated a willingness to include the five DCASO's, all of which are located in the San Francisco Bay area, and the Hawaii Residency Office in the unit. The Assistant Secretary, on September 16, 1975, found that a unit encompassing the employees in DCASR headquarters, the five DCASO's in the San Francisco Bay area, and the Hawaii Residency Office was appropriate for the purpose of exclusive recognition in that the employees in such unit shared a clear and identifiable community of interest with each other, that such a unit would promote effective dealings and efficiency of agency operations, and that the agency contentions to the contrary were "at best, speculative and conjectural."

More particularly, with regard to efficiency of agency operations, the Assistant Secretary observed that more than cost factors should be involved in making such a determination, citing and quoting extensively from the Council's negotiability determination in the Little Rock case.[1/] The Assistant Secretary found it:

> [E]vident that a determination of efficiency of agency operations is dependent upon a complex of factors and that . . . tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of operations despite increased cost factors. [Footnote omitted.]

1/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].

He noted:

> . . . that in unit determination proceedings the parties are obligated to come forward, for the use of the Assistant Secretary, with all relevant information including any contrary evidence with respect to efficiency of agency operations; that information related to efficiency of agency operations may well be within the special knowledge and possession of the agency involved; and that where agencies fail or are unable to respond to the solicitation of such information by the Assistant Secretary, the Assistant Secretary should base his decision on the information available to him, making the best informed judgment he can under the circumstances.

He found that the unit "could result in actual economic savings and increased productivity due to the homogeneity of its composition." Noting that "the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being," the Assistant Secretary found that "standing alone, such speculation as to what might be helpful or desirable [was] insufficient to establish that the proposed unit is inappropriate within the meaning of section 10(b) of the Order."

With regard to effective dealings, the Assistant Secretary, observing that the principal or ultimate authority within the region involved in the negotiation and approval of negotiated agreements and in the resolution of grievances and other personnel matters is located in the DCASR Headquarters, concluded that the unit found appropriate would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations "are located organizationally with the unit found appropriate." The Assistant Secretary went on to state, however, that, in his view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations "even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters." Relying on the amendments to section 11(a) of the Order in E.O. 11838,[2/] the

2/ Section 11(a) provides in pertinent part:

> 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,

(Continued)

Assistant Secretary stated that "it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate." Further, he went on to say that:

> . . . the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to personnel policies and practices and matters affecting working conditions, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

The Assistant Secretary concluded:

> Thus, in my view, the Order, while recognizing the appropriateness of broadly based units under certain circumstances, is also, as reflected by the amendment to Section 11(a), supportive of the concept that bargaining units at lower levels may in certain instances, promote effective dealings, as well as result in the increased efficiency of agency operations. [Footnote omitted.]

FLRC No. 76A-4 (A/SLMR No. 564)

In October 1974, AFGE Local 3204 sought an election in a districtwide unit of all eligible General Schedule and professional employees in the Seattle, Washington DCASD. The proposed unit included, in addition to the employees of the Seattle District, employees of the Portland, Oregon DCASO which, organizationally, reports to regional headquarters through Seattle. The region contended that the unit sought was not appropriate because, among other things, it would not promote effective dealings and efficiency of agency operations. In the activity's view, only a single DCASR-wide unit would be appropriate.

The Assistant Secretary found the petitioned-for unit appropriate in September 1975. In doing so, he determined that the approximately 180

(Continued)

> including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. . . . [Emphasis indicates material added by E.O. 11838, February 6, 1975.]

employees sought to be included within the proposed unit of the Seattle DCASD and the Portland DCASO share a clear and identifiable community of interest separate and distinct from other employees of the region. In disagreement with the claims of regional officials, the Assistant Secretary determined that the proposed unit would promote effective dealings and the efficiency of agency operations. In this regard, he again noted, as in his decision in A/SLMR No. 559 supra, that a determination of effective dealings and efficiency of agency operations is dependent on a complex of factors, including tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization which can result in improved efficiency of agency operations despite increased cost factors and that a claimed unit may promote effective dealings and efficiency of operations even though it does not include all employees directly under the area or regional head, or the activity officials who have final initiating authority with respect to personnel, fiscal, and programmatic matters. He was not persuaded by the region's arguments that the negotiating authority of the District Commander would be extremely limited, noting certain areas of responsibility that the District Commander does have. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

Following each of the Assistant Secretary's decisions in these cases, separate elections were conducted in each of the three separate units which had been found appropriate and AFGE was certified as the exclusive representative in each unit. Thereafter, in each case, DSA appealed the Assistant Secretary's decision to the Council. Upon consideration of the petitions for review, the Council determined that the same major policy issue is presented by each of the decisions of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). Neither party filed a brief on the merits.

Opinion

Section 6(a)(1) of the Order assigns to the Assistant Secretary the responsibility for deciding questions as to units appropriate for the purposes of exclusive recognition. The Council, pursuant to section 2411.18(a) of its regulations, will sustain such decisions unless they are arbitrary and capricious or inconsistent with the purposes of the

Order. In the opinion of the Council, the decision of the Assistant Secretary in each of these cases is inconsistent with the purposes of the Order, specifically the language and intent of section 10(b).

Section 10(b) provides, in pertinent part, that:

> A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations.

The Council on several occasions has considered the meaning and application of section 10(b) in the establishment of appropriate units for the purposes of exclusive recognition. In particular, the Council has addressed the requirement that any proposed unit of exclusive recognition must meet all three appropriate unit criteria prescribed in section 10(b), that is, a unit must (1) ensure a clear and identifiable community of interest among the employees concerned, (2) promote effective dealings, and (3) promote efficiency of agency operations.

In the report accompanying E.O. 11838, the Council, in discussing its belief "that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program," stated:

> We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.3/

Thus, the Council concluded that the appropriate application of the three criteria will facilitate the reduction of fragmentation in bargaining unit structure in the Federal labor-management relations program and thereby promote the policy of creating more comprehensive units.

In its decision in Tulsa AFS, the Council discussed at length the obligations of the Assistant Secretary in applying the three 10(b) criteria.4/ The Council reviewed the history of the development of exclusive recognition of appropriate units in the Federal labor-management relations program and concluded:

3/ Labor-Management Relations in the Federal Service (1975), at 37.

4/ Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

> It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate. This conclusion is amply supported by the purpose of the provision, as evidenced by its "legislative history" . . . especially wherein the criterion of community of interest of the employees involved was explicitly balanced with other considerations important to management and protection of the public interest in the promulgation of E.O. 11491 in 1969, i.e., that units found appropriate must also promote effective dealings and efficiency of agency operations.

Further, after quoting those passages of the Council's Report to the President which led to the issuance of Executive Order 11838 wherein the three criteria were discussed, the Council stated as to the required findings under section 10(b) of the Order:

> Thus, the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate.

In Tulsa AFS, the Council also discussed the responsibility of the Assistant Secretary in unit determination proceedings to develop and consider evidence concerning the appropriate unit criteria in section 10(b) of the Order. The Council stressed that it is the obligation of the Assistant Secretary to "develop as complete a record as possible with regard to each of the three criteria . . . and . . . give full and careful consideration to all relevant evidence in the record in reaching his decision." In this regard, the Council noted that parties to a representation proceeding are responsible for providing the Assistant Secretary with all information relevant to the appropriate unit criteria that is within their knowledge and possession, but emphasized that the Assistant Secretary must actively solicit such evidence as necessary to enable him to make a fully-informed judgment as to whether a particular unit will satisfy each of the three 10(b) criteria. In this regard, the Council stated:

> [T]here is a need for a sharper degree of definition of the criteria of effective dealings and efficiency of agency operations to facilitate both the development and presentation of evidence pertaining to those criteria by agencies and labor organizations, and the qualitative appraisal of such evidence by the Assistant Secretary in appropriate unit determinations. As he has done with the community of interest criterion, therefore, the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. In this way, each of the policy goals to be achieved in unit determinations will have an equal degree of precision and, hopefully, will receive the necessary and desirable equality of emphasis in representation proceedings.

Summarizing the responsibilities of the Assistant Secretary which flow from section 10(b) of the Order: Before the Assistant Secretary may find that a proposed unit is appropriate for purposes of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by section 10(b), find appropriate only units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations. In making the affirmative determination that a proposed bargaining unit satisfies each of the three criteria, the Assistant Secretary must first develop as complete a record as possible, soliciting evidence from the parties as necessary, and then ground his decision upon a careful, thorough analysis of subsidiary factors or evidentiary considerations which provide a sharp degree of definition and precision to each of the three criteria. Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. We turn now to the application of these principles to the three cases before the Council. They will be treated seriatim.

A/SLMR No. 461

As outlined above, in this case the Assistant Secretary found that a unit of one geographic element of the San Francisco DCASR, namely the Salt Lake City DCASD, was an appropriate unit for purposes of exclusive recognition under the Order. In so finding, he reviewed the evidence relating to certain subsidiary factors or indicators of community of interest and based upon these evidentiary considerations found that the employees in the petitioned-for unit shared a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. Additionally, as required, the Assistant Secretary found that such a unit will promote effective dealings and efficiency of agency operations. However, this latter conclusion was "based on the foregoing considerations," that is, the evidentiary considerations which supported a finding that the employees had community of interest, rather than on any evidence directly bearing on the promotion of effective dealings and efficiency of agency operations.

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet his obligations under the Order. In this regard, as we have indicated, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each of the 10(b) criteria. Finally, and most importantly, the Assistant Secretary must decide appropriate unit questions consistent with the purposes of the Order, including the policy of preventing and reducing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

In this case, while the Assistant Secretary clearly met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that criterion, we conclude that he failed to meet these responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an intensive effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations," soliciting evidence from the parties as necessary.5/ While the testimony and arguments advanced by the activity as to why the proposed DCASD unit would not promote effective dealings and efficiency of agency operations may not, in the Assistant Secretary's view, have provided him with a sufficient basis on which to make a determination,6/ the development of such evidence does not

5/ A review of the record indicates that, as to effective dealings and efficiency of agency operations, the Hearing Officer asked a few questions concerning the delegated authority of certain management officials to negotiate and sign a collective bargaining agreement and asked an agency witness only three insubstantial questions concerning whether the proposed unit would impair efficiency of agency operations.

6/ In testimony before the Assistant Secretary's Hearing Officer and in its posthearing brief to the Assistant Secretary, the agency presented evidence regarding effective dealings and efficiency of agency operations as well as evidence regarding community of interest of the employees involved. The San Francisco Region Civilian Personnel Officer testified at the hearing, among other things, in effect, that it would be more efficient for the region to negotiate and deal with the exclusive representative of employees in a single regionwide unit rather than with

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stop with the presentation by the parties. Although, as we stated in Tulsa AFS, the parties are responsible for providing the Assistant Secretary with all relevant information within their knowledge and possession, we emphasized in that decision that the Assistant Secretary, in carrying out his responsibility to decide appropriate unit questions, must actively solicit such information and develop the evidence necessary to enable him to make a fully-informed judgment as to whether the proposed unit will satisfy each of the three 10(b) criteria. We conclude that the Assistant Secretary did not meet that responsibility in A/SLMR No. 461. Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such contentions and evidence full and careful consideration. Indeed, his only consideration was in a footnote wherein he rejected the activity's contention that a less than regionwide unit would limit the scope of negotiations solely to those matters within the delegated authority of the Commander of the District Office.7/

(Continued)

representatives of employees in a multiplicity of units within the region. In this regard, he testified in effect that the smaller Salt Lake City unit would, by creating the possibility of multiple units in the region, impair efficiency by exceeding the capacities of the agency's limited labor-management relations staff. In its posthearing brief to the Assistant Secretary, the agency argued, among other things, that the size and composition of the proposed unit, the potential for meaningful negotiations, and the availability of personnel management resources all demonstrate that one regionwide unit would more likely promote efficiency of agency operations and effective dealings.

7/ In rejecting the agency's contention 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, the Assistant Secretary relied on his decision in A/SLMR No. 372 wherein he had, in turn, relied on the Council's decision in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 211 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30]. However, A/SLMR No. 372 was subsequently reviewed by the Council in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80. The Council set aside the Assistant Secretary's decision therein and remanded the case to him. In doing so, the Council stated, as to the Assistant Secretary's reliance upon Merchant Marine and as to the relationship of the amendments to section 11(a) of the Order to the principles enunciated in Merchant Marine:

(Continued)

Second, the Assistant Secretary's decision was not based upon a careful, thorough analysis of evidentiary considerations or factors which provide

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> Turning to the instant case [DSA, Cleveland], it is clear that the Assistant Secretary has misinterpreted and misapplied the Merchant Marine decision. For under the Order, as presently effective, labor relations and personnel policies as established (and, of course, published) by the DCASR headquarters may properly serve to bar the matter concerned from the scope of bargaining under section 11(a) of the Order. Since these matters would thus be outside the scope of bargaining at the DCASO level, DCASR, under the Merchant Marine decision, would be under no obligation to provide representatives to negotiate and enter into agreement on such matters at the DCASO level.
>
> Thus, as the Assistant Secretary, in finding the separate DCASO units appropriate in the present case, relied in part on an erroneous interpretation and application of the Merchant Marine decision, we shall remand the case to him for reconsideration and disposition consistent with our opinion.
>
> We are mindful in the above regard that under the amendments to section 11(a), adopted in E.O. 11838 and to become effective 90 days after the Council issues the criteria for determining "compelling need," DCASR directives as such would not thereafter serve to limit the scope of bargaining at the DCASO level—because DCASR appears to be a subdivision below the level of "agency headquarters" or "the level of a primary national subdivision." However, the Assistant Secretary should carefully examine the regulatory framework of DSA, including the DCASR's, which prevails at the time of his reconsideration and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) can be properly applied. Moreover, in so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838 were not designed to render fragmented units appropriate.
>
> In the above regard, as indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnotes omitted.]

a sharp degree of definition and precision to the "effective dealings" and "efficiency of agency operations" criteria. Indeed, there was no discussion of such evidentiary considerations or factors. Instead, the treatment of these two criteria amounted to little more than a conclusionary statement based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest.

While we realize that certain considerations traditionally discussed in the context of community of interest can also be relevant in ascertaining whether a proposed unit would promote effective dealings or efficiency of agency operations (e.g., supervisory hierarchy and uniformity of personnel policies), other, quite different considerations also apply. As we stated in Tulsa AFS,[8/] there is a need for a sharper degree of definition to the criteria of effective dealings and efficiency of agency operations and the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. Rather than relying solely on the "foregoing considerations," the Assistant Secretary was required to examine the very kind of testimony and contentions put forward by the agency (e.g., more efficient use of negotiation resources derived from single regionwide negotiations rather than a multiplicity of negotiations in segments of the region), as well as the wide range of other considerations raised by the facts of the case. In developing such subsidiary factors or evidentiary considerations, which more precisely define what is meant by promoting effective dealings, the Assistant Secretary might well consider in the circumstances of this case such matters as the locus and scope of authority of the responsible personnel office; the limitations on the negotiation of matters of critical concern to employees because the concerns of Salt Lake City DCASO employees may be inseparable from those of other employees in the region; the likelihood that people with greater expertise in negotiations will be available in a larger unit; the actual experience of this agency in other bargaining units; and the level at which labor relations policy is set in the agency and the effectuation of agency training in the implementation of a number of negotiated agreements and grievance procedures covering employees performing essentially the same duties. As to "efficiency of agency operations" among those factors which should be considered would be the benefits to be derived from a unit structure which bears some rational relationship to the operational and organizational structure of the agency. This is certainly not to say that section 10(b) requires that each bargaining unit always be coextensive with the agency's view of how it can best organize to carry out its mission, but the relationship between the proposed bargaining unit and the operational and organizational structure of the agency should be given substantial weight in ascertaining whether the unit will promote efficiency of agency operations. In the instant case, for example, while the Assistant Secretary relied in part on the fact that the

8/ See page 7 supra.

Salt Lake City DCASD employees share districtwide supervision, he appears to have given no weight to the fact that those employees share a common supervisory structure with all employees in the region and enjoy a commonality of mission, personnel policies and practices and matters affecting working conditions with all employees of the region.

Third, in simply concluding that the proposed unit will promote effective dealings and efficiency of operations based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest, the Assistant Secretary failed to give equal weight to all three criteria.

Finally, there is the requirement that the Assistant Secretary decide appropriate unit questions consistent with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. The Assistant Secretary's decision finding appropriate a unit limited to the Salt Lake City DCASD is clearly contrary to that policy in that his decision tends to foster and promote fragmentation. The San Francisco DCASR is a single organizational element of the agency with a chain of command headed by the Regional Commander, running down through all of the component elements. With the exception of the DCASO in Portland which reports through the DCASD in Seattle, all elements of the region report directly to DCASR headquarters. All employees of the region perform their duties pursuant to policies and procedures established by the regional headquarters staff, and the employees within the region are subject to uniform personnel policies and job benefits. The DCASR's Civilian Personnel Office, located at headquarters, has the responsibility for servicing all components within the region. The region encompasses an organizational structure of an agency which is functionally integrated. It has been established in this manner to accomplish its mission. Its employees thus share a commonality of mission, organization and personnel policies and practices and matters affecting working conditions.

There is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Against this backdrop, the AFGE petitioned for a single portion of the organizational and functional whole, the Salt Lake City DCASD, a unit of approximately 77 employees out of a total of approximately 1,250 eligible employees in the region. In concluding that these employees shared a community of interest with each other, the Assistant Secretary relied upon those factors which, in his view, reflected some degree of separation between these employees and the remaining employees in the DCASR. In doing so, he failed to give proper recognition to the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office within the DCASR. As a result, the unit structure which his decision promotes within the San Francisco DCASR results in artificial distinctions between groups

of employees whose mission and functions, supervisory structure and conditions of employment are identical. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occured herein.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order would dictate a finding that a unit limited to the Salt Lake City DCASD is not an appropriate unit for purposes of exclusive recognition under the Order.[9/]

A/SLMR No. 559

The Assistant Secretary, as outlined above, in this case found appropriate a unit composed of the employees in DCASR headquarters and the five DCASO's, all in the San Francisco Bay area, along with the Hawaii Residency Office. After reviewing at length the organizational and work environment of the region and its component parts, he found that there was a clear and identifiable community of interest among the employees in the unit found appropriate, noting specifically that such employees share a common mission and are covered by the same personnel and labor relations policies; that there are similar job classifications in each of the components within the headquarters, the five DCASO's and the Hawaii Residency Office; that there have been reassignments to and from the Regional Headquarters and the DCASO's; and that there is employee contact between headquarters and the DCASO's.

While the Assistant Secretary again made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. In this case, while the Assistant Secretary met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that

9/ In this regard, we note, as did the agency in testimony and brief before the Assistant Secretary, that the Assistant Secretary earlier considered and rejected as inappropriate various less-than-regionwide units in the San Francisco DCASR ranging in size from 18 to 686 employees. He found such units "would artifically [sic] divide and fragment . . . operations, and cannot be reasonably expected to promote effective dealings or efficiency of operations." Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, A/SLMR No. 112 (Nov. 30, 1971), decision by the then Assistant Secretary. This precedential decision was neither discussed nor even adverted to in the instant case.

criterion,10/ we conclude that he failed to meet those responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."11/ Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such testimony appropriate and adequate consideration.

As to whether the unit sought in A/SLMR No. 559 would promote efficiency of agency operations, the Assistant Secretary, relying on Council negotiability decisions12/ on the meaning of section 12(b)(4),13/ concluded that more than cost factors should be involved in making such determinations. As previously indicated, he stated:

10/ We do not here decide that the factors relied upon by the Assistant Secretary establish a separate community of interest for the employees in the unit found appropriate. Indeed, many of the factors relied upon by the Assistant Secretary indicate a community of interest that is regionwide in scope rather than limited to the employees in the unit sought by the union.

11/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

12/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30]; American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (June 10, 1975), Report No. 73 [aff'd National Broiler Council, Inc. v. Federal Labor Relations Council, Civil Action No. 147-47-A (E.D. Va., Sept. 5, 1975)].

13/ Section 12(b)(4) provides in pertinent part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

(Continued)

> From the foregoing, it is evident that a determination of efficiency of agency operations is dependent on a complex of factors and that it has been recognized that the tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of agency operations despite increased cost factors. [Footnote omitted.]

Based on these considerations, the Assistant Secretary concluded that the proposed unit would promote efficiency of agency operations, stressing that the unit would encompass the employees within the same commuting area and would include the Hawaii Residency Office which otherwise might be fragmented.14/ The Assistant Secretary concluded that the establishment of such a unit "could result" in actual economic savings and increased productivity due to the homogeneity of its composition.

While the Assistant Secretary reached a conclusion as to whether the proposed unit would promote the efficiency of agency operations, in our view, he failed properly to consider the relevant testimony and arguments advanced by the agency and, in effect, thereby failed to give the required equal weight to this criterion. At the outset, the Assistant Secretary found that the agency's views as to both this criterion and the criterion of promoting effective dealings to be "at most, speculative and conjectural." Such a rejection of the agency's views was inappropriate and a misconception of the nature of these criteria. We believe that inherent in determining whether or not a proposed unit will promote the efficiency of agency operations is the need to anticipate the impact of a given unit structure on the agency's operations. Just as the Assistant Secretary considered economic savings and increased productivity which "could result," the Assistant Secretary must also consider the costs and inefficient use of resources that, in management's opinion, "could result" from such a unit structure. The speculative and conjectural nature of a contention, in these circumstances, does not in and of itself render the contention without merit.

As to the specifics of the agency's contentions, the Assistant Secretary stated:

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. . . . . .

> (4) to maintain the efficiency of the Government operations entrusted to them.

14/ In this regard, the same concern about fragmentation might have been expressed about any unrepresented portion of the region, for example, the Seattle DCASD, which in all significant respects had the same relationship with the DCASR headquarters as the Hawaii Residency Office.

> In addition, it was noted that the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being, which . . . are relevant factors in making such an assessment. Thus, the Activity's position in this regard was reflected in the testimony of its Civilian Personnel Officer that "it was reasonable" to infer that a region-wide unit would do more to promote efficiency of agency operations (and effective dealings) than the originally petitioned for unit of the DCASR Headquarters, Burlingame, and that it would be a hardship on his office if several agreements were required because this would require expenditure of both manpower and financial resources "that might not be necessary if there were a single unit throughout the Region." I find that, standing alone, such speculation as to what might be helpful or desirable to be insufficient to establish that the proposed unit is inappropriate within the meaning of Section 10(b) of the Order. [Footnote omitted.]

In our view, rather than being rejected, in part, as "speculative," the contentions of the agency were valid considerations to be weighed in determining whether the proposed unit would promote efficiency of agency operations. As we have indicated, a policy of the Order is the promotion of more comprehensive bargaining units. Hence, the activity's contention that a regionwide unit of employees performing the same jobs in an organization with the same mission and subject to the same personnel policies and supervision would do more to promote efficiency of agency operations was consistent with the purposes of the Order. Similarly, while not dispositive, the efficient use of agency labor-management relations and financial resources is a valid factor in determining efficiency of agency operations.

We do not disagree with either the Assistant Secretary's conclusion that more than cost factors are involved in a determination of the promotion of efficiency of agency operations, or his conclusion that the benefits resulting from employee representation by a labor organization can result in improved efficiency of agency operations. However, the according of equal weight to the efficiency of agency operations criteria requires careful consideration of the agency's reasoned view of the impact of the proposed unit on the efficiency of its operations.[15/]

In finding that the alternative unit sought would promote effective dealings, the Assistant Secretary noted that the unit would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations are located organizationally within the unit found appropriate. Thereafter,

15/ In this regard, agency testimony concerning the efficiencies in agency operations experienced in other units would be relevant, as would testimony concerning the effectiveness of dealings in such units.

relying on the amendments to section 11(a) of the Order in E.O. 11838,[16/] the Assistant Secretary stated:

> Moreover, in my view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters. Thus, it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate.

The Assistant Secretary's reliance on the recent amendments to section 11(a) to support his finding that the unit would promote effective dealings is in error. As stated above in footnote 7, the Council, in its decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80, emphasized:

> [A]s indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnote omitted.][17/]

While the changes in section 11(a) were intended to expand the scope of bargaining by eliminating unnecessary constrictions on meaningful negotiations which had been imposed by higher level agency regulations not critical to effective agency management or the public interest, the changes in section 11(a) were also intended, as stated in FLRC No. 74A-41, to complement the recommendations of the Council relating to reduction of unit fragmentation, which reduction would also serve to expand the scope of bargaining. The Assistant Secretary's reliance on the 11(a) changes to support a finding of a less comprehensive unit is therefore totally inappropriate. While the changes to section 11(a) were intended to lessen the impact of certain agency regulations upon the scope of bargaining,

16/ Note 2 supra.

17/ In the subject decision, A/SLMR No. 559, the Assistant Secretary took note of this language in FLRC No. 74A-41, but concluded that he did not find this concept to be inconsistent with the continued existence or establishment of units less comprehensive than region or districtwide, which otherwise meet the tests of appropriateness under the Order.

contrary to the conclusions of the Assistant Secretary, they were not intended to reflect a policy of encouraging the establishment of bargaining units at lower organizational levels within an agency.

While it is true that units may promote effective dealings and be appropriate under section 10(b) even if established at lower agency organizational levels, in our view it is clear that, generally, effective dealings can be better achieved in more comprehensive units. As we have indicated, negotiations covering more comprehensive units permit the parties to address a wider range of matters of critical concern to greater numbers of employees. For example, employees of the entire region herein would have identical concerns as to such matters as merit staffing procedures, areas of consideration, reduction-in-force procedures, and competitive areas. Moreover, negotiations in less fragmented bargaining unit structures established at higher organizational levels permit unions and agencies to allocate their manpower resources and send to the bargaining table more experienced and skilled negotiators who should do a more efficient job of reaching a satisfactory agreement.

The instant decision of the Assistant Secretary clearly reflects a desire that negotiations be conducted at the lowest organizational levels possible and, hence, as close as possible to the particular employees who will be affected by the outcome of the negotiations; however, such a desire cannot be used as a rationale for creating units in a manner inconsistent with the purposes of the Order. Such reasoning, carried to an extreme as here, results in the fragmentation of units contrary to the policies sought to be served by the Order. Moreover, we do not agree that the resolution of local concerns is sacrificed by the creation of more comprehensive units. To the extent that there may be concerns unique to some employees which are not shared by an entire broader unit, there are obvious, well-recognized ways that these concerns may be addressed within the parameters of the bargaining relationship. And while a unit at a lower organizational level may provide a temporary vehicle to address certain localized problems, in the long run, units broader in scope will facilitate consideration and resolution of a greater range of concerns common to employees and will better serve the interests of both the employees and the agencies. It was to achieve this end that the policies of the Order were adopted. Thus, the Assistant Secretary's contrary unit determination was inconsistent with these purposes of the Order.

As previously stated with respect to A/SLMR No. 461, the Assistant Secretary must decide appropriate unit questions consonant with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. In finding appropriate the alternative unit sought in this case, the Assistant Secretary's decision plainly contravenes that policy since his decision tends to foster and promote fragmentation. On the other hand, for the reasons previously detailed at page 14 above, there is no question that a regionwide unit, if alone sought, would meet all of the section 10(b) criteria.

While the employees in the San Francisco Bay area may have, as discussed by the Assistant Secretary, a community of interest with each other and possibly some degree of separation from other elements because of separate local supervision and geographic dispersion, the petitioned-for unit would be inconsistent with the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office. The unit structure, which his decision promotes within the San Francisco DCASR, results in artificial distinctions between employees whose mission and functions, supervisory structure and conditions of employment are identical. Further, as noted with regard to A/SLMR No. 461, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occurred herein.

In conclusion, the Assistant Secretary's finding that the alternative unit sought would promote effective dealings and efficiency of agency operations was based upon considerations which did not properly provide a sharp degree of definition and precision to these two criteria. Indeed, the considerations upon which the Assistant Secretary relied were not implementive of and were not consistent with those criteria. As a result, the Assistant Secretary failed properly to give equal weight to these criteria in his decision.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the alternative unit sought herein is not an appropriate unit for the purposes of exclusive recognition under the Order.

A/SLMR No. 564

In this case, the Assistant Secretary found that the employees in the petitioned-for unit, the Seattle DCASD, including the Portland DCASO, share a clear and identifiable community of interest separate and distinct from other employees of the region. In response to the activity's claim that such a unit would not promote effective dealings or efficiency of agency operations, the Assistant Secretary found that the activity took the identical position that it took in A/SLMR No. 461; he rejected the activity's position partly on the basis of the circumstances recited in A/SLMR No. 559 and his reasoning therein. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in

> those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned-for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must again conclude that in doing so he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. Specifically, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."18/ While the testimony and arguments advanced by the activity as to why the proposed unit would not promote effective dealings and efficiency of agency operations may not have provided the Assistant Secretary with a sufficient basis on which to make a determination, as we have indicated, the development of such evidence does not stop with the parties. It is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; he did not do so here.

With regard to the circumstances which he particularly noted in finding that the unit sought would promote effective dealings and efficiency of agency operations, the Assistant Secretary plainly failed to make an affirmative determination that the unit equally satisfied each of the 10(b) criteria. As we indicated previously, the experience of an agency and labor organization under a given unit structure may be considered in determining whether a petitioned-for unit satisfies the three criteria set forth in section 10(b) of the Order. However, the Assistant Secretary may not rely upon "the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations" in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit. Rather, as we have previously emphasized, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each

18/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

of the 10(b) criteria. Reliance upon a lack of evidence fails to satisfy the requirement in the Order that the Assistant Secretary make such an affirmative determination.

Accordingly, for the reasons fully discussed above in regard to the Assistant Secretary's decision in A/SLMR No. 559, we must likewise reject the Assistant Secretary's reliance upon that decision in reaching his decision in A/SLMR No. 564. In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the unit sought herein is not an appropriate unit for purposes of exclusive recognition under the Order. However, as noted with regard to both A/SLMR No. 461 and A/SLMR No. 559, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive unit structure.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's Decision and Direction of Election in each of the above-entitled cases is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decisions and remand the cases to him for action consistent with our decision herein.

In this regard, we have been administratively advised that the Assistant Secretary currently has under consideration a petition for consolidation of units represented by AFGE within the Defense Supply Agency, including the units involved herein. (Assistant Secretary Case No. 22-07578-UC). Should the Assistant Secretary determine that a consolidated unit is appropriate, it would not be inconsistent with this decision to include the units involved herein in such a consolidated unit by reason of the special circumstances here involved, including the fact that the employees in these units have previously indicated through the election process that they wish AFGE to serve as their exclusive representative and the length of time which has elapsed since the elections. Of course, if a consolidation election should be held to determine whether the employees in the proposed consolidated unit wish to be represented in that unit, the employees in the three units involved herein would have the options only of being represented in the consolidated unit or being unrepresented--unless, of course, AFGE files a separate petition seeking to represent the employees involved herein in a regionwide unit which, as already indicated, would be appropriate.

By the Council.

Henry B. Frazier III
Executive Director

Issued: December 30, 1976

August 31, 1977

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

FLORIDA AIR NATIONAL GUARD,
ST. AUGUSTINE, FLORIDA
A/SLMR No. 888

This case involved a petition for clarification of unit (CU) filed by the National Association of Government Employees, Local R5-91 (NAGE) seeking to clarify the status of three job descriptions: Aircraft Armament Systems Mechanic, WG 6652-13; Hydromechanical Fuel Control Repairer, WG 8255-12; and Turbine Powered Systems Repairer (Foreman), WG 8274-12. While the NAGE contended that all three classifications should be included in the existing unit, the Activity argued that all three positions were supervisory and should be excluded from the exclusively recognized unit.

The Assistant Secretary concluded that two of the three employees in question, the Hydromechanical Fuel Control Repairer and the Turbine Powered Systems Repairer (Foreman), were supervisors and that the other employee, an Aircraft Armament Systems Mechanic, was not a supervisor within the meaning of the Order. Accordingly, the Assistant Secretary clarified the unit consistent with his findings.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FLORIDA AIR NATIONAL GUARD,
ST. AUGUSTINE, FLORIDA

Activity

and

Case No. 42-3588(CU)

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-91

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 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 the subject case, the Assistant Secretary finds:

The Petitioner, National Association of Government Employees, Local R5-91, herein called NAGE, seeks to clarify an existing exclusively recognized unit of all Florida Air National Guard Technicians 1/ to include two employees in the classification "Pneudraulic Systems Mechanic, WG-12, job numbers 45-48 and 45-35," and one employee in the classification "Aircraft Ordnance Mechanic, WG-13, job number 45-79." 2/ The NAGE contends that the three employees are not supervisors within the meaning

1/ On August 16, 1971, the NAGE was certified as the exclusive representative in a unit of all "Wage Board and General Schedule Florida Air National Guard Technicians, excluding Army Aviation Technicians at Craig Field, Jacksonville, Florida, Florida Army National Guard Technicians, employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, and supervisors and guards as defined by Executive Order 11491."

2/ The job titles of these three employees, as set forth in their job descriptions, are: Aircraft Armament Systems Mechanic WG 6652-13, job No. 45-79; Hydromechanical Fuel Control Repairer, WG 8255-12, job No. 45-35; and Turbine Powered Systems Repairer (Foreman), WG 8274-12, job No. 45-48. These job titles will be used hereafter to identify these positions.

of Section 2(c) of the Order and, therefore, should be included in the unit. The Activity takes the position that these employees are supervisors and should be excluded from the unit.

The mission of the Activity is to train personnel, care for military equipment and maintain readiness in case of alert. The Activity is divided into specialized branches each of which has its particular mission. The two branches involved herein are the Munitions Branch and the Field Maintenance Branch.

Aircraft Armament Systems Mechanic, WG 6652-13, job number 45-79

This technician position, also known as the Explosible Ordnance Disposal Shop Supervisor, is located in a subdivision of the Munitions Maintenance Branch of the Aircraft Maintenance Division. At the time of the hearing, this position was filled by Mr. William L. Crouse. The evidence shows that Crouse has one subordinate employee, an Explosive Ordnance technician, Wage Grade 11.

The record reveals that Crouse does not possess the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline this employee. Although it appears that he may recommend such actions, the evidence establishes that his recommendations are not necessarily effective in that his immediate supervisor evaluates and reconsiders Crouse's recommendations and on occasion reverses them. It further appears that while Crouse schedules work for his subordinate employee, this duty is sufficiently routine and clerical in nature as to make Crouse more in the nature of a work leader than a supervisor.

Under these circumstances, I find that the evidence does not establish that Crouse is a supervisor within the meaning of Section 2(c) of the Order, and I shall therefore order that he be included within the exclusively recognized unit.

Hydromechanical Fuel Control Repairer, WG 8255-12, job number 45-35 and Turbine Powered Systems Repairer (Foreman), WG 8274-12, job number 45-48 3/

The technician filling the Hydromechanical Fuel Control Repairer position is also known as the Fuel Systems Shop Supervisor. The technican filling the Turbine Powered Systems Repairer position is also known as the Environmental Shop Supervisor. The record reveals that, among their duties and responsibilities, each technician has one subordinate employee and that these technicians have effectively recommended their hiring.

On this basis, I find that employees in these classifications are supervisors within the meaning of Section 2(c) of the Order and should be excluded from the unit herein.

3/ These employees work for the Areospace System Section of the Field Maintenance Branch.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted to the National Association of Government Employees, Local R5-91, on August 16, 1971, be, and it hereby is, clarified by including in such unit the position of Aircraft Armament Systems Mechanic, WG 6652-13, job number 45-79; and by excluding from such unit the positions of Hydromechanical Fuel Control Repairer, WG 8255-12, job number 45-35 and Turbine Powered Systems Repairer (Foreman), WG 8274-12, job number 45-48.

Dated, Washington, D.C.
August 31, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

August 31, 1977

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

SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
WILKES-BARRE OPERATIONS BRANCH,
WILKES-BARRE, PENNSYLVANIA
A/SLMR No. 889

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2809, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(6) of the Order by failing to bargain on the method of selection of Equal Employment Opportunity (EEO) Counselors in accordance with a written accord of May 20, 1975, entered into by the parties wherein they agreed that the method of selection would be by "joint Union/Management agreement."

The Administrative Law Judge found that under the terms of the parties' negotiated agreement and the May 20 accord, the Respondent had an obligation to bargain on the method of selection of EEO Counselors and that its failure to do so constituted a violation of Section 19(a)(6) of the Order.

The Assistant Secretary concurred in the conclusion of the Administrative Law Judge that the method of selection of EEO Counselors was a negotiable matter within the meaning of Section 11(a) of the Order, absent a statutory or other appropriate limitation, or absent a clear and unmistakable waiver of the right to negotiate on such a matter. As no such limitation or waiver was found to exist, the Respondent was found to be obligated to negotiate on the method of selection and its failure to do so was deemed violative of Section 19(a)(6) of the Order.

To remedy the Respondent's improper conduct, the Assistant Secretary ordered that the Respondent bargain with the AFGE on the method of selection, and re-evaluate all the applicants for the EEO Counselor positions in accordance with any agreed upon method of selection.

A/SLMR No. 889

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
WILKES-BARRE OPERATIONS BRANCH,
WILKES-BARRE, PENNSYLVANIA

Respondent

and

Case No. 20-5510(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2809, AFL-CIO

Complainant

DECISION AND ORDER

On March 8, 1977, Administrative Law Judge George Fath issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

The Respondent, the Wilkes-Barre Operations Branch of the Social Security Administration, and the Complainant, American Federation of Government Employees, Local 2809, AFL-CIO, are parties to a negotiated agreement which was in effect at all times material herein. The agreement contains no specific reference to the selection or appointment of Equal

Employment Opportunity (EEO) Counselors. 1/ A Social Security Administration Instruction prescribes that either the EEO or Deputy EEO Officer be the appointing authority for EEO Counselors and outlines the duties and responsibilities of the Counselors, but does not prescribe the method for selecting such Counselors.

The record reveals that on May 8, 1975, after discovering that the then current EEO Counselor was no longer eligible for that position, the Complainant's President, Joan Parsons, contacted the Respondent's Branch Chief, Joseph Roarty, and suggested that the parties meet to discuss the matter. Roarty and Parsons met and signed a written accord on May 20, 1975, whereby they agreed that applications for the vacant EEO Counselor positions would be by self-nomination and that the method of selection would be by "joint Union/Management agreement". 2/ Thereafter, in June or July 1975, Roarty was advised by higher agency management that he had lacked the authority to enter the May 20 accord because the selection of Counselors is a retained right under the Social Security Administration regulation which provides for the EEO or Deputy EEO Officer to act as the selecting official. Roarty so advised the Complainant. The Respondent further contended that under Article II, Section 3 of the parties' negotiated agreement, the Complainant had waived its right to bargain over matters which are subject to agency regulations. 3/

On August 13, 1975, a meeting was held between Alonzo Rogers, EEO Officer for the Social Security Administration's Bureau of Data Processing, Branch Chief Roarty, and the Complainant's Vice President and Chief Steward in which Rogers reiterated that applicants for the Counselor positions would be by self-nomination. Rogers then distributed a proposed draft of the agency's affirmative action plan and requested the Union's input on it. On that same date, a memorandum was sent to the Respondent's employees by Roarty indicating, in part, that Rogers would be conducting the selection process for the EEO Counselors and also that he would be "consulting and conferring with the Union officials for their input."

1/ The only references to EEO matters contained in the negotiated agreement are set forth as follows:
Article II, Section 1 provides:
The Branch and the Labor Organization agree to establish appropriate machinery, ..., for joint consultation and/or negotiation, on personnel policies, practices, and procedures relating to working conditions which are within the authority of the Branch, ..., including, ... equal employment opportunities, ...
Article X, Section 9 provides:
Labor and Management agree to cooperate in providing equal opportunity for all qualified persons, ..., and to promote the full realization of equal employment opportunity through a positive and continuing effort.

2/ This written accord contained other provisions which have no relevance to the instant proceeding.

3/ Article II, Section 3 provides in part:
The Branch and the Labor Organization agree that personnel policies
(Continued)

Some 37 applicants were interviewed by Rogers in September with a representative of the Complainant present as an observer. By letter of October 29, Rogers informed Roarty of the five candidates who had been selected. Thereafter, the Complainant's President met with the Respondent and indicated that the latter had failed to comply with the terms of the May 20 accord in which the parties agreed that the method of selection would be by "joint Union/Management agreement." The instant unfair labor practice complaint subsequently was filed alleging a violation of Section 19(a)(6) of the Order on the basis that the Respondent had unilaterally changed the terms of the May 20 accord by failing to negotiate over the method of selection of the EEO Counselors.

The Administrative Law Judge found that the Respondent violated Section 19(a)(6) of the Order by failing to negotiate over the method of selection of EEO Counselors and by unilaterally altering the terms of the parties' negotiated agreement and the May 20 accord. He concluded, among other things, that under Article II, Section 1 of the negotiated agreement and under the terms of the May 20 accord, the Respondent had an obligation to bargain over the method of selection. As the Respondent had failed to meet its bargaining obligation in this matter, the Administrative Law Judge recommended, among other things, that the Respondent negotiate with the Complainant over the method of selection and rerun the selection process.

I concur in the conclusion of the Administrative Law Judge that the Respondent's conduct herein violated Section 19(a)(6) of the Order. In this regard, I view the procedures and factors involved in the method of selection of EEO Counselors to be a negotiable matter under Section 11(a) of the Order, 4/ absent statutory or other appropriate limitation, or absent a clear and unmistakable contractual waiver of the right to negotiate on such a matter. 5/ No such limitation or waiver existed in the instant case. Thus, the Social Security Administration regulation involved herein did not proscribe negotiations concerning procedures

3/ and procedures and working conditions that are specifically established by Federal Statutes, Executive Orders, or rules or regulations issued by the Civil Service Commission, Department of Health, Education, and Welfare, or Social Security Administration cannot be the subject of negotiation.

4/ See, American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama, 2 FLRC 65, in which the Federal Labor Relations Council held negotiable proposals which concerned procedures with respect to promotion of unit employees that would assure the labor organization involved an essentially noncontrolling, participatory role.

5/ See, NASA, Kennedy Space Center, Kennedy Space Center, Florida, A/SLMR No. 223.

or methods of selecting EEO Counselors and the matter was not specifically covered by the parties' negotiated agreement. 6/ Further, the record does not reflect that the Complainant clearly and unequivocally waived its right to negotiate on this matter. 7/ Accordingly, I find that the Respondent was obligated to negotiate on the method of selection of the EEO Counselors and, as it failed to fulfill such obligation, particularly after having agreed to do so in the May 20 accord, it violated Section 19(a)(6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that the Social Security Administration, Department of Health, Education and Welfare, Wilkes-Barre Operations Branch, Wilkes-Barre, Pennsylvania, shall:

1. Cease and desist from:

Failing to meet and confer with the American Federation of Government Employees, Local 2809, AFL-CIO, on the method for selection of Equal Employment Opportunity Counselors at the Wilkes-Barre Operations Branch.

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

(a) Meet and confer on the method of selection of Equal Employment Opportunity Counselors for the Wilkes-Barre Operations Branch with the American Federation of Government Employees, Local 2809, AFL-CIO.

(b) Re-evaluate all applicants for the Equal Employment Opportunity Counselor positions at the Wilkes-Barre Operations Branch and fill those positions in accordance with any agreed upon method of selection.

(c) Post at the Wilkes-Barre Operations Branch, Wilkes-Barre, 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

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6/ As the matter was not covered by the negotiated agreement, the parties could not have utilized their contractual grievance procedure to resolve the dispute herein.

7/ Contrary to the contention of the Respondent, Article II, Section 3 of the parties' negotiated agreement, set forth at footnote 3 above, was not considered to constitute a waiver of the Complainant's right to negotiate in this regard since, as indicated above, the Social Security regulation involved herein did not proscribe negotiations with respect to procedures or methods for selecting EEO Counselors.

Branch Chief, and they 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 Branch Chief shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
August 31, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 refuse to meet and confer with the American Federation of Government Employees, Local 2809, AFL-CIO, on the method of selection of Equal Employment Opportunity Counselors at the Wilkes-Barre Operations Branch.

WE WILL meet and confer on the method of selection of Equal Employment Opportunity Counselors with the American Federation of Government Employees, Local 2809, AFL-CIO.

WE WILL re-evaluate all applicants for the Equal Employment Opportunity Counselor positions at the Wilkes-Barre Operations Branch and fill those positions in accordance with any agreed upon method of selection.

_____
(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 Regional Administrator 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
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
SOCIAL SECURITY ADMINISTRATION DEPARTMENT OF HEALTH, EDUCATION AND WELFARE WILKES-BARRE OPERATIONS BRANCH		
Respondent	:	Case No. 20-5510 (CA)
and		
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2809		
Complainant		

Francis X. Dippel
Management Representative
Bureau of Data Processing
516 Altmeyer Building
6401 Security Boulevard
Baltimore, Maryland 21235

For the Respondent

James Farrar
National Representative, AFGE
Rockland Building, Suite 201
4847 North Broad Street
Philadelphia, Pennsylvania 19141

For the Complainant

Before: GEORGE A. FATH
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under Executive Order 11491, as amended (hereinafter called the Order). A Notice of Hearing on Complaint was issued by the Acting Regional Administrator for Labor-Management Services, Philadelphia Region, on May 28, 1976, based on a complaint filed on February 17, 1976 by Local 2809, American Federation of Government Employees (hereinafter called the Union) against Social Security Administration, Department of Health, Education & Welfare, Wilkes-Barre Operations Branch (hereinafter called Respondent and Branch). The Notice of Hearing on Complaint was issued with respect to the alleged violations of Section 19(a)(6) of the Order as set forth in the complaint. Briefly stated, the Union complaints: The Respondent violated Union-Management Agreement in that it failed to negotiate in good faith the method of selection of Equal Employment Opportunity Counselors for the Wilkes-Barre Operations Branch of the Agency.

A hearing was held on September 15, 1976, at Scranton, Pennsylvania. All parties were represented and were given full opportunity to present evidence, examine and cross examine witnesses, argue and file briefs.

The following findings, conclusions and recommendations are based upon the entire record including observation of the witnesses, their demeanor, and evaluation of their testimony.

Findings of Fact

At all times pertinent, the Union was the exclusive bargaining representative of the nonsupervisory employees of the Wilkes-Barre Operations Branch of the Agency. At the time of the incidents giving rise to this complaint there was a collective bargaining agreement between the parties effective August 16, 1972.

On May 8, 1975, Ms. Joan C. Parsons addressed a letter to Mr. Joseph N. Roarty, Branch Chief of the Branch to point out that Ms. Theresa Chupka, the EEO Officer (sic) had become an employee of the personnel office under the office of administration. The letter implies that she thereby became ineligible to continue as an officer. She expressed the belief

that it would be appropriate at this time for a Union/ management meeting to discuss the matter. (Exhibit C-1).

A memorandum, of a meeting between Roarty and Parsons, Exhibit C-3, dated May 20, 1975, signed by both in pertinent part, states as follows:

> Mr. Roarty stated he received a call from Mr. Joseph Bracey, Baltimore, in regards to the EEO Officer. Mr. Roarty received an "ok" to select 3 people to hold this office. The vacancies will be by self-nomination. Mr. Roarty further stated that the method of selection will be by joint Union/ Management agreement.

In June or July of 1975, Roarty telephoned Bracey on several things connected with the selection of counselors and told him of the Union-Management agreement. Roarty testified that Bracey told him the agreement was outside the scope of his responsibility and that he could have no input into this particular area -- it was strictly the responsibility of the Baltimore office (Tr. 101, 102). Roarty interpreted this as a prohibition of negotiation extending to the entire method of selection of EEO Counselors from beginning to end, except insofar as the Union wished to submit nominees under the self-nominating process.

Mr. Alonzo Rogers, EEO Officer for the Baltimore for the Bureau of Data Processing, was assigned to Wilkes-Barre to conduct the selection process. On August 13, 1975, he held a meeting attended by management and Union officers. A document described as a proposed plan of the Respondents EEO program was handed to the Union people with the suggestion that if they had any input they could submit it. Rogers talked about why he was sent to Wilkes-Barre. The method of selecting the counselors was not discussed (Tr. 78). On the same day, a memorandum was addressed to all employees of the Branch informing them that Rogers would be conducting the selection for three to four counselors and will be consulting with the Union officials for their input.

On September 15, 1975, the interviews were begun. Rogers permitted the Union to have a representative present during the screening. (He wanted to have the Union present to show that there was nothing to hide). Although the Union was

present, it was not permitted to participate in the interviews. About 37 people, self nominees, were interviewed. Five or six people, who objected to the presence of the Union during their interviews, were excluded and refused consideration. Rogers testified, "I said that any candidate in the self-nominating process that did not come in to be interviewed because the Union would be present need not come in to be interviewed because the Union would be present (Tr. 98, 99).

The interviews were calculated to elicit from the nominees their knowledge of the civil rights movement, the Equal Employment Act of 1964, the meaning of discrimination, and whether they had experienced or seen discrimination in the Wilkes-Barre Branch.

Parsons testified to a meeting she had with management after the interviews. She brought up the agreement of May 20, 1975. She testified that Rogers told her it was invalid and not worth anything.

By letter dated October 29, 1975, Rogers informed Roarty of the selection of five EEO Counselors for the Branch.

On or about November 20, 1975, the Union filed a memorandum with the Branch Chief charging the Social Security Administration with a violation of Section 19(a)(6) of the Executive Order for refusing to negotiate in good faith on the method of the selection of EEO Counselors. A Complaint alleging violation of Section 19(a)(6) of the Order was filed with the Regional Administrator on February 17, 1976.

Applicable Provisions of Executive Order and Collective Bargaining

Executive Order, as amended:

Section 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet as 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 for which a compelling need exists under criteria established

by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; 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.

Section 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.

General Agreement Between Social Security Administration, Wilkes-Barre Operations Branch and SSA Local 2809, American Federation of Government Employees, AFL-CIO, Effective August 16, 1972.

Article II

Section 1. The Branch and the Labor Organization agree to establish appropriate machinery, as hereinafter provided, for joint consultation and/or negotiation, on personnel policies, practices, and procedures relating to working conditions which are within the authority of the branch, and within the limitations set forth in Section 2 below, including, but not limited to such matters as safety, training, labor-management cooperation, employee services, methods of adjusting grievances, appeals, overtime, leave, promotion plans, demotion practices, equal employment opportunities, reduction in force practices, and hours of work.

Section 2. 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.

Section 3. The Branch and the Labor Organization agree that personnel policies and procedures and working conditions

that are specifically established by Federal Statutes, Executive Orders, or rules or regulations isssued by the Civil Service Commission, Department of Health, Education, and Welfare, or Social Security Administration cannot be the subject of negotiation. It is further understood and agreed that the areas of consultation or negotiation shall not extend to such areas of discretion and policy as the mission of the Branch, its budget, organization and assignment of personnel, or the technology of performing work.

General Agreement Between Social Security Administration Headquarters Bureaus and Offices In Baltimore and SSA Local 1923, American Federation of Government Employees, AFL-CIO, Effective September 24, 1974

Article 5

Section C. The Parties mutually agree that the Union may nominate individuals to serve as Equal Opportunity Counselors. No employee may serve as both an Equal Opportunity Counselor and a Union official or supervisor. The Union will be notified as to the specific reason for the nonselection of any of its nominees. The Parties will meet and confer on the factors to be used for the selection of these Counselors.

Conclusions of Law

The Respondent denies that it refused to consult, confer or negotiate with AFGE Local 2809 in violation of Section 19 (a)(6) of the Executive Order.

It contends that Section 11(a) of the Order limits and restricts its obligation to negotiate only on those matters which may be appropriate under applicable laws and regulations, and, hence it is obligated to negotiate on only those matters contained in the General Agreement between the parties. Within the limits imposed by this view of the Section, it points to Article II, Section 3 of the General Agreement, and says that the Union clearly and unmistakably waived its right to negotiate the matter of the method and selection of EEO Counselors. On the foregoing premises it reaches the following conclusion:

> Thus, because the selection and appointment of EEO Counselors lies solely with the EEO Officer of the Social Security Administration, in the person of Mr. Frank DeGeorge, who is

> the Associate Commissioner for Management and Administration, Mr. Roarty, the Branch Chief, does not and did not have the authority to negotiate the methods of and the selection of EEO Counselors. Further, in argumento, (sic), even if such authority to negotiate had existed with Mr. Roarty, he had no obligation to negotiate the methods of and selection since the entire EEO Program is governed by the Civil Service Commission Regulations, Department of Health, Education and Welfare, and the regulations of Social Security Administration, and hence, the Complainant has waived the rights to negotiate these matters by the provisions of the General Agreement between the parties.

The Respondent further argues that Roarty misunderstood his role in the matter of EEO and made a mistake in his dealings with the Union relative to negotiation on the matter of selection of counselors. It concludes that since it was a mistake, a honest one, the Respondent cannot be guilty of violating Section 19(a)(6).

Finally, it argues that the parties on the local level did not understand and comprehend the restrictions on them. As evidence of the lack of understanding of the parties, it shows that Roarty and Parsons referred to the selection of EEO Officers rather than EEO Counselors in their early discussions. It concludes that the parties did not fully understand or comprehend the problems at hand until their meeting with Rogers on August 13, 1975.

These arguments are rejected.

In fashioning its defense, the Respondent introduced a new term into this case that was not an issue between the parties. In issue was the question as to whether or not the Respondent had an obligation to confer with the Union in the matter of the method of selection of the EEO Counselors. The question raised by the defense is whether the Respondent had an obligation to negotiate the method and selection of EEO Counselors. As proposed by the Union, it was simply a matter of discussing with management the nominating process, qualifications of nominees, and the appointment machinery. As posed by the

Respondent, the Union was asking not only for a voice in the method of selection of counselors, but it was asking to be allowed to negotiate the selection as well. It is to the altered proposition that Respondent makes its argument, and attempts to show that it did not have the authority to negotiate the selection of Counselors--a management prerogative. Obviously, the argument is beside the point.

In Baltimore, the Respondent recognizes the negotiability of the method of selecting counselors. Under the terms of an agreement between the Headquarters Bureaus and the Local Union at Baltimore effective September 24, 1974, received into evidence over an objection on relevance, the Respondent is bound not only to meet and confer on all phases of the development and implementation of the Affirmative Action Plan (EEO), but, in addition, it is required to notify the Union as to the specific reason for the nonselection of a Union Nominee. While the broad terms of this agreement cannot be engrafted on the general agreement between the Respondent and the Branch, this agreement is evidence that the Respondent does have authority to negotiate the method of the selection of Counselors. Presumably, the rules, regulations, and policy under which Respondent operates in Baltimore are equally applicable at its Branch in Wilkes-Barre.

Article II Section 3 of the General Agreement between the parties, said by the Respondent to be a waiver by the Union of the right to negotiate the method of the selection of counselors, contains express recognition of certain matters, consistent with the Order, which are nonnegotiable. The proscriptions of the Order are a part of every general agreement - expressed or implied. This section of the General Agreement is precatory. Under no circumstances can it be considered a waiver for the simple reason that there are no rights to be waived where none exist. If, indeed, this section were to be construed a waiver, under the circumstances in this case, it could be extended to logically include every term of the agreement between these parties to prevent negotiation. Such an absurd conclusion is prohibited by the plain meaning of the Order which was promulgated to promote discourse between labor and management through negotiation. This argument is unsound.

Article II, Section 1 of the General Agreement between the Respondent and the Branch contains an agreement to establish approrpriate machinery for joint consultation and/or

negotiation on personnel policies and procedures relating to working conditions of the Branch, including, but not limited to equal employment opportunities. There is no evidence, and the point is not made by the Respondent, that this provision does not extend to negotiation of the method of selecting EEO Counselors. There is an obligation to negotiate equal employment opportunities under the General Agreement, and the special agreement between Roarty and Parsons of May 20, 1975, serves as a reiteration and confirmation of that obligation. Where, as in this case, an agency, through its local bargaining representative, negotiated and reached agreement on a proposal in dispute as permitted by the Order, the agency cannot, after that fact, change its position. See AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75.

The Respondent cannot relieve itself of the responsibilities created by the agreements by claiming honest mistake and misunderstanding. As defenses, these pleas lack legal efficacy and they do not prevail against the Complaint.

The Respondent consciously disregarded its obligation to negotiate on the matter of the method of the selection of Counselors in violation of Section 19(a)(6) of the Executive Order. It acted unilaterally in altering the terms of the general and special agreements between it and the Branch. It acted unilaterally in dictating the terms and conditions for the selection of Counselors without regard to the desires, needs, and peculiar problems of the employees of the Branch. The token participation permitted the Union was not negotiation regardless of how that term is defined, and was calculated to give the appearance "that there was nothing to hide".

In determining the remedy to be applied in this case, consideration should be given to the effects of the Respondent's conduct in this case. In contrast to its policy in Baltimore, the Respondent singled out the Wilkes-Barre Branch for unequal treatment in the matter of EEO. It undermined the authority and effectiveness of the Branch Chief in working toward harmonious labor-management relations by abruptly rescinding an agreement he had made to negotiate. The rejection of the Union in this matter tended to denigrate the Union in the eyes of the employees of the Branch. The exclusion of employees who objected to the Union being present at their interviews discriminated against those employees for their nonunion status.

Finally, the criteria used for screening nominees was restricted in perspective and, as a measurement of qualifications, capable of producing Counselors lacking in the understanding necessary to solve problems in Wilkes-Barre, Pennsylvania.

All things considered, the purpose of the Order and the EEO Program will be best served by discharging all of the Counselors appointed in the above described process. The parties should begin anew in the selection process with careful attention given to their obligations under the Order and their agreements.

Recommendations

The Respondent is found to have engaged in conduct violative of Executive Order 11491, as amended, and, therefore, it is recommended that the Assistant Secretary adopt the following Order which is designed to effectuate the policies of the Order.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Department of Health, Education and Welfare, Wilkes-Barre, Pennsylvania, shall:

1. Cease and desist from:

(a) Refusing to consult, confer and negotiate with Local 2809, American Federation of Government Employees, in the matter of the method of selection of Equal Employment Opportunity Counselors at the Wilkes-Barre Operations Branch of the Social Security Administration.

(b) Unilaterally changing the terms and conditions of the collective bargaining agreement between Wilkes-Barre Operations Branch and Local 2809.

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

(a) Discharge all EEO Counselors appointed by Social

Security Administration as the result of the selection process begun on or about August 13, 1975.

(b) Institute and complete within a reasonable time a selection process for the appointment of EEO Counselors which includes negotiation with the Union on the matter of the method of the selection of Counselors.

(c) Provide for participation of nonunion employees in the selection process for the appointment of EEO Counselors.

(d) Post at its facility at Wilkes-Barre Operations Branch, Wilkes-Barre, 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 Branch Chief 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 Branch Chief 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.

GEORGE A. FATH
Administrative Law Judge

Dated: March 8, 1977
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 RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT refuse to meet and confer in good faith in the matter of the method of selecting EEO Counselors for the Wilkes-Barre Operations Branch of the Social Security Administration.

WE WILL NOT unilaterally change the terms and conditions of the collective bargaining agreement between the Wilkes-Barre Operations Branch and Local 2809 of the American Federation of Government Employees.

_____
(Agency or Activity)

Dated: _____ By: _____

August 31, 1977

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

USDA FOREST SERVICE,
CHEROKEE NATIONAL FOREST,
JACOBS CREEK CIVILIAN CONSERVATION CENTER
A/SLMR No. 890

This case arose as a result of a petition filed by the National Federation of Federal Employees seeking an election in a unit of all professional and nonprofessional employees of the Jacobs Creek Civilian Conservation Center (Center) located on the Activity, the Cherokee National Forest (Forest). The Activity maintained that only a unit comprised of all Forest employees is appropriate. It contended that employees of the Center share a community of interest with other Forest employees and that a separate unit of exclusive recognition at the Center would have an adverse effect on the efficiency of the Forest's operations and on the Forest's ability to engage in effective labor-management relations dealings.

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. He found that the Center constituted a functionally distinct group of employees who share a community of interest separate and distinct from the other employees of the Forest. Additionally, he found that the claimed functional unit will promote effective dealings and efficiency of agency operations. The Assistant Secretary noted that the Center was in existence in 1973 when the Activity consented to an election in a Forest-wide unit which specifically excluded the Center's employees. He noted further that in the Region involved, employees of five of the remaining six Civilian Conservation Centers are in exclusively recognized units separate from the National Forests in which they are located and all of these units are covered by negotiated agreements. In these circumstances, and in the absence of any evidence that the scope and character of the Activity's existing unit have changed by virtue of events subsequent to its certification, the Assistant Secretary rejected the Activity's position that only a Forest-wide unit which includes the Center's employees is appropriate. Moreover, he found that, under the particular circumstances of this case, where the claimed employees constituted a functional unit of all unrepresented employees in the Forest who have not had an opportunity to vote on the question of exclusive recognition, the establishment of the petitioned for unit will minimize fragmentation of the remaining unrepresented employees of the Activity. Also, the Assistant Secretary found, contrary to the position taken by the Activity, that four GS-186-7 Group Leaders are not supervisors and are eligible to be included in the unit found appropriate.

Thus, in accordance with Section 10(b)(4) of the Order, the Assistant Secretary ordered an election among the professional and nonprofessional employees in the unit found appropriate.

A/SLMR No. 890

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

USDA FOREST SERVICE, CHEROKEE
NATIONAL FOREST, JACOBS CREEK
CIVILIAN CONSERVATION CENTER 1/

Activity

and

Case No. 41-5131(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES

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 Ann H. Woodward. 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 seeks an election in a unit of all professional and nonprofessional employees of the Jacobs Creek Civilian Conservation Center (Center) located in the Cherokee National Forest (Forest), excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors as defined by Executive Order 11491, as amended, and all other employees of the Forest. 2/ At the hearing, the Petitioner stated that it was not willing to proceed to an election in any alternative unit.

1/ The name of the Activity appears as amended at the hearing.

2/ The claimed unit appears essentially as amended at the hearing.

The Activity takes the position that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the Order. 3/ The Activity maintains that only a unit comprised of all Forest employees is appropriate. It contends that employees of the Center share a community of interest with other Forest employees and that a separate unit at the Center would have an adverse effect on the efficiency of the Forest's operations and on the Forest's ability to engage in effective labor-management relations dealings. The Activity also asserts that the substantial amount of effort that has gone into creation of a "National Forest concept" would be disrupted by the psychological barriers imposed by having two separate units in one National Forest system.

In support of the claimed unit, the Petitioner contends that not over ten percent of the job classifications within the Center are compatible with those in the Forest. Also, it asserts that other separate Forest and Center units within the Region involved have worked efficiently. Accordingly, the Petitioner takes the position that the petitioned for unit is appropriate for the purpose of exclusive recognition under the Order.

The mission of the Forest Service, an agency of the U.S. Department of Agriculture, is accomplished through four main activities: (1) protection and management of natural resources on National Forest lands; (2) cooperation with state and local governments, forest industries and private landowners to help protect and manage non-Federal forest and associated range and watershed land; (3) research in various aspects of forestry; and (4) participation with other agencies in human resource and community assistance programs. The mission of the Cherokee National Forest involves primarily the first and fourth of these Forest Service activities. With respect to the latter activity, the Forest Service cooperates with the Departments of Labor, Commerce, and Health, Education and Welfare in a number of human resource programs which provide employment, job training and education for older Americans, youth and other individuals. In this connection, one cooperative program with the Department of Labor, the Job Corps, is unique in that it utilizes 17 separate administrative entities--Civilian Conservation Centers (Job Corps Centers)--located in various National Forests nationwide to accomplish the Job Corps' mission.

The mission of the Jacobs Creek Center located in the Cherokee National Forest is to provide youths with room and board, basic education and the opportunity to obtain training in such vocations as carpentry, painting, bricklaying, cooking, and the operation of earthmoving equipment in order that they can become employable in the job market. Together, the Center and the Forest provide the environment for training of Job Corps enrollees. As part of their training, the Job Corps enrollees from

3/ The Activity also contends that four GS-7 group leaders are not eligible to be included in the claimed unit because they are supervisors as defined by the Order. The Petitioner disputes this contention.

the Center construct roads, trails, recreation areas, and buildings and do other needed construction and environmental work on Forest acreage.

The Forest is one of 15 National Forests within Region No. 8 of the Forest Service. It is administratively divided into a Forest Supervisor's Office, the Jacobs Creek Center, and six Ranger Districts. The administrative head of the Forest is the Forest Supervisor. Reporting directly to the Forest Supervisor are seven line officials: The Center Director and the six District Rangers.

The Forest is authorized 232 permanent employees: 50 in the Center, 55 in the Forest Supervisor's office, and the remaining 127 divided among the Ranger Districts. The eligible nonprofessional employees of the Forest Supervisor's office and the Ranger Districts are included currently in an exclusively recognized unit represented by the National Federation of Federal Employees, Local 913. 4/ There has never been an election or other evidence of bargaining history at the Center. The record reveals that the Center was in existence in 1973 when the Activity consented to an election in the Forest-wide unit which specifically excluded the Center's employees.

In my view, the Center constitutes a functionally distinct group of employees who share a community of interest separate and distinct from the other employees of the Forest. The evidence shows in this regard that of the approximately 29 employees in the petitioned for unit only three employees have essentially the same duties, skills, education, experience, and job classifications as certain other employees in the existing Forest-wide unit. 5/ The Center's employees have little contact, and

4/ The unit of exclusive recognition was certified on August 9, 1973. The professional employees voted to remain unrepresented. The current negotiated agreement between the parties was executed April 26, 1976, and became effective May 14, 1976, for a three year duration with automatic annual renewal thereafter not to exceed three additional years.

5/ The three employees are: One GS-322-2 Clerk-Typist, one GS-322-4 Clerk-Typist, and one GS-1105-4 Purchasing Agent. The record establishes that the following employees in the petitioned for unit have duties, skills, education, experience, and job classifications which are essentially unique to the Job Corps Center relative to the employees in the existing Forest-wide unit: Two GS-1710-5 Teachers (professional employees), three GS-1710-9 Teachers (professional employees), one GS-1712-5 Training Instructor, four GS-1712-7 Training Instructors, four GS-186-4 Group Aides, three GS-186-5 Group Leaders, four GS-186-7 Group Leaders, and two WG-7404-8 Cooks. No evidence was presented at the hearing regarding the remaining employees included in the unit: One GS-699-5 Health Technician, one WG-7305-3 Laundry Machine Operator, and one WG-6907-4 Warehouseman.

except for the three employees mentioned above, do not interchange or transfer with employees of the existing Forest-wide unit. 6/

Further, I find that the claimed functional unit will promote effective dealings and efficiency of agency operations. The record reveals that the Center was in existence in 1973 when the Activity consented to an election in the Forest-wide unit which specifically excluded the Center's employees. Also, it appears that in the Region involved herein -- Region No. 8 of the Forest Service -- employees of five of the remaining six Civilian Conservation Centers are in exclusively recognized units separate from the National Forests in which they are located and all of these units are covered by negotiated agreements. 7/ In these circumstances, and in the absence of any evidence that the scope and character of the Activity's existing unit have changed by virtue of events subsequent to its certification, I reject the Activity's position that only a Forest-wide unit which includes the Center's employees is appropriate. 8/ Moreover, under the particular circumstances of this case, where the claimed employees constitute a functional unit of all unrepresented employees in the Forest who have not had an opportunity to vote on the question of exclusive recognition, I find that the establishment of the petitioned for unit will minimize fragmentation of the remaining unrepresented employees of the Activity. 9/

As noted above, the Activity takes the position that the four GS-186-7 Group Leaders who work at the Center are not eligible to be included in any unit found appropriate because they are supervisors within the meaning of the Order. On the other hand, the Petitioner contends that these employees are not supervisors and should be included in the claimed unit.

6/ See United States Department of Agriculture, Forest Service, Schenck Civilian Conservation Center, North Carolina and Forest Service, National Forests of North Carolina, A/SLMR No. 116, and United States Department of Agriculture, Black Hills National Forest, A/SLMR No. 58. Compare United States Department of Agriculture, Forest Service, Wolfe Creek Job Corps Civilian Conservation Center and United States Department of Agriculture Forest Service, Umpqua National Forest, Roseburg, Oregon, A/SLMR No. 567.

7/ See, in this regard, the U.S. Civil Service Commission's publication, Union Recognition in the Federal Government (November 1976).

8/ It was noted further that the funding and policy formulation for all 17 Job Corps Centers within the Forest Service originates with the Department of Labor and is channeled through the Forest Service for administrative efficiency only.

9/ See Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629, FLRC No. 76A-91.

The record reveals that three of the four GS-7 Group Leaders are Dorm Managers who are responsible for the Job Corps enrollees during their dormitory hours. Each Dorm Manager has an Assistant Dorm Manager -- GS-5 Group Leader -- working under him. The remaining GS-7 Group Leader is responsible for the enrollees' leisure time activities at the Center. He has two GS-5 Group Leaders working under him. All four GS-7 Group Leaders report to a GS-9 Group Leader who, in turn, reports to a GS-11 Supervisory Group Leader who, in turn, reports to the Center Director, a GS-13.

As a result of an expansion of the Center, a reorganization of the Center began approximately three months prior to the hearing in this matter and had not yet been completed. 10/ The evidence establishes, however, that at the time of the hearing the four GS-7 Group Leaders involved could not hire, transfer, suspend, lay off, recall or discharge the GS-5 Group Leaders working under them or effectively recommend such action. While a recommendation regarding discipline had been made by an employee in question, there was no evidence that such recommendation was effective. Further, although these employees can assign work and direct the work of their subordinates, it appears from the record that their authority is no more than routine in nature. 11/ Accordingly, I find that, under the circumstances, the four GS-7 Group Leaders involved herein do not possess the supervisory indicia set forth in Section 2(c) of the Order and, therefore, I shall include them in the unit found appropriate.

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 professional and nonprofessional employees of the Jacobs Creek Civilian Conservation Center located on the Cherokee National Forest, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors as defined by the Order, and all other employees of the Cherokee National Forest.

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

10/ When the reorganization is completed, it appears that the GS-186-4 Group Aides noted above at footnote 5 will be converted to GS-186-5 Group Leaders. According to the record, there is no difference between the duties performed by employees in the two classifications.

11/ See Department of Interior, Bureau of Indian Affairs, Navajo Area, Gallup, New Mexico, A/SLMR No. 99.

votes for inclusion in such a unit. Accordingly, the desires of the professional employees 12/ as to inclusion in the unit with nonprofessional employees must be ascertained. I shall, therefore, direct separate elections in the following groups:

> Voting Group (a): All professional employees of the Jacobs Creek Civilian Conservation Center located on the Cherokee National Forest, excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors as defined by the Order, and all other employees of the Cherokee National Forest.
>
> Voting Group (b): All nonprofessional employees of the Jacobs Creek Civilian Conservation Center located on the Cherokee National Forest, excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors as defined by the Order, and all other employees of the Cherokee National Forest.

The employees in the nonprofessional voting group (b) will be polled whether or not they desire to be represented by the National Federation of Federal Employees.

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 National Federation of Federal Employees. 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 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 or not the National Federation of Federal Employees 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:

12/ As noted above at footnote 5, there are 5 professional employees eligible to be included in the unit: Two GS-1710-5 Teachers and three GS-1710-9 Teachers.

1. If a majority of the professional employees votes for inclusion in the same unit as the 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 Jacobs Creek Civilian Conservation Center located on the Cherokee National Forest, excluding all management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors as defined by the Order, and all other employees of the Cherokee National Forest.

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:

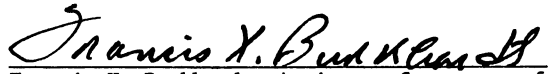
> (a) All professional employees of the Jacobs Creek Civilian Conservation Center located on the Cherokee National Forest, excluding all nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors as defined by the Order, and all other employees of the Cherokee National Forest.
>
> (b) All nonprofessional employees of the Jacobs Creek Civilian Conservation Center located on the Cherokee National Forest, excluding all professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors as defined by the Order, and all other employees of the Cherokee National Forest.

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 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 Federation of Federal Employees.

Dated, Washington, D. C.
August 31, 1977



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

September 1, 1977

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 HOUSING AND
URBAN DEVELOPMENT, LOS ANGELES
AREA OFFICE
A/SLMR No. 891

This case involved an amended unfair labor practice complaint filed by the National Federation of Federal Employees, Local 477 (NFFE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by: (1) not providing a substantive response to the NFFE's request for information concerning a contemplated adverse action against employee Russell Eaton, a member of the bargaining unit; (2) failing to inform Eaton of his right to union representation at a meeting concerning a proposed adverse action, on November 10, 1975, as required by Article 12.2 of the parties' negotiated agreement; and (3) discriminating against Eaton by assigning him to clerical duties after he was informed of his imminent termination.

In her Recommended Decision and Order, the Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. In this regard, she concluded that: (1) the Respondent's action in failing to respond substantively to the NFFE's request for information was based upon the failure of the NFFE to indicate that Eaton had designated the NFFE as his representative, and did not reflect union animus. (2) Article 12.2 of the parties' negotiated agreement provides that employees under investigation must be notified of their right to representation, and the Respondent complied therewith at the initial stage of the continuing investigation. Article 13 of the agreement provides that employees are entitled to representation at meetings concerning proposed adverse actions, but does not specify that the employee must be so advised, and Eaton did not ask for any such representation at the November 10, 1975, meeting. Further, the Respondent was not obligated to afford the NFFE an opportunity to be present at the November 10, 1975, meeting as such meeting was not a formal discussion within the meaning of Section 10(e) of the Order. (3) The assignment of Eaton to clerical duties was not harassment or coercion under the Order since there was no evidence of union animus on the part of the Respondent. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings and recommendation of the Administrative Law Judge, and he ordered that the complaint be dismissed in its entirety.

A/SLMR No. 891

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, LOS ANGELES AREA OFFICE

Respondent

and

Case No. 72-6132(CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 477

Complainant

DECISION AND ORDER

On April 13, 1977, Administrative Law Judge Joan Wieder issued her Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-6132(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 1, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 528
San Francisco, California 94105

In the Matter of

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT LOS ANGELES AREA OFFICE,
Respondent

and

NO. 72-6132 (CA)

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 477,
Complainant

Irwin B. Rosenstein, Esquire
Area Counsel
2500 Wilshire Boulevard
Los Angeles, California 90057
For the Respondent

Bruce M. Stark, Esquire
10203 Santa Monica Boulevard, Suite 301
Los Angeles, California 90067
For the Complainant

Before: JOAN WIEDER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arose upon the filing of an unfair labor practice complaint, on June 23, 1975, which was amended October 20, 1975, by W. Pedro Newbern II, first vice-president, Local 477 of The National Federation of Federal Employees against The Los Angeles Office of the Department of Housing and Urban Development (hereinafter referred to as Respondent). As amended, the complaint alleged that the Respondent engaged in certain conduct during a meeting with an employee on November 10, 1975, and certain activities relative thereto which are violative of sections 19(a)(1) and (6) of Executive Order 11491, as amended (hereinafter referred to as the Order).

The complaint alleged, in substance, that Messers. Donald Phillips and George Tousignant met with Mr. Russell Eaton, a member of Local 477, regarding the potential implementation of adverse action against Mr. Eaton, without informing Mr. Eaton of his right to union representation or his right to appeal and that these actions failed to accord Local 477 proper recognition consonant with the terms of Article 3.1 of the Agreement. It is further alleged that correspondence regarding management's action toward Mr. Eaton was not substantively responded to, which further failed to accord proper recognition to Local 477. And finally, the assignment of Mr. Eaton to clerical duties without a formal detail was demeaning and humiliating and, therefore, constituted harassment and coercion of a union member.

A hearing was held on this case on January 6, 1977, at Los Angeles, California. The parties through their counsel were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and file briefs in support of their positions.

Preliminary Motion

On February 14, 1977, the attorney for Complainant moved for leave to file a late brief on the ground that a copy of the transcript had not been received. Briefs were due no later than February 7, 1977. Respondent's attorney has filed a statement in opposition to the motion for continuance. Although the request for an extension of time was not timely filed under section 203.22 of the Rules and Regulations, the motion can be considered under section 203.19 and other pertinent sections of the Rules and Regulations. The Claimant's brief

clearly is not a reply brief. Counsel for Claimant was dilatory in his request. However, the fact that the transcripts had not been received could have caused his confusion since the brief date was set seven days after the date transcripts should have been received. Additionally, it is patently clear that Respondent, who was timely in its filing, will not be harmed since the contents of Complainant's brief clearly does not reply to Respondent's brief. Accordingly, Complainant's motion will be granted, and his reply brief dated February 16, 1977, considered. Complainant also seeks to have Respondent's brief disregarded. This request is denied. The decision reached herein is predicated solely upon the evidence of record and the applicable law.

Based on the entire record, including my observation of the witnesses and their demeanor and upon the relevant evidence adduced at the hearing, I make the following findings of fact, conclusions of law and recommendation:

Issues

1. Did the Collective Bargaining Agreement impose upon Respondent an affirmative duty to inform Mr. Eaton of his right to be represented at the meeting of November 10, 1975, and if so, was such failure a unilateral change in the negotiated agreement.

2. Did the temporary assignment of Mr. Eaton to another office where he was given clerical duties constitute harassment and coercion.

3. Did Respondent fail to substantively reply to Claimant's inquiries, and if so, can such behavior be deemed a failure to accord Local 477 proper recognition.

Findings of Fact

Mr. Russell Eaton was the subject of an official investigation of the Respondent's Regional Office. The subject matter of the investigation concerned several counts of severe misconduct in his capacity as an appraiser. At the time the investigation was being conducted, it was normal agency practice to have personnel in the San Francisco Regional Office actually perform the investigation. After completing the investigation, the Regional Office telephonically notified the Los Angeles Area Director that the results were so incriminating as to justify immediate removal. The Regional Personnel Office stated it was going to prepare the removal papers

for the Los Angeles Area Office. The Area Director retained the obligation to evaluate the investigative report to determine whether the results support the proposed action.

Prior to receiving the actual investigation report, but in response to the representation of Regional Counsel that removal was warranted, the Area Director met with Mr. Eaton's supervisors, Messers. Phillips and Tousignant, to determine the best course of action in dealing with the matter. Based on the assumption that certain removal was forthcoming, it was decided at this meeting to offer Mr. Eaton the opportunity to resign, thereby avoiding besmirchment of his personnel record. This decision to hold the meeting is consonant with the provisions of the Federal Personnel Manual section S1-1(b)(3) which states:

> "It is proper for an agency to initiate a discussion with an employee in which he is given an election between leaving his position voluntarily (by resignation, optional retirement, or requesting a reduction in rank or pay) or having the agency initiate formal action against him. It is also proper for the agency, in the course of the discussion, to advise the employee which of the possible alternatives will be in his best interest. The fact that the employee may be faced with an inherently unpleasant situation, or that his choice may be limited to two unpleasant alternatives, does not make the resulting action an involuntary action. However, if the agency uses deception, duress, time pressure, or intimidation to force him to choose a particular course of action, the action is involuntary."

Pursuant to the decision to offer Mr. Eaton an opportunity to resign, he was called to a meeting with his immediate supervisors on November 10, 1975, informed of the charges against him and offered the opportunity to resign prior to the arrival of the official removal papers. Mr. Eaton was not advised that he had a right

to representation at the meeting nor did he request representation. Mr. Eaton chose not to resign. However, during the course of the investigation he was informed that he had the right to counsel but knowledgeably refused representation as demonstrated in his statement dated July 15, 1975. The July 15, 1975, statement clearly states that Mr. Eaton had been advised that the purpose of his interview was to obtain his responses to questions concerning his alleged violation of the Respondent Activity's standards of conduct by engaging in outside employment as a fee appraiser, the use of departmental mail franking previleges for personal business, the use of government time and photograph equipment in connection with his personal business, and the falsification of monthly travel vouchers submitted to HUD. He also initialed that section which indicated that he had been advised of his right to legal counsel and his further right to terminate any interview regarding the matter at any time he so desired.

Upon the termination of the November 10, 1975, meeting, his supervisors temporarily assigned him to the office of Mr. Les Thompson. Mr. Thompson was not instructed as to what duties Mr. Eaton was to be assigned, and Mr. Thompson took it upon himself to have Mr. Eaton engage in what is characterized as clerical duties. The decision to remove Mr. Eaton from his duties as a field appraiser was based upon the belief that his continued activities in the field would constitute a serious security problem. The record clearly shows that the assignment was not intended as punishment but, rather, was made upon the belief that removal was imminent and that there was a need for protecting the reputation of HUD by keeping him out of the field. The office headed by Mr. Thompson was the Low Rent Section, which is comprised primarily of non-clerical staff. Security problems were considered to exist because of the allegation that his outside appraisals conflicted with HUD appraisals. At the time all decisions were made regarding Mr. Eaton, neither the area director nor Messers. Phillips or Tousignant knew that Mr. Eaton was a member of Local 477 or had any union affiliation.

On November 21, 1975, Mr. Eaton delivered a letter to his supervisors, with a copy to Local 477, asking questions about the status of his removal papers. No response was received. On December 4, 1977, Local 477 sent a letter to the area director characterizing Mr. Eaton's November 21, 1975, letter as a grievance and seeking responses to questions "for informational purposes only" pursuant to the provisions of Articles 3, 9

and 13 of the collective bargaining agreement. It should be noted that Mr. Eaton testified that he did not consider his letter a grievance. The area director responded to Complainant's letter on December 10, 1975, advising that Mr. Eaton's case was still under review.

It appears that management was reticent to fully discuss the details of the investigation with third parties due to the recent enactment of the Privacy Act of 1974, which contains penalties for disclosures of certain information. The recent enactment of the Privacy Act relative to the request of Local 477 engendered difficulties in HUD's determining what should and should not be disclosed. The Executive Board of the NFFE met with the area director twenty-nine days later to discuss the Eaton case. Furthermore, on several occasions area counsel discussed Mr. Eaton's case with union representatives, informing them that pending re-evaluation of the facts, which he characterized as unsatisfactory in the investigative report, counsel was hesitant to answer the letter of November 21, 1975. The record is not clear as to whether the union agreed to this course of action. The record does clearly indicate that the employer understood that the union would await the re-evaluation. Respondent did re-open the investigation to resolve whether the suggested removal action was warranted, a fact conveyed in the December 10, 1974, letter. Furthermore, the area director believed that the investigative file was the property of the inspector-general and that he lacked the authority to release it to Complainant. It is noted that on January 6, 1976, Mr. Eaton did receive a notice of proposed removal under section 752.2 of the HUD Handbook.

Discussion and Conclusions

The initial issue for consideration is whether the activity had an obligation to inform Mr. Eaton of his right to counsel at the November 10, 1975, meeting. Was the meeting within the scope of section 10(e) of Executive Order 11491, as amended? Section 10(e) 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 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." (Emphasis Supplied)

Was the meeting of November 10, 1975, a formal discussion within the meaning of the Executive Order? The record demonstrates Mr. Eaton did not request representation even though during the investigation he was informed of his right to counsel. Therefore any finding of an unfair labor practice occurring at the November 10 meeting must be predicated on the affirmative finding that management had an obligation under section 10(e) of the Executive Order or the negotiated agreement to inform Mr. Eaton of his right to counsel. The record also clearly demonstrates that the proposed adverse action had not yet been instituted against Mr. Eaton at the time of the November 10 meeting since no thirty-day letter had been issued.

On November 10, there was no grievance filed and no general personnel policies and practices or other matters affecting general working conditions of employees in the unit discussed. There was no record formally made of the meeting and only the employee and his two supervisors were present. Although his immediate supervisor was not present, Mr. Eaton's second tier and third tier supervisors did attend and conduct the meeting. At the most, the meeting was a counseling session. Inasmuch as the counseling session predated the filing of any paper that could be characterized as a grievance, it cannot be found that the sessions involved a grievance. Moreover, the matters discussed at the meeting did not involve general working conditions and work performance, rather they were related solely to an individual employee's alleged shortcomings with respect to substantial allegations of wrong doing. Accordingly, the meeting did not constitute "formal discussions" in which the exclusive representative was entitled to counsel the employee by virtue of the provisions of section 10(e) of the Order. It follows that the failure to affirmatively inform Mr. Eaton of his right

to representation at the November 10 meeting did not constitute a violation of section 19(a)(6) of the Order. See Department of Defense, National Guard Bureau, Texas International Guard, A/SLMR No. 336.

Additionally, the discussions did not involve general working conditions but again merely informed the employee of a pending proposed adverse action and offered that employee the opportunity to resign prior to the institution of a proposed adverse action. These discussions would have no wider ramifications than upon any individual employee at any particular time with respect to incidents related to that individual employee's work. Although it is recognized that the counseling session or any other label for pre-meeting is not dispositive of its inclusion or exclusion from the requirements of section 10(e). The nature and significance of the discussions are determinative. Even though two management representatives were present, only the individual employee was or could be affected, not the members of the unit.

This conclusion is supported by the Statement on Major Policy Issue, FLRC No. 75 P-2, which states:

> "1. An employee in a unit of exclusive recognition has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and
>
> "2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with section 11(a) of the Order."

Consequently, assuming arguendo that the meeting was formal, under the Federal Labor Relation Council's policy statement the employee must request representation, which Mr. Eaton did not do in this case.

Inasmuch as the Order does not require that prior to the opening of a dialogue with Mr. Eaton, management inform him of his right to counsel, the question does remain whether the agreement between the activity and Local 477 includes a negotiated right to be advised of the right to representation. Section 12, titled Disciplinary Actions, of the negotiated agreement provides:

> "12.1 DEFINITION: For purposes of this article, a disciplinary action is a written reprimand or a suspension of thirty-days or less.
>
> "12.2 RIGHT TO REPRESENTATION: During the conduct of an investigation relative to disciplinary proceedings, no employee shall be subjected to questioning or inquiry without first being advised of his rights to representation.
>
> "Prior to initiating disciplinary actions against an employee, a preliminary investigation will be made to determine the facts in the case.
>
> "12.3 RIGHT OF APPEAL: Each employee shall have the right of appeal as contained in FMP Supp. 752-1 and HUD Handbook 771.2.
>
> ARTICLE 13 - ADVERSE ACTION
>
> "13.1 REPRESENTATION: Employees of the unit are entitled to representation of their choice at all discussions between employees and the employer concerning

> proposed adverse actions or at any hearing with the employer following a letter of proposal and/or a letter of final decision on such adverse actions. This representation includes assistance and preparation of replies to proposed adverse actions. For the purpose of this article, adverse actions are defined as those covered by sub-part B in FPM Supp. 752.1."

During the investigation the employee was clearly informed of his right to counsel and acknowledged that fact. Therefore, even if the action were defined as a disciplinary action, the requirements of Article 12 of the negotiated agreement had been met by the activity. However, Article 12.1 of the agreement defines disciplinary actions as a written reprimand of suspension of 30 days or less, neither of which occurred.

Article 13 of the negotiated agreement entitles the employee to representation when there is a proposed adverse action. Assuming that the meeting concerned a proposed adverse action, no behavior on the part of management denied the employee his right to representation. The failure to inform the employee to his right to representation is not a denial of representation. The language of section 13.1 of the negotiated agreement does not make it a mandatory obligation of management to notify an employee of his right to representation. Each employee had a copy of the negotiated agreement, which could be construed as informing such employee of their rights. However, the vesting of a right in one party does not automatically, in the absence of specific language in the negotiated agreement, impose an affirmative duty on the other parties to the said agreement. Furthermore, the meeting could not be found to have clearly concerned a proposed adverse action, since the Federal Personnel Manual, made the operative document for the purposes of the negotiated agreement, requires that such proposed adverse actions be in writing. There had been no written notice of proposed adverse action as of November 10, 1975, and, in fact, such notice was not issued until January of 1976.

The Federal Labor Relations Council in FLRC No. 75 P-2 in a statement on Major Policy Issues issued pursuant to section 4(b) of the Order and section 2410.3 of

the Council's Rules of Procedure (5 C.F.R. § 2410.3) concluded:

> "1. An employee in a unit of exclusive recognition has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and
>
> "2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a non-formal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with section 11(a) of the Order."

As can be seen from the FLRC policy statement, even if the meeting was designated as formal, contrary to the findings herein, the employee still must request such representation in order to invoke section 10(e) of the Order. In order for a non-formal investigative meeting or interview to require representation for the employee, the negotiated agreement between the exclusive representative and the agency must so provide, in accordance with section 11(a) of the Order. As indicated above, the negotiated agreement does not provide for representation at a non-formal interview without a proposed adverse action.

Furthermore, the right of the representative to attendance at any formal discussion between management and an employee is predicated on the requirement that the discussion concern grievances, personnel policies

and practices or other matters affecting general working conditions of the employees in the unit. The meeting of November 10 dealt solely with alleged violations of an employee which potentially could have led to a proposed adverse action and consonant with the Federal Personnel Manual an opportunity was being afforded that employee to resign to avoid potential besmirchment of his record.

Accordingly, I hold that the employee does not have a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative. I further find that if such right existed, the employee would have had to request it to invoke the provisions of the Order. Inasmuch as the negotiated agreement does not provide for representation at non-formal meetings that do not involve proposed adverse actions, there is no derivative or companion right of an employee to representation under section 10(e) of the Order.

However, it could be argued that section 1(a) of the Order grants the employee the right to representation at non-formal meetings or interviews held by management, particularly if the non-formal investigative interview is called by management. Section 1(a) of the Order, provides:

> "a. 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 ... 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."

The record clearly demonstrates that at the time of the November 10 meeting, management was not cognizant

that Mr. Eaton was a member of the union, therefore, any actions taken by management on that date are completely free of any union animus and could not be construed as constituting actions designed to induce fear of penalty or reprisal in the forming, joining or assisting a labor organization.

As the Federal Labor Relations Council found in FLRC No. 75 P-2, the provisions of section 1(a) "...are expressly confined to the employee's right to organize, become a member of, and to support, that organization, or to refrain from any such activity." The Council further finds, "...no intent is reflected to afford union representation at a non-formal investigative interview or meeting where such right of the employee has not been established as a personnel policy or practice of the agency involved." Complainant has not introduced any evidence of record that the agency has established as a personnel policy or practice the right to representation at non-formal investigative interviews.

The predicate for the Federal Labor Relations Council's policy in FLRC No. 75 P-2 is that:

> "[A] Detailed framework of statutes and regulations already protects an employee in the Federal program against arbitrary action by an agency when serious misconduct is alleged. Thus, for example, adverse action sought to be taken by agencies against employees (i.e., removals, suspensions for more than 30 days, furloughs without pay, or reductions in rank or pay) are subject to the rigid requirements of 5 U.S.C. Chapters 75 and 77, and of FPM Supplement 990-1, Parts 752 and 772, the latter specifically including the right of representation upon appeal to the Commission from agency actions. And in matters not covered by statutory appeals procedures, and not otherwise in conflict with statutes or the Order, negotiated grievance procedures, including binding arbitration, are sactioned for employee protection under section 13 of the Order. Consequently,

> no substantial purpose of the Order would be served by an interpretation of section 1(a) to include the right of an employee to union representation or assistance at a non-formal investigative interview or meeting to which he is called by management.

Inasmuch as the November 10 discussion was not a formal discussion within the meaning of the last sentence of section 10(e), failure to affirmatively inform Mr. Eaton of his right to union representation at that meeting was not a denial of a right conferred by that provision on the union nor a denial of a concomitant right of the employees that the union be given an opportunity to be present. Therefore, the failure to inform Mr. Eaton of his right to union representation was not a violation of either section 19(a)(1) or section 19(a)(6) of the Executive Order or the negotiated agreement. The finding that there was no duty to inform Mr. Eaton of a right to representation was not in controvention of the Order or the negotiated agreement requires a further finding that this failure could not constitute a unilateral change in the negotiated agreement.

Under the Executive Order, as distinguished from the National Labor Relations Act, an employee does not have a right to be represented at a pre-action investigation, nor does the union have a right to be represented at such a meeting. See Department of Defense, U. S. Navy Norfolk Naval Shipyard, Case No. 22-5283, March 4, 1975; U. S. Air Force, Headquarters Airforce Military Training Center (ATC), Case No. 63-5430(CA), February 4, 1976.

Mr. Eaton's letter of November 10, 1975, was not considered by Mr. Eaton to be a complaint. Consequently, any failure to respond in a timely manner could not be considered an unfair labor practice. The record clearly shows that there were communications between management and the union. However, the union characterizes the responses as uninformative and not the responses requested in their communications. The union's letters of November 12 and December 4, 1975, do not indicate that the union had been designated as Mr. Eaton's personal representative. It could be argued that Mr. Eaton's letter to the union dated November 10, 1975, requesting assistance was a delegation of representation. However, the adverse action was not proposed until January 1966 and the union was informed that the matter was being studied. There are no

facts of record that indicate that management's responses to the union's inquiries reflected animus, but rather indicated an abundance of caution to insure that the investigative file contained sufficient evidence to warrant the institution of a proposed adverse action. The record clearly demonstrates that management's actions were directed solely to insure that the alleged wrongdoings were clearly substantiated in the investigative report for the protection of Mr. Eaton.

The final issue for consideration is whether Mr. Eaton's reassignment was harassment or coercion. The fact that Mr. Eaton was assigned to duties which he considered clerical in nature does not, in itself, constitute an unfair labor practice or harassment. The reassignment was a management decision based on the fact that there were very serious questions regarding Mr. Eaton's conduct in his position and without any knowledge that he was a member of a union. The complete lack of evidence probative of union animus precludes the finding of an unfair labor practice or violation of the Order. The record is devoid of any evidence that the reassignment was based on the potential of union assistance or representation in the investigative process or in the proposed adverse action which was instituted on January 6, 1976, well after all the activities complained of occurred.

The reassignment of Mr. Eaton cannot be viewed as coercive or intimidating by agency management for the purpose of dissuading the employee from seeking or accepting union assistance and representation with regard to such matters as the processing of grievances and, therefore, there has been no violation of sections 19(a)(1) or 19(a)(6)of the Order.

Neither the Order nor the negotiated agreement circumscribe management's prerogatives in detailing employees to lower graded positions. The method of detailing Mr. Eaton had not been shown to be in controvension of any Civil Service Regulations, the Order or the negotiated agreement. In fact, Complainant never raised the allegation that the detail was in violation of the agreement.

The record does not support a finding that the activity in any way tried to unilaterally limit the scope of the agreement nor its bargaining obligations with the Complainant. Even if Respondent erroneously interpreted section 13.1 of the negotiated agreement, it would be as a simple breach of contract and not a unilateral change in the agreement.

The dispute as to the meaning of section 13.1 of the negotiated agreement deals with the meaning of elastic words. It is not clear on the face of the agreement that management's interpretation is clearly and obviously a breach of the contract and constitutes a deliberate attempt to unilaterally change that contract. Since the management's interpretation of section 13.1 had never previously been brought in question, according to the record in this case, there appears to be at most an obligation to bargain regarding the impact and implementation of the terms of that section in the negotiated agreement. The dispute so obviously involves semantical interpretation as to require resolution in accordance with established grievance procedures. The record does indicate that one of the members of the union's negotiating team understood the section to afford an opportunity for representation when requested by the employee, consonant with the clear language of section 10(e) of the Order and further understood that each member of the union would receive a copy of the negotiated agreement and would be therefore familiar with entitlement to representation upon their own request.

Filing a grievance under a negotiated grievance procedure is a right protected by section 19(a)(1) of the Order. The Department of Defense, Arkansas National Guard, A/SLMR No. 53; National Relations Labor Board, Region 17, A/SLMR No. 295; California National Guard, A/SLMR No. 348. Since there was no grievance filed at the time of the meeting or other actions taken in regard to Mr. Eaton, it cannot be found that Respondent interfered with, restrained, or coerced Mr. Eaton in the investigative proceedings or by detailing him to another section. The timing of the reassignment was such that it precludes any suspicion that the detailing was motivated by a grievance or by Mr. Eaton's union activities or membership. If the detailing had followed the filing of a grievance or some statement by Mr. Eaton relative to his union membership or his desire to have union representation, there would become corroborative fact of union animus or coercion.

Since Complainant has not sustained its burden of proof of violation of the Order, the complaint should be dismissed.

RECOMMENDATION

The complaint should be dismissed.

Joan Wieder

JOAN WIEDER
Administrative Law Judge

Dated: April 13, 1977

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. AIR FORCE,
SCOTT AIR FORCE BASE
A/SLMR No. 892

This case involved an unfair labor practice complaint filed by Local R7-23, National Association of Government Employees (Complainant) alleging that the Respondent violated Section 19(a)(1)and (6) of the Order by unilaterally altering the wording of a provision of a negotiated agreement after the parties purportedly had reached agreement on said provision.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. During a negotiation session on May 10, 1976, the parties initialed each other's copy of a section of a draft negotiated agreement believing they had agreed to the same language in the section. However, the Complainant's copy read " 'every' effort has been made" while the Respondent's copy read " 'normal' efforts ___ ___ ___." (emphasis added) The Respondent had a clean copy of the draft agreement typed from its copy, incorporating the phrase "normal efforts" in the draft agreement. The draft agreement was signed at a ceremonial signing on June 10, 1976, by two of the three signatories and after review by a higher headquarters it was returned to the Respondent for re-negotiation of several provisions. The Complainant then discovered the disparity in the draft agreement from its initialed copy and protested the use of the wording "normal efforts." The negotiated agreement which was ultimately signed on September 3, 1976, omitted the section of the agreement which would have included the disputed phrasing. The Complainant signed the final agreement under protest because of the omission of its version of this section of the negotiated agreement, which it alleged was agreed to by all parties on May 10, 1976.

The Administrative Law Judge found that the parties did not reach an accord concerning the contents of the disputed section of the agreement, particularly with respect to the use of the phrase "every effort" as opposed to "normal efforts." Accordingly, he found that the Respondent did not violate Section 19(a)(1) and (6) of the Order by unilaterally altering any agreed upon provision or by ultimately omitting that section from the final version of the agreement.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 892

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. AIR FORCE,
SCOTT AIR FORCE BASE

Respondent

and Case No. 50-13196(CA)

LOCAL R7-23, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES 1/

Complainant

DECISION AND ORDER

On June 3, 1977, Administrative Law Judge Robert J. Feldman issued his Recommended Decision 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 Recommended Decision.

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 Recommended Decision and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13196(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 1, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

1/ The designation of the Complainant on the title sheet of the Administrative Law Judge's Recommended Decision was inadvertently set forth as "Local R7-23, National Association of Environment Employees," instead of "Local R7-23, National Association of Government Employees." Such inadvertance is hereby corrected.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

U.S. AIR FORCE, SCOTT AIR FORCE BASE :
Respondent :

and :

LOCAL R7-23, NATIONAL ASSOCIATION OF ENVIRONMENT EMPLOYEES :
Complainant :

Case No. 50-13196(CA)

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For the Respondent

Paul J. Hayes, Esq.
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For the Complainant

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491 as amended (hereinafter referred to as the Order). Respondent was charged with violating Sections 19(a)(1) and 19(a)(6) by unilaterally altering the wording of a provision of a collective bargaining agreement after a final accord was purportedly reached upon such provision. Upon all the evidence adduced, my observation of the witnesses, and my judgment of their credibility, I make the findings of fact and reach the conclusions of law set forth below.

Findings of Fact

1. Complainant is the authorized representative of collective bargaining units composed of certain non-supervisory Air Force General Schedule employees assigned to Scott Air Force Base and all non-supervisory professional and non-professional General Schedule employees of DECCO, Defense Communications Agency (DCA), Scott Air Force Base.

2. From the fall of 1975 through the spring of 1976 the parties were engaged from time-to-time in negotiating a new collective bargaining agreement.

3. Under date of February 3, 1976, the civilian personnel officer on behalf of the Base commander addressed a letter to the president of the union listing certain articles proposed by the union which management considered to be non-negotiable in that they violated specific sections of Order or of identified regulations. Among them was the following, without specification of the section of the Order or the regulation which it purported to violate:

f. Article XVII, Section 6.

> "The geographical area of consideration will be expanded beyond Scott AFB only after every effort has been made to attract qualified applicants locally. A copy of rationale and justification of expanding the geographical area will be furnished the union."

4. On May 10, 1976, the parties met and engaged in what was thought to be their final negotiation of certain disputed provisions of Article XVII entitled "Promotions and Hiring", among which was the above-quoted section. The chief negotiator for the union, one Hayes, was accompanied by the president of the union and two other representatives, one of whom attended only part of the session. The chief negotiator for management, one Artman, was accompanied by a civilian attorney employed in the office of the Base judge advocate and by a representative of DECCO.

5. At this session, the above-quoted Section 6 was renumbered Section 7; following the suggestion of Hayes to the effect that the language ought to be changed to conform with pertinent provisions of the Federal Personnel Manual, so much of the first sentence of renumbered Section 7 following

the word "attract" was changed to read: "at least three highly qualified employees, except for positions included in an Air Force-wide career program (GS-13 and above)"; and the second sentence of that Section was deleted and replaced by the following: "This Section does not restrict consideration of voluntary or concurrent applications on file at the time the SF-52 is executed by the supervisor."

6. In addition to the above modifications, as to which there is no dispute, there was discussion as to whether the words "every effort" should be changed to "normal effort". Artman stated that he wanted the word "every" changed to "normal", but Hayes did not express his assent to such change.

7. The revised Sections of Article XVII were then signed-off, with the modifications stated in Finding No. 5 above interlineated by hand in the respective typewritten copies of the original proposal used by the parties as working drafts in the negotiations. Each of such working drafts was signed by the president of the union and was initialed by Artman on behalf of management.

8. The working draft retained by the union and bearing Artman's initials contains no change in the phrase "every effort".

9. The working draft retained by management and bearing the signature of the union president contains the following change: The word "every" is crossed out and above it is the handwritten word "normal".

10. On or about May 11, 1976, a clerk-steno employed in the Civilian Personnel Office at Scott AFB typed out a clean draft of the Sections of Article XVII which had been signed-off by the parties at the May 10 session. Artman's version of the renumbered Section 7, containing the word "normal" in lieu of the word "every" (see Respondent's Exhibit A), was given to her to copy. She was not instructed that an exact, faithful copy was required, so on her own initiative,and with no regard for the sanctity of a signed document, she made a further change in the wording, substituting for the phrase "after every effort has been made" in the original proposal (Complainant's Exhibit 1) the phrase "after normal efforts have been made".

11. On June 9, 1976, Artman delivered to the secretary of the DECCO representative a document purporting to be a completed final draft of the collective bargaining agreement, consisting of a preamble and 34 enumerated articles. The secretary made four or five xeroxed copies of that document, retained one stapled copy in the DECCO Labor/Management files, and turned over the remaining copies to Artman.

12. The completed final draft of the agreement contained the following Section:

> Section 7: The geographical area of consideration will be expanded beyond Scott AFB only after normal efforts have been made to attract at least three highly qualified employees, except for positions included in an Air Force-wide career program (GS-13 and above). This section does not restrict consideration of voluntary or concurrent applications on file at the time the SF-52 is executed by the supervisor. [Respondent's Exhibit E]

13. A ceremonial signing of the completed final draft was held on June 10, 1976. The actual participants were the president of the union and the Base commander; the third signatory, the DECCO commander, was not present.

14. Upon Artman's representation that the agreement could not become effective until approved by Headquarters, Military Airlift Command (MAC), and with the understanding that final proof reading and editing of the agreement was to be deferred until such time as it was ready for reproduction on the 20% reduction sheets after such MAC approval, the union president signed the signature page of the completed final draft. The signature page was also signed by the Base commander at the same time.

15. Some time during the month of August, 1976, the union president proof-read the entire agreement as prepared on the 20% reduction sheets used for reproduction purposes at the Base printing plant; and in the process of such proof-reading discovered the discrepancy between Article XVII, Section 7 as recorded in the completed final draft and such Section as it appeared in the signed-off copy retained by the union (Complainant's Exhibit 1).

16. The union president thereupon requested Artman and the Civilian Personnel Officer to change the word "normal" back to "every", but her request was refused.

17. On September 3, 1976, the Labor/Management Agreement was duly executed in final form by all three signatories with Section 7 of Article XVII omitted.

18. By letter to the Base commander dated September 3, 1976, the union president stated that she was signing such Labor/Management Agreement under protest with the understanding that it is printed with Section 7, Article XVII omitted.

Conclusions of Law

The issues herein were framed by the Acting Regional Administrator and accepted by the parties' representatives as follows: (1) whether or not the parties within the context of a collective bargaining session held on May 10, 1976, reached an accord concerning the contents of Article XVII, Section 7 of their agreement; (2) if a final accord was reached, whether or not the wording of the aforementioned provisions of the agreement was subsequently unilaterally altered by Respondent in violation of Section 19(a)(1) and (6) of the Order.

With reference to the extent of the effort to be made to attract the qualified employees mentioned in Section 7, Complainant's representative acknowledges that it does not make any material difference whether it's "normal" or whether it's "every" (Tr. 1-81). Rather, he contends, the issue is one of principle. No question of principle arises, however, unless and until it is established that there was a meeting of the minds on the wording alleged to have been changed.

It is clear from the evidence that previous to the signing-off of Section 7, there was some discussion as to whether or not the phrase "every effort" should be modified to "normal effort", concern being expressed on the management team that the former might impose an undue burden on the personnel staff and might impede the hiring process. It is also clear that Hayes, as chief negotiator for the union, did not verbalize or otherwise express his assent to such change. It is equally apparent that Artman, as chief negotiator for the agency, did not verbalize or otherwise express his assent to the use of the phrase "every effort" in the union proposal, nor can any such assent be implied in view of the fact that the Respondent had declared the entire section as non-negotiable and the entire section was treated by both parties as open.

It must be remembered that a signed-off portion of a prospective collective bargaining agreement is not a contract per se. It is only documentary evidence that the parties have reached a mutual understanding with respect to that particular section or article, as the case may be, during the course of

negotiating the entire agreement. Consequently, instead of proof that the parties were in agreement on the exact language to be employed, we have on the one hand, documentary evidence that they agreed to use the word "every"; and on the other hand, documentary evidence that they agreed to use the word "normal". In the absence of other credible evidence of mutual consent, the reasonable inference to be drawn is that the parties did not in fact reach an agreement on the use of either word.

Complainant in effect accuses Artman of a species of forgery, claiming that he crossed out the word "every" and inserted the word "normal" on his copy of the revised section 7 (Respondent's Exhibit A) after it had been signed-off by the union president. To support this allegation, the union president testified that when she signed-off Artman's copy of the revised section, the word "every" was not crossed out and the word "normal" was not inserted. It is apparent from her entire testimony, however, that her statement to that effect was not based upon actual, visual recollection, but was founded upon an implicit faith in her own infallibility with respect to her invariable practice of not signing-off on management's copy of any section without comparing it with her own copy. It is not a necessary inference from her testimony that the alteration must have taken place after she signed-off. It is not unreasonable to infer instead that among all the other interlineations appearing on Artman's copy, the union president simply did not notice that the word "every" had been changed to "normal". Complainant has not established by a fair preponderance of the credible evidence that any post-signing-off alteration was made.

Upon all the evidence adduced, I conclude that the parties did not reach an accord concerning the contents of Article XVII, Section 7, particularly with respect to use of the phrase "every effort" as opposed to "normal efforts". Consequently I must conclude that Respondent did not violate Section 19(a)(1) or (6) of the Order by unilaterally altering any agreed provision or by omitting that Section from the final version of the contract.

RECOMMENDATION

On the basis of the foregoing Findings of Fact and Conclusions of Law, I hereby recommend to the Assistant Secretary that the complaint be dismissed in its entirety.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: June 3, 1977
Washington, D.C.

September 7, 1977

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

JACKSONVILLE DISTRICT,
INTERNAL REVENUE SERVICE,
JACKSONVILLE, FLORIDA
A/SLMR No. 893

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by changing a testing procedure for certain IRS employees without notifying the NTEU and affording it an opportunity to request bargaining on the impact and implementation of the change.

On October 10, 1975, representatives of both parties met to discuss the Taxpayer Service Program for the upcoming tax filing season. The NTEU contended that at the meeting passing reference was made to testing of certain employees but as testing had occurred in previous years it raised no questions at the time. The Respondent, on the other hand, argued that a change in the testing procedure was discussed in the context of its overall quality control program. The record revealed that testing commenced in the Jacksonville District during the week of November 17, 1975. Thereafter, on November 25, 1975, the parties held a telephone discussion concerning the use to which the test results would be put after several unit members had expressed their concern in this connection, and on December 4, 1975, the NTEU submitted a set of proposals regarding matters discussed at the meeting of October 10.

The Administrative Law Judge made no factual findings or conclusions of law with respect to the October 10th meeting. However, he concluded, based upon the telephone conversation of November 25 and the NTEU's proposals of December 4 that the latter had knowledge of the change in the testing program and that the Respondent, therefore, had timely fulfilled its obligation of notifying the NTEU and affording it an opportunity to request bargaining on the impact and implementation of the change.

Contrary to the Administrative Law Judge, the Assistant Secretary found that the Complainant was not furnished sufficient notice of the change in the testing program prior to its implementation in the Jacksonville District. He noted that the November 25th telephone conversation and the December 4th proposals, upon which the Administrative Law Judge based his determination that the Complainant had notice of the change in the testing program, occurred after the testing had already commenced in the Jacksonville District. In deciding whether the Complainant was afforded timely notice of the change, the Assistant Secretary noted, therefore, that it was critical to determine whether the Respondent provided appropriate notice to the Complainant at the October 10th meeting. Assuming arguendo that some reference was, in fact, made to testing at the October 10th meeting the evidence did not establish that a proposed change in the testing program was a specific subject of the meeting or that at the meeting the Respondent so clearly informed the Complainant of a contemplated change in the established testing program as to constitute the type of precise and timely notification envisaged by the Order which would have enabled the Complainant to bargain in a meaningful manner, prior to the change, concerning the impact and implementation of the management decision. Under these circumstances, the Assistant Secretary found that the Respondent failed to meet its bargaining obligation in violation of Section 19(a)(1) and (6), and issued an appropriate remedial order.

A/SLMR No. 893

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

JACKSONVILLE DISTRICT,
INTERNAL REVENUE SERVICE,
JACKSONVILLE, FLORIDA

Respondent

and

Case No. 42-3334(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On March 23, 1977, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order 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 Recommended Decision and Order and the Respondent filed an answering brief 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 Recommended Decision and Order and the entire record in the subject case, including the exceptions filed by the Complainant and the Respondent's answering brief to the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The complaint herein alleged essentially that a testing program, different from that which had been utilized in previous years, was conducted by the Respondent for certain Internal Revenue Service (IRS) employees in the Jacksonville District of the IRS without prior notification to the Complainant and without thereby affording the Complainant an opportunity to request and engage in bargaining on the impact and implementation of the testing program, in violation of Section 19(a)(1) and (6) of the Order.

The record reveals that on October 10, 1975, a meeting was held in Washington, D. C. between representatives of the IRS and the Complainant, the National Treasury Employees Union (NTEU). 1/ The meeting was called by the IRS for the purpose of discussing the Taxpayer Service Program for the Fiscal Year 1976. The Complainant asserts that two topics were discussed at the meeting - the detailing of IRS employees into the Taxpayers' Service function and the hiring of "when actually employed" (WAE) employees for the Taxpayer Service Program. The Complainant further contends that only "a passing reference" was made to the testing of Taxpayers' Service Representatives (TSRs) and that it raised no question at the time because testing of TSRs had been conducted in the past and it was not until some time later that the NTEU learned that, in fact, there had been a change in the testing procedure. 2/ The Respondent asserts that in addition to discussing details and the hiring of WAE employees at the meeting, it raised the issue of "quality control" which was to be accomplished, in part, by a series of pre-tests and post-tests of the TSRs. At the conclusion of the meeting, the Complainant indicated that it would be submitting proposals on the matters discussed.

It is undisputed that testing of TSRs began in the Jacksonville District during the week of November 17, 1975. On or about November 25, 1975, the Complainant's National President and the Chief of the Respondent's Labor Relations Staff telephonically discussed the use to which the test results would be put after several NTEU members had expressed their concern in this connection to NTEU officials. On December 4, 1975, the Complainant submitted a set of proposals concerning the detailing of employees into the Taxpayers' Service function and the hiring of WAE personnel.

In his Recommended Decision and Order, the Administrative Law Judge made no factual findings or conclusions of law with respect to the October 10th meeting. He concluded, however, that the Complainant had knowledge of the testing program as evidenced both by the telephone

1/ At the hearing, the parties stipulated that the IRS officials present at the meeting were acting as agents of the 57 IRS district offices, including the Jacksonville District, and the NTEU officials who attended the meeting were acting as agents of various local NTEU chapters which held exclusive recognitions in the IRS, including the NTEU's Florida Joint Council, which was the exclusively recognized representative of employees in the Jacksonville District.

2/ The record reveals that in previous years TSRs had received training to acquaint them with new developments in the tax filing procedure in preparation for the tax filing season and were tested to determine whether the training had been effective. In the Fall of 1975, the testing program was changed by instituting a "pre-test," designed to measure the level of knowledge prior to the training program, which was in addition to, and different from, the "post-testing" conducted previously.

conversation of November 25 between the Complainant's National President and a representative of the Respondent and the Complainant's proposals of December 4, one of which made reference to "monitoring quality." 3/ With regard to the Complainant's proposals of December 4, the Administrative Law Judge found it unlikely that the Complainant "would have been acquainted with the 'monitoring' portion of the program and ignorant of the testing program." 4/ Accordingly, the Administrative Law Judge concluded that the Respondent had timely fulfilled its obligation of notifying the Complainant regarding the change in the testing program thereby affording it an opportunity to request bargaining on impact and implementation. On that basis, he recommended dismissal of the complaint.

Contrary to the Administrative Law Judge's conclusion, I find that the Complainant was not furnished sufficient notice of the change in the testing program for the TSRs, prior to its implementation in the Jacksonville District, to enable it to consider what bargaining requests, if any, it would wish to make with respect to implementation and impact of the change on unit employees. The November 25th telephone conversation and the December 4th proposals, upon which the Administrative Law Judge based his determination that the Complainant had notice of the change in the testing program, occurred after the testing had already commenced in the Jacksonville District during the week of November 17, 1975. Under these circumstances, in deciding whether the Complainant was afforded timely notice of the change it is critical to determine whether the

3/ The Administrative Law Judge also took note of but made no findings with respect to a letter purportedly sent to the Complainant on September 26, 1975, in which the Respondent indicated that a representative sample of TSRs in four IRS District Offices (Jacksonville not among them) would be used to preliminarily validate a series of tests. I find that this letter did not constitute notice to the NTEU of changes in the testing program inasmuch as it did not contain information relative to the testing program in the Jacksonville District, and it did not clearly indicate that the testing program would include pre-testing. Further, the parties stipulated at the hearing in this matter that the Respondent gave the Complainant no notice of its intention to test Taxpayers' Service employees in November and December of 1975 other than that which it claims to have given through its representatives at the October 10th meeting.

4/ In view of the disposition herein, I find it unnecessary to determine whether this proposal reflected the Complainant's knowledge of the testing program.

Respondent provided appropriate notice to the Complainant at the October 10th meeting which was prior to the commencement of the testing program. 5/ As noted above, the Complainant contended that the October 10th meeting was called for the purpose of discussing two major topics - the detailing of employees into the Taxpayers' Service function and the hiring of WAE employees - and that only passing reference was made to testing. The Respondent asserted that while the new Taxpayers' Service Program was discussed in general, specific matters were talked about also, including the matter of quality control which was to be achieved, in part, through a series of pre-tests and post-tests.

In my view, even assuming arguendo that some reference was, in fact, made to testing at the October 10th meeting, the evidence does not establish that a proposed change in the testing program was a specific subject of the meeting, or that at the meeting the Respondent so clearly informed the Complainant of a contemplated change in the established practices with respect to testing as to constitute the type of precise and timely notification envisaged by the Order which would have enabled the Complainant to bargain in a meaningful manner, prior to the change, concerning the impact and implementation of the management decision. Accordingly, as, in my view, the Respondent failed to give adequate notice to the Complainant of the change in the testing program prior to its institution in the Jacksonville District of the IRS, and thereby failed to afford it an opportunity to request timely bargaining on the impact and implementation of such a change, I find that the Respondent failed to meet its bargaining obligation in violation of Section 19(a)(1) and (6) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Internal Revenue Service, Jacksonville District, Jacksonville, Florida shall:

1. Cease and desist from:

(a) Instituting a change in the testing program for Internal Revenue Service employees in the Taxpayers' Service function, represented exclusively by the National Treasury Employees Union, without notifying the National Treasury Employees Union 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 such change and on the impact of such change on adversely affected employees.

5/ See Federal Railroad Administration, A/SLMR No. 418, where the Assistant Secretary stated that, "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." (emphasis in original decision)

(b) In any like or related manner interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Upon request, meet and confer with the National Treasury Employees Union, to the extent consonant with law and regulations, concerning the impact on adversely affected employees of a change in the testing program in the Taxpayers' Service function which change was implemented during the week of November 17, 1975.

(b) Post at all Internal Revenue Service, Jacksonville District, facilities and installations 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 Jacksonville District 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 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
September 7, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 institute a change in the testing program for Internal Revenue Service employees in the Taxpayers' Service function, represented exclusively by the National Treasury Employees Union, without notifying the National Treasury Employees Union 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 implementing such change and on the impact the change will have on the employees adversely affected by such action.

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

WE WILL, upon request, meet and confer with the National Treasury Employees Union, to the extent consonant with law and regulations, concerning the impact on adversely affected employees of a change in the testing program in the Taxpayers' Service function which change was implemented during the week of November 17, 1975.

_____
(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 Regional Administrator, Labor-Management Services Administration, United States 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
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:

JACKSONVILLE DISTRICT
INTERNAL REVENUE SERVICE
JACKSONVILLE, FLORIDA,
Respondent,

and

NATIONAL TREASURY EMPLOYEES
UNION,
Complainant.

Case No. 42-3334(CA)

HARRY G. MASON, ESQUIRE
Regional Office, Internal Revenue Service,
Southeast Region
Post Office Box 1074
Atlanta, Georgia 30301,
For the Respondent

DIANE S. GREENBERG, ESQUIRE
Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20005,
For the Complainant.

Before: PETER McC. GIESEY
Administrative Law Judge

This is a proceeding brought under the terms of Executive Order 11491, amended, (hereafter, "the Order") by National Treasury Employees Union (hereafter,"the Union") against Jacksonville District, Internal Revenue Service (hereafter, "Jacksonville IRS"). The Union asserts that Jacksonville IRS violated sections 19(a),(1) and 19(a),(6) of the Order by implementing certain testing requirements for personnel engaged in taxpayer assistance during the 1975 filing season without informing the Union and thereby permitting the Union timely to request and engage in negotiations on implementation and impact of the assertedly new policy or procedure.

A hearing was held in Jacksonville, Florida on November 29, 1976. Briefly, the record shows the following circumstances.

Statement of the Case

The following is undisputed.

The Florida Joint Council of the Union is the exclusive bargaining agent of employees in a appropriate unit of the Jacksonville IRS.

By mutual agreement, representatives of the IRS meet from time to time with representatives of the Union to discuss and negotiate matters which have agency wide application.

Such a meeting was held on October 10, 1975.

The General Counsel of the Union, who attended the October, 1975 meeting, testified that two "major topics" were discussed, the detailing of incumbent employees to taxpayer's service (taxpayer service representatives, "TSRs") and the hiring of extra personnel on "when actually employed" ("WAE") status for the TSR function. According to this witness "a passing reference to testing of TSRs" was made during the meeting by an "operating official" of the IRS. The witness stated that he asked no questions concerning this matter because testing of TSRs was accomplished each year. He asserted that he "only learned much later that the testing that was contemplated in the late fall of '75 was significantly different in content and thrust than was the testing that had been done in

prior years," that, whereas testing had been accomplished following training in years before 1975, during that year tests were administered" at the beginning of the programs to find out the level of experience, the level of competence" in order to offer training in areas of weakness. He denied receiving any written notice of the new testing program.

This union official testified that "as soon as we learned, particularly in Jacksonville, that the [IRS] was installing a brand-new testing program [,w]e alerted all of our chapters... and did request negotiations...." He stated that because "the program had begun here [in Jacksonville], there was no way of reaching agreement on any matter because they put it in place without [notice]...."

On cross examination, the General Counsel defined the difference in programs as having "created a tremendous number of questions [,w]hat happens to me if I fail [,i]s that going to reflect on my evaluation [,a]m I going to be fired because I failed the test?" He also stated that "we learned later that the whole idea...was so that people would...be more receptive to the training."

Respondent's witness, the Chief of its Labor Relations Branch, who had attended the October, 1975 meeting, testified that the meeting was held "to make sure that [The Union] was aware of what this new [Taxpayers' Service] program would be." He stated that the program was described in general but that "we talked about specifics, also." Among the latter, according to the witness, was an effort to "build greater quality control...[which] going to take the form of testing employees, pretests and post tests...there was a pre-test to see what they knew and there were post tests to see how successful the training was in providing the individual employee with the tools necessary to provide a quality job." Another part of the "quality control" was to consist of telephone monitoring. He testified that, "somewhat to my surprise," the Union representatives made no comment on the "quality control" program but restricted the discussion to furlough and recall of WAEs and detailing of regular employees to the TSR function.

He also testified that, in September, 1975, a letter had been sent to the Union setting forth the new testing program. 1/ In November, he received a telephone call from the National President informing him that some of the employees were "concerned about how these test results - both pre-test and post test - were going to be used." He testified that he stated he would return the call on that day, that he did;

> and read him portions of a telegram that was sent within the next couple of weeks to all regional commissioners across the country which indicated that the results of the pretests and the post tests were not to be given to -- particularly in the case of people that were being detailed into Taxpayers' Service -- were not to be given to their supervisors and were under no circumstances to be used for evaluation purposes, that this was part of an overall quality control program and not to get at individual employees.

Early in December, the Union submitted proposals "in response to the IRS announcement that it intends to supplement the TSR function with WAE employees." Inter alia, the six page proposal contains the following paragraph;

> Any recordation made by a supervisor as a result of 'Monitoring quality' must be shown to the employee and the employee must be provided with an opportunity to respond as required in Article 9, Section 2 of the NTEU-IRS Multi-District Agreement.

1/ The letter, addressed to the Union's National President, states;

> This is to inform you that the IRS will be utilizing a representative sample of 50-55 incumbent TSR's to preliminarily validate a series of tests designed to measure the level of knowledge achieved during the six week training course for new TSR's. These employees will be tested over a four-day period (9/30 - 10/3). We plan to conduct the tests in Chicago, Manhattan, Los Angeles, and Philadelphia Districts. The tests will be administered by members of the National Office Taxpayer Service Division and Training Division, and results will be completely confidential, having no impact on the sample group. The test participants' names will not appear on the examination.

Findings of Fact and Conclusions of Law

All witnesses were credible. It is unremarkable that some witnesses memories were more precise than others. It is equally unremarkable that respondent's representative should testify to having participated in communicating with the Union's President and that the Union's General Counsel should testify that he did not receive the communication. It is of no consequence that this Union official also testified that he could "recall receiving no such letter." The letter was not addressed to him and his testimony indicates that it was not routed to him - regardless of the fact that such mail "is routinely routed to me for processing" or that such is "a general practice." The Union official to whom the September, 1975, letter was addressed did not testify. In any case, I credit the agency official's testimony that in November he personally informed the Union's President of the testing program, purpose and the restricted use of test results. Moreover, the Union's knowledge of the details of the "quality control" program is attested to by its proposals of December 4, 1975. I regard it as unlikely in the extreme that Union would have been acquainted with the "monitoring" portion of the program and ignorant of the testing program. That is not to say that the single official of the union who testified to his lack of knowledge was in any way incorrect. It is sufficient that someone, in this case the National President, had such knowledge far enough in advance to allow time for a request and for negotiation pursuant to that request.

Accordingly, I find that respondent timely fulfilled its obligation to inform the Union of the change in terms and conditions of employment of certain of the employees represented by it and thus afforded the Union reasonable opportunity to request to meet and discuss the implementation and impact of such changes.

Recommended Order

It is recommended that the Assistant Secretary dismiss the complaint.

Peter McC. Giesey
Administrative Law Judge

Dated: March 23, 1977
Washington,D.C.

September 16, 1977

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 HEALTH, EDUCATION AND WELFARE,
PUBLIC HEALTH SERVICE HOSPITAL,
SAN FRANCISCO, CALIFORNIA
A/SLMR No. 894

This case involved a petition for clarification of unit (CU) filed by the Department of Health, Education and Welfare, Public Health Service Hospital, San Francisco, California (Activity) seeking to clarify the status of head nurses, whom it claimed were supervisors and should, therefore, be excluded from the existing exclusively recognized unit. The California Nurses Association, on the other hand, contended that the head nurses were not supervisors and should remain in the unit for which it was granted recognition in 1967.

The Assistant Secretary found that the head nurses are supervisors within the meaning of Section 2(c) of the Order. In this connection, the record revealed that head nurses assign work to subordinate employees utilizing independent judgment; designate team leaders and those patients requiring team care, often acting as team leaders themselves; evaluate employee performance, which evaluations require the use of independent judgment; make effective recommendations regarding the retention of probationary employees; provide input into the hiring process; and are designated as the first step management official under the agency grievance procedure and under a grievance procedure negotiated by the Activity and another labor organization covering certain employees under the supervision of the head nurses. Under these circumstances, the Assistant Secretary found that employees assigned to the position of head nurse are supervisors within the meaning of the Order, and clarified the existing exclusively recognized unit consistent with his findings.

A/SLMR No. 894

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
PUBLIC HEALTH SERVICE HOSPITAL,
SAN FRANCISCO, CALIFORNIA

Activity/Petitioner

and

Case No. 70-5517(CU)

CALIFORNIA NURSES ASSOCIATION

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 Patricia Baran. 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:

The Activity/Petitioner, hereinafter called the Activity, filed the instant petition seeking to clarify the status of head nurses, whom it claims are supervisors within the meaning of Section 2(c) of the Order and should, therefore, be excluded from the existing exclusively recognized unit. The California Nurses Association, hereinafter called CNA, contends that the head nurses are not supervisors and should be included in its unit which it described as: "All staff nurses and head nurses, and other registered nurses not designated supervisors under Executive Order 10988 who are officially assigned to hospital positions and who are carried on the official hospital payroll." 1/

The Activity provides medical and surgical care for eligible individuals, and serves also as a teaching institution and research facility. The CNA and the Activity entered into a negotiated agreement in 1969, which terminated in 1972. Although the parties are not now under a negotiated agreement, a dues check-off agreement is presently in effect.

The head nurses involved herein are all employed in the Activity's Nursing Department, which is comprised of seven units: Medical-Surgical; Intensive Care; Primary Care (formerly called General Outpatient); Metabolic; Renal Dialysis; Psychiatric Outpatient; and Operating Room.

1/ The CNA was granted exclusive recognition in 1967.

Staff nurses, nursing assistants and ward clerks staff these units under the general direction of the head nurses. 2/ The responsibility for the administration of the Nursing Department is in the Office of Director of Nursing. Assigned to the Office of Director of Nursing is a Deputy Director; an Associate Director of Nursing, Education; two Clinical Supervisors, Medical-Surgical; two Assistant Directors of Nursing, one each for the evening and night shifts; two Nurse Supervisors, one each for the evening and night shifts; and an Operating Room Supervisor.

The record reveals that head nurses are responsible for their respective units on a 24-hour 7-day week basis, although, typically, the tour of duty for the head nurses is the day shift. In the exercise of their administrative duties, head nurses draw up work schedules which are submitted to the Director or Deputy Director of Nursing for review. The head nurses also designate team leaders and determine which patients need team care. Work assignments on the team are made by the team leader and, in this connection, the record reveals that head nurses often act as team leaders. When a head nurse finds a particular unit short-staffed, the Deputy Director or Clinical Supervisor is notified, who, in turn, calls in an off-duty staff nurse or transfers personnel from one unit to another. Employees taking sick leave call the nursing office which follows the same procedure as noted above to cover staffing deficiencies. Requests for annual leave are submitted to the head nurses who complete master leave schedules which are sent to the nursing office for approval. Conflicts in leave are resolved by the head nurse with the affected employees. Those conflicts that are not resolved at this level are referred to higher level supervision.

The record reveals that head nurses make recommendations for within-grade increases and complete performance evaluations for employees on their staffs. In the case of probationary employees, head nurses recommend their retention or discharge and the evidence indicates that the recommendations of the head nurses in this regard are followed. Performance evaluations for other employees are reviewed by the Clinical Supervisor who may comment on the evaluation but may not change it. In cases of unsatisfactory performance, head nurses counsel the employee involved individually and then may counsel the employee again with the Clinical Supervisor present. The head nurses report infractions of the rules to higher supervision but have themselves excused short periods of tardiness. The record indicates that head nurses are designated as the first step management official in both the agency grievance procedure and the negotiated grievance procedure covering nursing assistants and ward clerks, although there is no evidence that head nurses have been involved in grievance handling under either procedure.

Applicants seeking positions within the Nursing Department are screened by the Deputy Director before being referred to a head nurse who determines whether or not the applicant will be able to work with the other employees within a given unit and, in general, acquaints the

2/ The record indicates that nursing assistants and ward clerks are included in a unit exclusively represented by the American Federation of Government Employees, AFL-CIO.

applicant with the type of work performed in the unit. The record reveals that head nurses attend periodic meetings with personnel from the Office of Director of Nursing; serve as members of hospital committees; and have received limited supervisory training.

Based on all the foregoing circumstances, I find that head nurses are supervisors within the meaning of Section 2(c) of the Order inasmuch as they assign work to subordinate employees utilizing independent judgment; evaluate the work performance of subordinate employees; make effective recommendations regarding retention of employees; and are designated the first line authority under established grievance procedures. 3/ Accordingly, I find that the employees assigned to the position of head nurse are supervisors within the meaning of Section 2(c) of the Order, and should, therefore, be excluded from the unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the California Nurses Association was granted recognition on November 17, 1967, be, and hereby is, clarified by excluding from said unit employees classified as head nurses.

Dated, Washington, D.C.
September 16, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

3/ Cf. The Veterans Administration Hospital, Augusta, A/SLMR No. 3; U.S. Soldiers' Home, Washington, D.C., A/SLMR No. 13; Veterans Administration, Veterans Administration Hospital, Lexington, Kentucky, A/SLMR No. 22; Veterans Administration Hospital, Buffalo, New York, A/SLMR No. 96; and Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, A/SLMR No. 778, where, based on similar facts, head nurses were found to be supervisors within the meaning of the Order.

SEP 16 1977

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

ALABAMA NATIONAL GUARD,
MONTGOMERY, ALABAMA
A/SLMR No. 895

This case involved an unfair labor practice complaint filed by Local 1445, National Federation of Federal Employees (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by embarking on a program of more strict enforcement of grooming standards without providing the Complainant with proper notification and opportunity to discuss the matter.

The Administrative Law Judge found that the Base Commander's memorandum of May 25, 1976, to the four branch chiefs, reflected a distinct change in its policy of enforcing the grooming and uniform standards of Air Force Regulation 35-10 (AFR 35-10), in that it changed a previously existing permissive policy to a policy of vigorous enforcement of such regulation and that the Complainant was not afforded a reasonable opportunity to meet and confer on procedures the Respondent intended to use in implementing the change and on the impact of such change on adversely affected employees, thereby violating Section 19(a)(1) and (6) of the Order.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that the Respondent's conduct was not violative of the Executive Order. In this regard, he found that the Respondent had, prior to the Base Commander's memorandum of May 25, 1976, on various occasions called to the attention of the technicians their obligations with regard to grooming and dress standards; had emphasized the need for the technicians to conform to the grooming and dress regulations; and that the parties' negotiated agreement, dated March 15, 1976, had addressed itself to the technicians' obligations to conform to such grooming and dress regulations. He further found that the evidence established that the technicians had been counselled and reprimanded for violations of AFR 35-10 prior to the Base Commander's memorandum of May 25, 1976, and that the Complainant was aware of the problems which arose from nonconformance with the grooming standards and discipline in connection therewith.

Under these circumstances, the Assistant Secretary concluded that the Base Commander's memorandum of May 25, 1976, to the four branch chiefs, which reiterated the statements concerning violations of the AFR 35-10 regulation in his previous memoranda, did not constitute a change in the Respondent's policy with respect to enforcement of the grooming standards, but rather was a reaffirmation of the existing standards and was intended to ensure uniformity of enforcement of the existing policy among subordinate supervisors. He found, therefore, that the Respondent's conduct was not inconsistent with its bargaining obligations under the Order.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

A/SLMR No. 895

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ALABAMA NATIONAL GUARD,
MONTGOMERY, ALABAMA

Respondent

and

Case No. 40-7578(CA)

LOCAL 1445, NATIONAL
FEDERATION OF FEDERAL EMPLOYEES

Complainant

DECISION AND ORDER

On May 23, 1977, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order 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 in the instant case alleges that the Respondent violated Section 19(a)(1) and (6) of the Order by embarking on a program of more strict enforcement of grooming standards without providing the Complainant with proper notification and opportunity to discuss the matter. In his Recommended Decision and Order, the Administrative Law Judge found that the Base Commander's memorandum, dated May 25, 1976, to the four branch chiefs, reflected a distinct change in the Respondent's policy of enforcing the grooming and uniform standards of the Air Force Regulation 35-10 (AFR 35-10), in that it changed a previously existing permissive policy to a policy of vigorous enforcement of the regulation in order to correct certain problems with regard to the appearance of technicians. Accordingly, he concluded that the Respondent's action constituted a unilateral change in its policy of enforcement of AFR 35-10, and thereby violated Section 19(a)(1) and (6) of the Order by not affording the Complainant a reasonable opportunity to meet and confer on the procedures Respondent intended to use in implementing the change and on the impact of such change on adversely affected employees.

Under the particular circumstances of this case, I do not agree with the findings and conclusions of the Administrative Law Judge. The evidence establishes, and the Complainant concedes, that since January 1973, regulations have been in existence which require technicians, while in uniform and in duty status, to conform to certain dress and appearance standards with regard to such matters as the wearing of hair, sideburns and mustaches, and the use of wigs. The obligation to comply with existing standards was brought to the technicians' attention by the Respondent as a result of the circulation of Technical Information letters on March 15 and November 13, 1974, and May 6, 1976, and also by memoranda distributed to all technicians, dated September 14, 1973, and February 12, 1975, which emphasized the need for personnel to conform to the grooming and dress regulations. 1/ In addition, the record indicates that the parties' negotiated agreement, dated March 15, 1976, addressed itself to the technicians' obligations to conform to the grooming and dress regulations. 2/

The evidence establishes that although AFR 35-10 3/ was not uniformly enforced by all the subordinate supervisors, prior to the Base Commander's memorandum of May 25, 1976, employees had, in fact, been counselled and reprimanded with regard to violations of this regulation. Moreover, the problems which arose from nonconformance by the technicians with

1/ The September 14, 1973, memorandum referred to "military bearing" with special emphasis on personal appearance. The February 12, 1975, memorandum was more emphatic and pointed out that grooming standards, which were a "firmly established legal condition of our employment here!," must be adhered to, and suggested that, if any technician was not fully aware of such grooming standards and military bearing and appearance requirements, he study AFM 35-10. It concluded with the order that without "equivocation" the Respondent expected full compliance by each of the technicians "immediately and into the future so long as the requirement still exists."

2/ The agreement was subject to existing published agency policies and regulations. In addition, Section 3 of Article II (Obligations of Technicians) of the agreement stated, in pertinent part:
> Technicians should maintain a good standard of neatness and appearance. The standard is comprised of neat haircuts, neat shoe shine, proper dress of uniforms and safety.

3/ Although AFR 35-10, was dated February 25, 1975, and was made applicable October 30, 1975, it contained appearance standards which were in effect since January 1973.

grooming standards and discipline in connection therewith were known to the Complainant and, in fact, on March 4, 1974, it requested a meeting with the Adjutant General to discuss haircuts and the alleged harassment of the technicians by threatening them with loss of employment and denial of promotions because of personal appearance.

In my view, the Base Commander's memorandum of May 25, 1976, sent to each of his four division chiefs, in which he states that the base has been "plagued for too long now by a permissiveness which has condoned gross violations" and that he was determined to correct the problem by holding the division chiefs personally responsible for any violations committed by "his assigned air technician personnel," did not constitute a change in the Respondent's prior policy with respect to enforcement of the grooming standards. Rather it was a reaffirmation of the Respondent's existing policy and was intended to ensure uniformity of enforcement of the existing policy among subordinate supervisors. 4/ Under these circumstances, I conclude that the Respondent's conduct herein was not inconsistent with its bargaining obligations under the Order and, therefore, I shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-7578(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 16, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

4/ Compare New Mexico National Guard, Department of Military Affairs, Office of the Adjutant General, Santa Fe, New Mexico, A/SLMR No. 362, which involved a new policy of enforcement, and Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, A/SLMR No. 736.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

ALABAMA NATIONAL GUARD,
Respondent

and

LOCAL 1445, NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
Complainant

Case No. 40-7578(CA)

RAY ACTON, ESQ.
and
J.B. BRACKIN, ESQ.
Office of the Attorney General
669 S. Lawrence Street
Montgomery, Alabama
For the Respondent

GEORGE TILTON, ESQ.
Associate General Counsel
Local 1445, NFFE
1016 16th Street, N.W.
Washington, D.C. 20036
For the Complainant

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on December 21, 1976 with reference to alleged violations of Sections 19(a)(1) and (6) of the Order. The complaint, filed by Local 1445, National Federation of Federal Employees (hereafter referred to as Complainant or the Union) alleged that Alabama National Guard (hereafter referred to

as Respondent or the Activity) violated the Order by embarking on a program of more strict enforcement of grooming standards without providing the Union with proper notification and opportunity to discuss the matter.

At the hearing held on February 17, 1977 the parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were received from both parties and carefully considered.

Upon the entire record in this matter and from my evaluation of the evidence and observation of the witnesses and their demeanor, I make the following:

Findings and Conclusions

Since 1971 the Union has been the exclusive collective bargaining representative of various of the Activity's employees in the State of Alabama including non-supervisory technicians working at Dannelly Air Field, Birmingham, Alabama. At all times since January 1973 Activity regulations were in effect which required technicians, while in uniform and in duty status, to conform with certain dress and appearance standards. 1/ The regulations are addressed to such matters as the wearing of uniforms, the length and condition of hair, sideburns and mustaches and the use of wigs.

The regulations were generally not strictly enforced by some supervisors when the technicians were performing their week-day employment activities. Nevertheless, the existance of these regulations and/or technicians' general obligation to comply therewith was brought to the technicians' attention by the Activity's circulating Technical Information Letters on March 15, 1974, November 13, 1974 and May 6, 1976. In addition, by memoranda distributed to all technicians at Dannelly Field dated September 14, 1973 and February 12, 1975, the Activity emphasized the need for personnel to conform to the grooming and dress regulations.

The Union was, from time to time, kept advised of any changes in these and other regulations or when publications were issued with regard thereto. The last such notification

1/ Air Force Regulation AFR 35-10, dated February 25, 1975 and made applicable to Air National Guard personnel on October 30, 1975 contains the appearance standards which, in substance, were in effect since January 1973.

relevant to the complaint was given to the Union on March 11, 1976. The form notification read "Attached for your information and guidance are the following publications that pertain to the Alabama National Guard Technician Program...." Attached was a National Guard Bureau Technicians Personnel Supplement for filing with the appropriate Federal Personnel Manual chapter which referred, inter alia, to AFR 35-10, restated the requirement that technicians comply with grooming and uniform standards and set out various situations during which the wearing of uniforms would be inappropriate.

Sometime after May 17, 1976, Sgt. Schyler Ubanks, a non-supervisory technician, met with Colonel James E. Hardwick, Air Commander at Dannelly Field, and expressed his concern with the lack of technician compliance with AFR 35-10 grooming and dress standards at Dannelly Field. Colonel Hardwick shared Sgt. Ubanks' concern. Indeed, in Colonel Hardwick's view noncompliance with AFR 35-10 began to get "out of hand" in 1973 and persisted to that day. Accordingly, Colonel Hardwick solicited Sgt. Ubanks' assistance to rectify the situation and on May 21, 1976, at Colonel Hardwick's request, Ubanks made a confidential inspection of technicians' compliance with the regulations and reported numerous infractions of the regulations to Colonel Hardwick. 2/ Pursuant thereto, Colonel Hardwick, on May 25, 1976, sent a memorandum to each of his four Division Chiefs. The memo stated, inter alia:

> "1. Alabama Air National Guard units, including those based at Dannelly Field (ANG), have been plagued for too long now by a permissiveness which has condoned gross violations of AFR 35-10 by Air Guardsmen, including many air technicians. The situation can be corrected, as it has been in several ANG units, but only if our officers, non-commissioned officers, and technician supervisors do their duty. Make no mistake about it -- responsibility rests heavily and equally upon each manager and supervisor down to the first level!"

The memo went on to emphasize Colonel Hardwick's determination to "correct the problem" in the Activity's

2/ Ubanks made approximately three similar inspections during a four or five week period after which Colonel Hardwick had him cease such activities.

military units starting first with the air technician detachment. Division Chiefs were informed that they were personally responsible to assure compliance with the regulations and that their active involvement in the endeavor was required. In addition, the memo listed the name and various uniform, mustache, hair and wig violations which Ubanks' investigation of May 21 had disclosed.

At no time prior to May 25, 1976 was the Union advised or made aware of Sgt. Ubanks' activities or Colonel Hardwick's inclination as set forth in his May 25 memo to the Activity's Division Chiefs.

Thereafter, the requirements of AFR 35-10 were generally more vigorously enforced by some of the Activity's supervisors. From January 1, 1973 to May 24, 1975, according to documentary evidence submitted at the hearing, a total of thirteen actions (counselling, reprimands, suspensions) were taken against technicians for violations of AFR 35-10 as opposed to twenty-nine such actions taken on May 25 to late January 1977. 3/ These actions involved seven technicians prior to May 25 and seventeen technicians on May 25 or thereafter. However, all the technicians against whom actions were taken prior to May 25 worked in the Support Services Division under the authority of Lt. Colonel Lonnie Slauson. Thus, in the Support Services Division seven technicians received thirteen actions prior to May 25 and eight technicians received nine actions after May 25. However, it is apparent from Lt. Col. Slauson's testimony given at the hearing that prior to May 25, 1976 he was aware of Colonel Hardwick's intent to more vigorously enforce AFR 35-10 and indeed contacted the branch chiefs under his command for the purpose of having the immediate supervisors "talk to" those technicians named. The record reveals that in Lt. Col. Slauson's Division nine employees were named in Colonel Hardwick's May 25 memo of which three were counselled on May 25, two were counselled on May 24, 4/

3/ The evidence included resumes of actions taken in three of the four divisions in Colonel Hardwick's command - Support Services, Aircraft Maintenance and Supply Management. The record is silent as to whether any violations were found or actions taken in the Activity's Air Operations Division.

4/ Although the Activity's summary of actions taken against technicians for violations of AFR 35-10 indicated that the two employees were counselled on May 24, it is clear from Lt. Col. Slauson's testimony that these counsellings occurred as a result of Sgt. Ubanks' investigation for Colonel Hardwick and in furtherance of Colonel Hardwick's policy as stated in his May 25 memo.

and one technician who received numerous counsellings and a letter of reprimand on previous occasions was suspended for five days as of June 29, 1976. In addition, two technicians, not named in Colonel Hardwick's memo, were counselled on May 25 and another was counselled on May 27. Two other technicians were counselled for grooming violations after May 25 - one on October 6, 1976 and the other on November 22, 1976.

With regard to the three technicians in the Supply Management Division against whom actions were taken, all received counsellings within the first two days of June 1976, one technician having been named in Colonel Hardwick's May 25 memo.

As to the Aircraft Maintenance Division, none of the seventeen actions taken against the six technicians involved predated May 26, 1976 on which date action against technicians began to be taken and continued through November 1976.

The Union essentially contends that Colonel Hardwick changed the Activity's permissive policy in enforcement policy of AFR 35-10 to a more rigid enforcement policy without giving the Union proper notification and an opportuntiy to bargain on the matter. The Activity takes the position that there was no change in its policy of enforcing AFR 35-10. Rather, Respondent contends that Colonel Hardwick's memo of May 25, 1976 merely represented an example of the Activity's continuing effort to obtain compliance with its grooming and personal appearance standards. Further, the Activity contends that, in any event, the Union was timely notified of any change in enforcement through the transmittal the Union received on March 11, 1976 of the National Guard Bureau Technician Personnel Supplement, supra.

I find and conclude that Colonel Hardwick's memo dated May 25, 1976 reflects a distinct change in the Activity's policy of enforcing the grooming and uniform standards of AFR 35-10. The decision to change from a permissive policy, which, in Colonel Hardwick's own words, "condoned gross violations of AFR 35-10" to a policy of vigorous enforcement of the regulations in order to "correct the problem" was first effectuated by Colonel Hardwick's enlisting Sgt. Ubanks to make an inspection. Clearly, Colonel Hardwick's decision as reflected in his memo dated May 25 generally resulted in substantially more actions being taken against technicians for violations of AFR 35-10 in the following nine month period than in the prior forty-one month period.

Indeed, Colonel Hardwick acknowledged that technician compliance with AFR 35-10 improved "drastically" after issuance of the May 25 memo.

I further conclude that the May 25 memo cannot be equated with the Activity's prior efforts to obtain compliance with the regulations. None of the few prior, sporadically issued communications on this subject were comparable in tone, urgency, resolve or results. This is evident from the general lack of diligent enforcement following issuance of those documents. Thus, in two of the three Division in which evidence was submitted, no technician was cited for violation of AFR 35-10 during the pre May 25, 1976 period.

In addition, I reject Respondent's contention that its March 11, 1976 transmittal to the Union provided Complainant with adequate notice of change in the Activity's policy in enforcing AFR 35-10. The cover memo was a routine form notice. The document claimed to be significant was a manual insertion which simply restated the general thrust of AFR 35-10 and specifically recited some situations in which it had been determined that the wearing of the uniforms would be inappropriate. I see nothing in the document which raises even a suspicion that somehow the Union should have recognized they were receiving notice that ten weeks hence AFR 35-10 would be strictly enforced when prior thereto, a "permissive" attitude prevailed.

Accordingly, in all the circumstances I conclude that Respondent's unilateral change in its policy of enforcement of AFR 35-10 violated Sections 19(a)(1) and (6) of the Order by not affording the Union a reasonable opportunity to meet and confer on the procedures management intended to use in implementing the change and on the impact of such change on adversely affected employees. 5/

In the Supply Management Division and the Aircraft Maintenance Division no technicians were cited for violations of the regulations after January 1973 and prior to May 25, 1976. Therefore, I conclude that all of the actions taken against technicians after May 25 were the result of the Activity's change in policy of enforcing the regulations.

5/ New Mexico Air National Guard, Department of Military Affairs, Office of the Adjutant General, Sante Fe, New Mexico, A/SLMR No. 362.

However, in the Support Services Division a policy of enforcement of the regulations existed before May 25, 1976 as demonstrated by thirteen actions taken against seven technicians during that forty-one month period. Nevertheless, since the actions taken by the Activity for violations on May 24 through June 29 occurred as a direct result of Colonel Hardwick's decision to have AFR 35-10 more vigorously enforced, I conclude that these actions would not have been taken at that time but for the Activity's decision.

Therefore, I shall recommend as a remedy for the violations of the Order found herein that:

1. The actions taken against technicians in the Aircraft Maintenance Division and Supply Management Division on May 25 or thereafter due to violations of AFR 35-10 be withdrawn and expunged from their records. Further, I recommend that John H. Phillips, who was suspended on November 16, 1976 for violation of AFR 35-10 be made whole for any loss suffered as a result of such suspension.

2. The actions taken against technicians in the Support Services Division from May 24, 1976 to June 29, 1976 due to violations of AFR 35-10 be withdrawn and expunged from their records and Robert D. Boyles be made whole for any loss suffered as a result of the five day suspension he received on June 29, 1976.

Recommendation

Having found that Respondent has engaged in certain conduct prohibited by Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary adopt the Order as hereinafter set forth which is designed to effectuate the policies of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Alabama National Guard shall:

1. Cease and desist from:

(a) Unilaterally embarking on a program of more strict enforcement of uniform and appearance standards to be observed by employees represented exclusively by Local 1445,

National Federation of Federal Employees, or any other exclusive representative, without notifying Local 1445, 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 uniform and appearance standards and on the impact such policy will have on the employees adversely affected by such action.

(b) Counselling, reprimanding, suspending or taking such other action against employees represented exclusively by Local 1445, National Federation of Federal Employees, or any other exclusive representative in furtherance of its policy announced on May 25, 1976 of more strict enforcement of uniform and appearance standards.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by Executive Order 11491, as amended.

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

(a) Rescind Colonel Hardwick's memoranda of May 25, 1976 relative to the strict enforcement of uniform and appearance standards as applied to employees represented by Local 1445, National Federation of Federal Employees.

(b) Withdraw any counsellings, reprimands, or suspensions for violations of uniform and appearance standards given on May 25, 1976 or thereafter to any employee represented by Local 1445, National Federation of Federal Employees employed in the Aircraft Maintenance Division and the Supply Management Division and expunge from said employees' records any reference with regard thereto.

(c) Withdraw any counselling, reprimand, or suspension for violations of uniform and appearance standards given from May 24, 1976 to June 29, 1976 to any employee represented by Local 1445, National Federation of Federal Employees in the Support Services Division and expunge from said employees' records any reference with regard thereto.

(d) Make whole John H. Phillips and Robert D. Boyles for any loss of pay or other benefit of employment they may have suffered by reason of the suspension received on November 16, 1976 and June 29, 1976 respectively for violations of uniform and appearance standards.

(e) Notify Local 1445, National Federation of Federal Employees, or any other exclusive representative, of any intended change in policy with respect to the enforcement of uniform and appearance 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 uniform and appearance standards and on the impact such policy will have on the employees adversely affected by such action.

(f) Post at its facility at Dannelly Air Field, Birmingham, Alabama, 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 Air 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 Air Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(g) 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

Dated: 23 MAY 1977
Washington, D.C.

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 unilaterally embark on a program of more strict enforcement of uniform and appearance standards to be observed by employees represented exclusively by Local 1445, National Federation of Federal Employees, or any other exclusive representative, without notifying Local 1445, 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 uniform and appearance standards and on the impact such policy will have on the employees adversely affected by such action.

WE WILL NOT counsel, reprimand, suspend or take such other action against employees represented exclusively by Local 1445, National Federation of Federal Employees, or any other exclusive representative in furtherance of our policy announced on May 25, 1976 of more strict enforcement of uniform and appearance standards.

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 rescind the memoranda of May 25, 1976 relative to the strict enforcement of uniform and appearance standards as applied to employees represented by Local 1445, National Federation of Federal Employees.

WE WILL withdraw any counsellings, reprimands, or suspensions for violations of uniform and appearance standards on May 25, 1976 or thereafter to any employee represented by Local 1445, National Federation of Federal Employees employed in the Aircraft Maintenance Division and the Supply Management Division and expunge from said employees' records any reference with regard thereto.

WE WILL withdraw any counsellings, reprimands, or suspensions for violations of uniform and appearance standards given from May 24, 1976 to June 29, 1976 to any employee represented by Local 1445, National Federation of Federal Employees in the Support Services Division and expunge from said employees' records any reference with regard thereto.

WE WILL make whole John H. Phillips and Robert D. Boyles for any loss of pay or other benefit of employment they may have suffered by reason of the suspension received on November 16, 1976 and June 29, 1976 respectively for violations of uniform and appearance standards.

WE WILL notify Local 1445, National Federation of Federal Employees, or any other exclusive representative, of any intended change in policy with respect to the enforcement of uniform and appearance 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 uniform and appearance standards and on the impact such policy will have on the employees adversely affected by such action.

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 Administrator for Labor-Management Services, Labor-Management Services Administration, Room 300 - 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

September 19, 1977

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

LOCAL R7-51, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES (NAGE)
A/SLMR No. 896

This case involved an unfair labor practice complaint filed by an individual against the National Association of Government Employees, Local R7-51 (Respondent). Essentially, the Complainant alleged that the Respondent violated Section 19(b)(1) of the Order based on the conduct of the Respondent's President in refusing to process his grievances and by denying him representation of his choice.

The Administrative Law Judge recommended that the complaint be dismissed. In reaching this conclusion, he found, among other things, that there was insufficient evidence to establish that the Respondent failed to process the Complainant's grievances consistently with the terms of the negotiated grievance procedure.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations. He noted that an exclusive representative's responsibility to fairly represent unit employees in the processing of grievances under a negotiated procedure does not provide such employees with an absolute right to have each and every grievance processed on their behalf by the labor organization. Rather, the exclusive representative must be allowed full play to exercise its own discretion and judgment to, among other things, prevent frivolous grievances, protect the integrity of the union, and provide consistency in the treatment of grievances. The Assistant Secretary further noted that the duty of fair representation is breached only when the exclusive representative's conduct is arbitrary, discriminatory, or in bad faith.

As the Complainant failed to establish by a preponderance of the evidence that the Respondent herein was arbitrary, discriminatory or acting in bad faith in its decision not to process his grievances as a union matter, and as the Respondent thereafter provided representation consistent with its contractual obligations and did not prevent the Complainant from processing his grievances in his own behalf, the Assistant Secretary concluded that the Respondent's conduct was not violative of Section 19(b)(1) of the Order. Accordingly, he ordered that the complaint be dismissed.

A/SLMR No. 896

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

LOCAL R7-51, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES (NAGE)

Respondent

and Case No. 50-13162(CO)

CHARLES A. QUILICO (An Individual)

Complainant

DECISION AND ORDER

On April 7, 1977, Administrative Law Judge Louis Scalzo issued his Recommendation and Order 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 Recommendation and 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 Recommendation and Order, and the entire record in the subject case, 1/ including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as indicated herein.

Under the particular circumstances of this case, I agree with the Administrative Law Judge that the Respondent did not refuse to process the Complainant's grievances or deny representation to the Complainant in violation of Section 19(b)(1) of the Order.

The record indicates that on March 17, 1976, when the Respondent's President "rejected" the Complainant's grievances and relieved him of his steward's duties, such action reflected merely a decision by the Respondent not to process the grievances involved herein and was not intended to preclude such representation as the Complainant was otherwise entitled to under the negotiated agreement or to prevent him from

1/ The Administrative Law Judge inadvertantly failed to formally introduce the complaint in this matter into the record. Such inadvertance is hereby corrected.

processing the grievances on his own behalf if he so desired. 2/ Moreover, subsequent to March 17, the Respondent, while not approving use of a private attorney on the Complainant's behalf, participated in and approved of arrangements to have its national vice president represent the Complainant. Thereafter, when the Complainant decided against having the national vice president represent him and proceeded to represent himself at the second step consideration of his grievances on July 15, 1976, the Respondent interposed no obstacle.

An exclusive representative's responsibility to fairly represent unit employees in the processing of grievances under a negotiated procedure does not provide such employees with an absolute right to have each and every grievance processed on their behalf by the labor organization. 3/ Rather, the discretion and judgment of the exclusive representative must be allowed full play to, among other things, prevent frivolous grievances, protect the integrity of the union, and provide consistency in the treatment of grievances. This duty of fair representation is breached only when the exclusive representative's conduct is arbitrary, discriminatory, or in bad faith. As the Complainant in the instant case has failed to establish by a preponderance of the evidence that the Respondent was arbitrary, discriminatory or acting in bad faith in its decision not to process his grievances as a union matter, and as the Respondent thereafter provided him with such representation as was consistent with its contractual obligations and did not prevent him from processing his grievances on his own behalf, I find that the Respondent's conduct herein was not violative of Section 19(b)(1) of the Order and I shall dismiss the complaint herein.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13162(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 19, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

2/ Section 3, Article XXXIII of the negotiated agreement provides:
Employees using this procedure will be represented by the Union or an individual approved by the Union except in situations where the employee desires to seek an adjustment of his grievance without the intervention of the Union.

See also the Federal Labor Relations Council's Report and Recommendations (1971), Part B, and the Federal Labor Relations Council's Information Announcement, March 22, 1972, Question and Answer No. 8, 1 FLRC 669, at 671.

3/ See United States Department of the Navy, Naval Ordinance Station, Louisville, Kentucky, A/SLMR No. 400 at footnote 5, FLRC No. 74A-54.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
LOCAL R7-51, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES (NAGE)	Respondent	Case No. 50-13162 (CO)
and		
CHARLES A. QUILICO (An Individual)	Complainant	

James Wilbanks, President
Local R7-51, National Association of Government Employees
Building 106, Great Lakes Naval Base
Great Lakes, Illinois 60088

For the Respondent

William Staben
3006 Paddock Street
Waukegan, Illinois 60085

For the Complainant

Before: LOUIS SCALZO
Administrative Law Judge

RECOMMENDATION AND ORDER

Statement of the Case

This proceeding was intiated upon the filing of a complaint on June 24, 1976, alleging a violation of Section 19(b)(1)(2) and (3) of Executive Order 11491, as amended, (hereinafter referred to as the Order), by Charles A. Quilico, (hereinafter referred to as the Complainant) against Local R7-51, National Association of Government Employees (hereinafter referred to as the Respondent or Union), a labor organization representing all non-supervisory wage grade employees of the Navy Public Works Center (NPWC), Great Lakes Naval Base, Great Lakes, Illinois.

On December 9, 1976, the Regional Administrator, Labor Management Services Administration, Chicago Region issued a decision dismissing the portion of the Complaint which alleged violation of Sections 19(b)(2) and (3) of the Order, and on December 27, 1976, the period for filing a request for review with the Assistant Secretary expired with no such request being filed. On January 11, 1977, a Notice of Hearing based on the alleged violation of Section 19(b)(1) of the Order, was issued by the Regional Administrator. Pursuant thereto, a hearing was held in Chicago, Illinois on March 3, 1977. Both parties were present at the hearing and were afforded full opportunity to call and examine witnesses, adduce relevant evidence, and file briefs.

With respect to the alleged violation of Section 19(b)(1), the Complainant, an electrician employed by NPWC, charged that the behavior of James Wilbanks, president of the Respondent Union, toward the Complainant and Complainant's activities as a Union steward had the effect of interfering, restraining, or coercing complainant in the exercise of his rights assured by the Order.

It was alleged that a series of grievances initiated by the Complainant against NPWC were not processed by the Union in accordance with a negotiated agreement entered into by the NPWC and the Respondent Union, and further that the Complainant was denied representation by the Respondent Union as provided by Section 10(e) of the Order. These allegations were denied by the Respondent.

Upon the entire record and my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendations to the Assistant Secretary.

Findings of Fact

Grievance Procedure Outlined

The negotiated agreement herein involved provides a four-step grievance procedure. (Complainant's Exhibit 3). The first step contemplates that an aggrieved employee will discuss grievances at the lowest appropriate supervisory level. The employee may be represented or accompanied by his shop steward or in his absence, another steward designated by the Union.

If no satisfactory settlement is reached during step one, the employee must reduce the grievance to writing, and indicate in his written referral whether he desires to be represented by the Union, or whether he wishes to pursue the grievance without Union representation. If the employee elects to have Union representation, the written grievance must be in compliance with a format mutually acceptable to NPWC and the Union. It must be submitted to the employee's department head within ten calendar days after receipt of the immediate supervisor's decision. The department head or his representative must then meet with the employee to discuss the grievance within three working days after receiving written notice. Employees who have elected to be represented by the Union "will be accompanied and represented" at this second step discussion by the employee's shop steward and/or the vice president of the Union. Thereafter a written decision must be rendered by the department head within ten working days of the discussion.

If the employee is dissatisfied with a step two decision, he may, with the concurrence of the Union, refer the grievance in writing to the Commanding Officer of the NPWC within fifteen calendar days of the step two decision. The Union must indicate in the referral whether the Union wishes to submit the grievance to arbitration if dissatisfied with the Commanding Officer's decision. Procedures are provided for

the Commanding Officer to meet with the president and vice president of the Union or the steward involved, the aggrieved employee and any management officials involved in the case, and thereafter render a decision. Step four provides for arbitration in appropriate cases.

Under the provisions of the negotiated grievance procedure the Union agrees to avoid supporting frivolous, vague or untimely complaints, to investigate grievances to assure that a reasonably valid basis exists before proceeding, and to support only reasonable remedies for grievances. Employees using the negotiated procedure must be represented by the Union or an individual approved by the Union, except in situations where the employee seeks an adjustment without Union intervention, in accordance with Section 13(a) of the Order. In such cases the Union is afforded the right to be present at meetings relating to the adjustment sought. However, in such cases the employee is not entitled to arbitration. The decision rendered at step three of the grievance procedure is final and not subject to further appeal if the employee proceeds under Section 13(a).

Complainant acknowledged that the Union had the obligation of refusing to support frivolous grievances, and further that the Union must first approve any representative appearing on behalf of any employee utilizing the Union to assert a grievance under the negotiated grievance procedure. The record disclosed that it was a regular practice to involve the president or the chief steward at the second step of the grievance procedure, a more formal proceeding requiring the grievance to be made in writing to a department head. In this regard the evidence revealed that it was a regular Union practice for the chief steward of the Union to represent stewards who have made grievances on their own behalf, inasmuch as it was considered inadvisable for an employee to represent himself during the course of the grievance procedure. 1/

1/ Article VII, Section 2 of the negotiated agreement provides that the "appropriate Union Officers shall represent the unit in meeting with officials of the Employer to discuss matters of mutual interest."

Grievances Submitted by Complainant

The Complainant was appointed as a steward of the Union in April of 1974 by Mr. Wilbanks, the Union president. He continued until the fall of 1975, when a temporary replacement was appointed due to the Complainant's inability to work following an injury. He resumed his steward role sometime in February 1976, and was removed for cause by Mr. Wilbanks on March 17, 1976. 2/

The unfair labor practice alleged is tied to three grievances brought to the attention of Complainant's supervisor on March 16, 1976. (Complainant Exhibits 4, 5, and 6). These grievances all related to the Complainant personally, and involved (1) alleged statements made by a supervisor regarding abuse of benefits provided under the Federal Employees' Compensation Act (Complainant Exhibit 4); (2) alleged failure to pay the Complainant for time spent in visiting a doctor to obtain a letter allegedly required by Complainant's supervisor (Complainant Exhibit 5); and (3) alleged unfairness in allocating overtime (Complainant Exhibit 6).

The first step of the grievance procedure, initiated on March 16, 1976 by the Complainant with respect to the three grievances mentioned, involved a discussion with Complainant's supervisor. The Complainant was accompanied to the meeting by Mr. William Staben. Mr. Staben had been selected by the Complainant as his representative. The meeting was preceded by an effort on behalf of the Complainant to have the chief steward represent the Complainant at the March 16, 1976 meeting with Mr. Nader. The chief steward advised that he thought the grievances were frivolous. 3/ Nevertheless, the chief steward appeared at the meeting, but did not participate. 4/

2/ It was the practice for stewards to be appointed by the chief steward with the approval of the president, and for the president to terminate stewards for conduct deemed improper.

3/ Testimony regarding this aspect of the case entered the record as hearsay. Although questioned at the hearing, it is found to be admissible under the authority of Section 203.14 of the Regulations. 29 C.F.R. 203.14.

4/The role played by the chief steward at the meeting is not clear. There is indication that both the chief steward and Mr. Staben were there to represent the Complainant, and that the Complainant preferred Mr. Staben.

A management official phoned Mr. Wilbanks to apprise the Union of Mr. Staben's representation since Union approval was required as the Complainant had not elected to proceed with his grievances without the intervention of the Union. At this juncture Mr. Wilbanks took the position that the Complainant had acted unilaterally without Union approval in utilizing Mr. Staben's services. 5/

The record disclosed that Mr. Staben was asked by management to play a passive listening role at the March 16, 1976 meeting. However, he did answer questions posed by the Complainant's supervisor.

The evidence fails to establish that the Complainant ever obtained Union approval for Mr. Staben's representation of the Complainant in connection with the grievances made the subject of the March 16, 1976 meeting. Instead it appeared that Mr. Staben had, in February of 1976, appeared as an unauthorized union representative in connection with another unrelated grievance and in other matters involving Complainant and NPWC management officials; that the Union then became aware of such representation, and that the Union approved Mr. Staben's limited involvement in February 1976 with the caveat that future representation of the Union by non-Union officials would have to be approved.

In this regard it is noted that Mr. Staben erroneously stated that the earlier February 1976 meeting actually involved the three grievances discussed at the March 16, 1976 step one grievance meeting; however, this notion was repudiated by the Complainant. In fact, these three grievances

5/ Although Complainant's Exhibit 4 tends to indicate contingently that the Complainant wished to proceed unilaterally without the intervention of the Union, evidence introduced by the Complainant clearly reflects an intent to proceed as a Union steward aided by Mr. Staben as an authorized Union representative.

were not even disclosed prior to the March 16, 1976 meeting; and furthermore, the earlier discussion in February could not have involved grievances which on their face occurred after the February 1976 representation of the Complainant. 6/ There is no evidentiary basis for a finding that Mr. Staben was authorized to act for the Union in connection with grievances made the subject of discussion on March 16, 1976.

It was also brought out that much hostility and misunderstanding between the parties emanated from the earlier February 1976 incident.

Complainant's Steward Duties Terminated

Mr. Staben's unauthorized representation of the Union in connection with the Complainant's grievances on March 16, 1976, was followed by the Union's clear refusal to recognize Mr. Staben as a union representative on behalf of the Complainant. In addition, Mr. Wilbanks, acting as president of the Union, decided to terminate the Complainant's position as steward. Mr. Wilbanks made arrangements for a March 17, 1976 meeting comprised of Complainant, Mr. Wilbanks and management officials involved in the processing of Complainant's grievances. Included were Mr. George Young, Director of NPWC, Mr. Bud Young, an assistant of Mr. Young's, and Mr. Nader, the Complainant's immediate supervisor.

At the meeting Mr. Wilbanks, acting for what he deemed the good of the Union, made it clear that the Complainant no longer had authority to act as a union spokesman, and further that the Complainant did not have authority to approve grievances which would receive the support of the Union. During the course of the emotionally charged meeting, Mr. Wilbanks first learned that the Complainant had, earlier that day, (March 17, 1776) submitted to Mr. Young, the three grievances discussed with Mr. Nader the day previously. The Complainant deemed the submission as the second step of the grievance procedure. When shown these grievances, Mr. Wilbanks, on behalf of the

6/ Although the grievance identified as Complainant's Exhibit 4, is dated February 6, 1976, the record indicates that this grievance was not brought up until March 16, 1976.

Union, rejected them because he deemed them frivolous, and because the Complainant had failed to follow grievance procedure with respect to approval of a Union representative to handle the processing of the grievances. He wanted it understood that the Union did not support them, though they had ostensibly been carried through the first step of the grievance procedure with apparent Union support, and filed with Mr. Young with a request for second step processing. It was clear from the record that Mr. Wilbanks wanted to make it clear to all concerned that the Complainant no longer had any official connection with the Union as a steward.

The March 17, 1976 meeting was not arranged to process the Complainant's three grievances, although it appeared from the record that the Complainant mistakenly construed the event as being second step consideration of the grievances rejected by management the previous day, and unilaterally submitted to Mr. Young early on March 17, 1976 by the Complainant in his official capacity as a Union steward.

Although the primary reason for the Complainant's removal was his arranging for an unauthorized person to represent the Union in connection with the processing of grievances on February 1976, and on March 16, 1976, additional factors underlying the termination involved alleged unauthorized use of the Union telephone to make long distance calls, failure to represent employees, the making of derogatory remarks and unsubstantiated charges against union officers and other union members, failure to pursue each step of the grievance procedure before advancing grievances to the next higher step, filing an excessive number of grievances on his own behalf to the detriment of employees he was assigned to represent, aborting grievance hearings by insisting on the use of a tape recorder during discussions of grievances with management officials, and lastly for conduct unbecoming a Union steward. There is no evidence in the record that these underlying charges were discussed at the meeting on March 17, 1976.

Although the Union was not inclined to support the grievances initiated on March 16, 1976, there is no evidence whatsoever that the Union endeavored to deny the Complainant the right to proceed with grievances on his own behalf. In this regard management officials made numerous unsuccessful efforts to process the grievances.

On March 24, 1976, just eight days after initial discussion of the grievances, the Complainant was involved in a discussion concerning the proper format required in connection with his grievances. Although the Complainant alleged that management was harassing the Complainant regarding the need for following a required format, Complainant introduced no evidence to show that the Respondent was involved in this regard, nor was any proof adduced to establish that format requirements were in fact unreasonable.

Representation of Complainant by National Vice President

As late as the end of March the Complainant was endeavoring to obtain Union support for his grievances. In this regard he stated that he wanted to work within the framework of the Union. To this end the Complainant insisted unsuccessfully on having a private attorney appointed by the Union to represent the Complainant and the Union in processing the Complainant's grievances. He also contacted the national office of the National Association of Government Employees and complained of the Union's failure to take a strong stand on his grievances. Mr. Paul Hayes, a national vice-president visited the Respondent's office on April 7, 1976, and arrangements were made for Mr. Hayes to represent the Complainant. At the meeting efforts were made to explain the Respondent's position regarding the grievances. Although the Union had the opportunity to disapprove representation by Mr. Hayes, Mr. Wilbanks acquiesced and approval was granted as of April 7, 1976. 7/

Just prior to the meeting Mr. Wilbanks exhibited verbal hostility toward the Complainant. This emanated from the strained relationship between Mr. Wilbanks and Complainant over the Complainant's attitude toward the Union. However, it clearly appeared that the Union was endeavoring to meet the Complainant's demand for representation insofar as it was possible to do so under the circumstances. No efforts

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7/ The record reflects that Complainant was not working on April 7, 1976, and that he was not working at subsequent times thereafter when efforts were made to process his grievances.

were made at any point to coerce the Complainant into a withdrawal of his grievances. In fact, Mr. Hayes and Mr. Wilbanks visited Mr. Young on April 7, 1976 to advise Mr. Young that the Complainant would thereafter be represented by Mr. Hayes. The grievances were not otherwise discussed with Mr. Young.

Mr. Hayes was subsequently dishcarged by the Complainant because of what the Complainant construed as a conflict of interest. There is no evidence of such conflict in the record, and Mr. Hayes was never informed that he had been relieved of his duty to represent the Complainant.

Complainant's Insistence on Use of Tape Recorder

At a July 15, 1976 meeting called to provide the Complainant with second step consideration of the Complainant's three grievances, his use of a tape recorder was observed by management. The Complainant insisted upon the right to use the tape recorder, and the meeting was canceled at the outset by Mr. Young on behalf of NPWC. The negotiated agreement did not provide for the recordation of grievance proceedings, and it was not the practice to use tape recorders at such meetings. There is no evidence that the Respondent interposed objections to recordation. The July 15, 1976 meeting was attended by Mr. Young, Mr. John Alhouse, vice president of the Union, a NPWC labor consultant and the Complainant. 8/ At this meeting the Complainant made it clear that he would thereafter represent himself.

It must be noted that the Complainant cannot be considered as being entirely credible. The record discloses that he has an explosive temper, and that he frequently misunderstands and impugns innocent motives. He exhibited

8/ The record disclosed that the Complainant had made a similar effort to tape a grievance meeting in February of 1976. Mr. Young was also present at that meeting and insisted that the Complainant not use the tape recorder. On this occasion the Complainant agreed to the request.

a tendency to exaggerate and misrepresent the facts. Medical evidence introduced into the record reflects that he suffers from recurrent severe headaches, dizziness, blurred vision, grand mal seizures, syncope and a general nervous condition. At the hearing his representative characterized him as being an "excitable person," and indicated that he was then under slight sedation. The Complainant has been endeavoring to obtain benefits under the Federal Employees Compensation Act based upon an alleged job-related aggravation of his nervous condition. Specific reference was made to the processing of this unfair labor practive complaint as being a partial cause of disability.

Discussion and Conclusions

Charges to the effect that the Complainant has been denied rights due him under the Order have not been established. Section 203.15 of the Regulations, 29 C.F.R. §203.15 provides that a complainant in asserting a violation of the Order has the burden of proving the allegations of the complaint by a preponderance of the evidence. This burden has not been met.

A labor organization is entitled to protect itself from those acts of its members which threaten its continued existence. 9/ Here, there is strong evidence that Mr. Wilbanks was acting to protect the Union. Moreover, the strong statements of Mr. Wilbanks, if made as alleged, would not, in the context of the evidence developed in this case lead to a conclusion that Mr. Wilbanks engaged in an unfair labor practice. They merely constituted a pattern of strong insistence upon compliance with the provisions of the negotiated agreement.

The decision to terminate the Complainant's role as a steward in the manner described herein was understandably difficult for the Complainant; however, there is no evidence that it was improper or otherwise designed to interfere with, restrain, or coerce the Complainant in the exercise of his rights assured by the Order. Though Mr. Wilbanks apparently utilized "words of the street" on occasion in his dealings with Complainant, the record disclosed a strong personality

9/ American Federation of Government Employees, Local 987, A/SLMR No. 420.

conflict between these two individuals, and a definite difference of opinion as to how best to utilize the resources of the Union's bargaining power. It would not be possible to find the basis of an unfair labor practice upon the part of the Respondent in such a factual setting.

It is noted that Mr. Wilbanks, acting as president of the Union had an obligation to refrain from supporting frivolous complaints. There has been no showing here that his act of noting the absence of official Union support for the Complainant's three grievances, and his termination of unauthorized and undesirable representation of the Union was anything other than legitimate.

There is no indication of bad faith or ulterior motive. Certainly the provisions of §10(e) relative to the duty of a labor organization to represent the interests of all employees in a unit may not be construed so as to require a labor organization to blindly represent the causes of its stewards and members. Here, sincere efforts were made to work with the Complainant concerning the processing of his grievances when Complainant insisted upon Union representation. Thereafter, on July 15, 1976, when the Complainant elected to proceed independently of the Union, the Complainant alone was responsible for the cessation of negotiations, by insisting, over management objections, upon a recorded step two grievance proceeding. Neither the Executive Order nor the negotiated agreement provide a basis for such a right and the Respondent would not, in light of evidence adduced here, have been responsible for such denial even if they did.

Recommendation

Based upon the foregoing findings and conclusions, I recommend that the complaint herein be dismissed.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: April 7, 1977
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
A/SLMR No. 897

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by denying employees' requests for union representation at interviews conducted by Internal Revenue Service (IRS) inspectors. A hearing was scheduled on this matter but was subsequently postponed pending issuance of the Federal Labor Relations Council's (FLRC) Major Policy Statement concerning the representational rights of employees under the Order. Upon issuance of the FLRC's Major Policy Statement, the Respondent filed a motion to dismiss on the basis that the FLRC's Statement was dispositive of the allegations raised in the complaint. The Complainant subsequently withdrew all the allegations of the complaint with one exception involving an employee who was interviewed at one of the IRS District Offices.

The Administrative Law Judge initially determined that, as there was no factual dispute involved herein which required an evidentiary hearing, a determination of the alleged unfair labor practice could be made on the basis of the Major Policy Statement, the Respondent's motion to dismiss, the Complainant's response to the motion and the Respondent's reply. The Administrative Law Judge found that the interview to which the employee involved was called was a nonformal investigative interview and, as such, the employee did not have the right under Section 10(e) of the Order to representation by his exclusive representative. Accordingly, the Administrative Law Judge found that the Respondent had not violated Section 19(a)(1) and (6) of the Order and recommended that the complaint be dismissed.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 897

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE

Respondent

and Case No. 22-6504(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On April 13, 1977, 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 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 Recommendation. 1/

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge 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 Administrative Law Judge's findings and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6504(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 19, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ Pursuant to Section 203.23(b) of the Assistant Secretary's Regulations, the Administrative Law Judge transferred this case to the Assistant Secretary, along with his Report and Recommendation, which was based on the Respondent's motion to dismiss, the Complainant's response to the motion and the Respondent's reply. The Administrative Law Judge determined that as there was no factual dispute involved herein, an evidentiary hearing was not required.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

INTERNAL REVENUE SERVICE :
Respondent :

and : Case No. 22-6504(CA)

NATIONAL TREASURY EMPLOYEES UNION :
Complainant :

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For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

REPORT AND RECOMMENDATION
THAT MOTION TO DISMISS BE GRANTED

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order") and was initiated by a Complaint dated October 28, 1975, and filed November 3, 1975, which alleged violations of Sections 19(a)(1) and (6) of the Order by virtue of Respondent's denial of employee requests for the presence of union representation at investigative interviews. The Complaint alleged separate, but similar, violations

at the Chicago District Office, at the Brookhaven Service Center, Holtsville, New York, and at the Chamblee Service Center, Chamblee, Georgia. On October 21, 1976, the Acting Regional Administrator issued a Notice of Hearing for a hearing on December 8, 1976, in Washington, D.C.; however, on November 3, 1976, the hearing was postponed at the request of both parties and on November 12, 1976, Chief Administrative Law Judge H. Stephan Gordon entered an Order, at the request of both parties, indefinitely postponing hearing in this matter pending decision of the Federal Labor Relations Council (hereinafter also referred to as the "Council") on Major Policy Issue.

The Council issued its Statement on Major Policy Issue, FLRC No. 75 P-2, on December 2, 1976 (Report No. 116, Dec. 2, 1976) and on February 4, 1977, a further Notice of Hearing issued for a hearing on April 19, 1977, at 10:00 A.M., Room 700, Vanguard Building, Washington, D.C. and the undersigned was duly designated to hear and determine this matter. By covering letter dated February 10, 1977, Respondent, pursuant to Section 203.19 of the Regulations, filed with the Assistant Regional Administrator a Motion to Dismiss. On February 22, 1977, the Acting Regional Administrator entered an order approving Complainant's request for extension of time to file response to motion to dismiss and extended the time for filing such response to February 28, 1977. Complainant timely filed its response, entitled "Union's Response to Agency's Motion to Dismiss", and on March 7, 1977, Respondent submitted to the Assistant Regional Administrator its reply, entitled "Activity's Reply to Union's Response to Motion to Dismiss."

In the meantime, Complainant's National President, Mr. Vincent L. Connery, by letter dated March 4, 1977, addressed to the Assistant Secretary for Labor-Management Relations, requested the withdrawal of the Complaint as to the allegations against the Brookhaven and Chamblee Service Centers, but not the remaining allegation against Respondent's Chicago District Office. By letter dated March 28, 1977, addressed to Chief Judge Gordon, the Acting Regional Administrator: a) approved the withdrawal of the allegations with regard to the Brookhaven and Chamblee Service Centers and stated that the only matter remaining for hearing, as scheduled for April 19, 1977, involves the Chicago District Office; and b) referred, without decision, Respondent's Motion to Dismiss, Complainant's Response, and Respondent's Reply to Union's Response, received after issuance of the February 4, 1977, Notice of Hearing, for disposition by this Office.

Allegation of the Complaint

Attachment 1 to the Complaint, as material to the remaining allegation, concerning Respondent's Chicago District Office, reads, in part, as follows:

> "The substance of this Complaint concerns several situations [now one] where Internal Revenue Service employees were interrogated by IRS Inspectors. Inspectors are employed by the IRS to investigate the actions of other IRS employees. The employees [now one] interrogated by the Inspectors reasonably believed that they would be the subject of disciplinary action, requested the presence of a representative at the interrogation and the request was denied.
>
> * * * *
>
> "CHARGE I: On March 14, 1975, Mr. Donald L. Disier, an IRS employee in the Chicago District, was directed to report to Inspection. Mr. Disier was interrogated by Inspectors Schwebber and Sommers on March 18, 19, and 20, 1975.
>
> "Upon arriving at the place of interrogation, Mr. Disier requested a representative. His request was denied. He was told he would have a right to a representative only if a Miranda warning was given 1/ . . . Since no such warning was given, Mr. Disier had no representative.

1/ Mr. Disier's statement, Exhibit 2, stated, in part,

> "I was told by Inspector Schwebber that I was not entitled to any representation as we were not discussing any criminal material and that the only way I would be entitled to an attorney would be that if at any time I was advised by Inspectors of my rights under the Miranda warning."

* * * *

"Mr. Disier was so upset at the interrogation and the manner of the interrogation, that he resigned ... upon subsequent reconsideration, Mr. Disier withdrew his resignation and presently remains an IRS employee.

"When Mr. Disier was summoned to Inspection, he reasonably belived he may be the subject of disciplinary action, he requested a representative, and the request was denied. Such an action violated Executive Order 11491, as amended."

MOTION TO DISMISS

The sole basis alleged in the Complaint for an unfair labor practice is that "Mr. Disier was summoned to Inspection, he reasonably believed he may be the subject of disciplinary action, he requested a representative, and the request was denied. Such action violated Executive Order 11491, as amended." This is fully confirmed by Complainant's Response to Respondent's Motions to Dismiss. 2/ The issue,about which there is

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2/ In its Response, Complainant stated, in part, as follows:

"The charge was based on the fact that during March, 1975 individual employees in those activities had been similarly interrogated by IRS Inspectors and, reasonably believing they would be the subject of disciplinary action, had requested and been denied the presence of a representative at their interrogation." (Response, p. 1)

Complainant then argues: a) 75 P-2 is distinguishable because the Council did not consider together Section 1(a) and the first two sentences in Section 10(e); and b) the Council did not consider the type of investigative interviews involving Mr. Disier, which Complaint asserts was outrageous. Nevertheless, Complainant affirms that the sole basis for the alleged violation of Section 19(a)(1) and (6) of the Order was the denial of Mr. Disier's request for representation at the investigative interview concerning Mr. Disier's deviate conduct.

no factual dispute requiring resolution in an evidentiary hearing, is whether Respondent violated Section 19(a)(1) and (6) of the Order by its denial of Mr. Disier's request for representation at an investigative interview. Respondent's Motion to Dismiss is based, foursquare, on the Council's Statement on Major Policy Issue, FLRC No. 75 P-2. Complainant has had full opportunity to respond to Respondent's Motion to Dismiss and has done so. Accordingly, as the sole question for determination is a question of law, as to which parties have fully stated their respective views and arguments, and as there is no disputed question of fact requiring an evidentiary hearing, it is appropriate to determine the dispute on the basis of the Complaint, Respondent's Motion, Complainant's Response and Respondent's Reply. For reasons set forth hereinafter, the Council's Statement on Major Policy Issue, FLRC No. 75 P-2, is dispositive and the denial of Mr. Disier's request for representation at his investigative interview did not constitute a violation of Section 19(a)(1) and (6) of the Order.

Complainant states, in its Response to Respondent's Motion to Dismiss, that the Council decided that an employee does not have a protected right under Executive Order 11491, as amended, to assistance by the exclusive representative when he is summoned to an interview with agency management; but asserts that the Council rested its decision on an interpretation of the last sentence of Section 10(e) and that the Council "did not consider the fact that, read together, Section 1(a) and the first two sentences in Section 10(e) establish a right of an employee to union representation in investigative interviews wholly separable from an employee's rights derived from those situations enumerated in the last sentence of Section 10(e)." Complainant's argument proceeded:

"The first sentence of Section 10(e) provides that a labor organization ... is entitled to act for and negotiate agreements for employees in the unit. These rights to represent employees are in addition to the right also provided in Section 10(e) to represent employees in formal discussions.

"Moreover, the second sentence of Section 10(e) states that a union ... must represent the interest of all employees 'without discrimination and without regard to labor organization membership.'

"In Fort Wainwright, supra, the Assistant Secretary stated that this duty not only requires representation of employees in formal discussions, but also vests a corresponding right in an employee to request union representation in those discussions.

"Therefore, since an employee has a vested right to request union representation at formal meetings as a result of the union's duty to represent all employees, an employee also has a right to request a union to 'act for' this employee as stated in the first sentence of Section 10(e).

* * * *

"... Based on the rights vested in an employee by both Section 1(a) and Section 10(e), an employee can request that a union 'act for' or represent him in a situation where discipline may be imposed. A denial of that right would, therefore, clearly be a violation of Section 19(a)(1) of the Executive Order.

"This interpretation ... is not precluded by the Council's Statement on Major Policy Issue since the Council explicitly considered the rights vested by Section 10(e) of the Order as divisible from those rights vested by Section 1(a) of the Order ... therefore the instant case is not within the scope of the Council's decision."

Complainant's syllogistic argument must be rejected. While only the Council could say what it did, or did not, consider in reaching its Statement on Major Policy Issue, FLRC No. 75 P-2, the Council's Statement makes it abundantly clear that it considered together the provisions of Section 1(a) and 10(e) of the Order, as well as other portions of the Order, including the Preamble and Section 7(d)(1). Indeed, the issue before the Council was:

"Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive

representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?" (Emphasis by the Council.)

The first two sentences of Section 10(e) do, indeed, treat the rights and obligations of the exclusive representative, but, as the Council stated,

"Unlike the express provisions relating to formal discussions, section 10(e) provides no right of a union to representation at nonformal meetings or interviews held by management with an employee (absent agreement of the parties [footnote 4. omitted) and therefore no derivative or companion right of an employee to such assistance or representation may be predicated on that section of the Order. However, the question remains whether section 1(a) of the Order may be deemed to grant an employee any such right to representation at nonformal meetings or interviews held by management with an employee particularly at nonformal investigative interviews called by management with the employee.

"... In our opinion, these provisions [Section 1(a)] fail to establish any right of an employee to union assistance or representation at a nonformal investigative intereview or meeting conducted by management on matters of individual concern to that particular employee.

"Clearly, nothing in the literal wording of section 1(a) refers either to union attendance at a meeting or interview between employees and management or to any employee right to request such union attendance when summoned to a meeting or interview by management. Rather, the subject provisions are expressly confined to the employee's right to organize, become a member of, and support, that organization, or to refrain from any such activity.

"Moreover, the stated purposes of the Order would not be effectuated by an interpretation of section 1(a) to afford such right of an employee to union assistance or reprsentation at a nonformal investigative interview or meeting regarding his own possible misconduct and without immediate significance to the employment interests of other personnel in the bargaining unit.

. . .

"Furthermore, ... a detailed framework of statutes and regulations already protect an employee in the Federal program against arbitrary action by an agency when serious misconduct is alleged ... Consequently, no substantial purpose of the Order would be served by an interpretation of section 1(a) to include the right of an employee to union representation or assistance at a nonformal investigative interview or meeting to which he is called by management.

. . .

"Conclusion

"Accordingly, as set forth above, we find that:

"1. An employee in a unit of exclusive recognition has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and

"2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with section 11(a) of the Order."

Mr. Disier was summoned by Respondent to a nonformal investigative interview, or meeting, regarding Mr. Disier's own possible misconduct, i. e., his deviate conduct, which was without immediate significance to the employment interests of other personnel in the bargaining unit, did not concern a grievance, personnel policies or practices, or other matters affecting general working conditions of employees in the unit; and, as the Council has determined, Mr. Disier had no protected right under the Order to assistance or representation at such investigative meeting or interview and the denial of his request to representation was not a violation of Section 19(a)(1) or (6) of the Order.

Complainant next argues that the nature of the investigative meeting, or interview, created a right to representation. It may be assumed that Mr. Disier was distraught by the investigation of his deviate conduct; but Complainant's argument begs the question. Either he had a right under the Order to representation at the investigative interview or he did not, and the Council has firmly held that an employee does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management. It necessarily follows that, as Mr. Disier had no protected right under the Order to representation, the manner in which the investigative interview was conducted created no such protected right under the Order to representation or assistance.

As has been stated many times, the Order is very limited; it does not seek to right all wrongs; and conduct may be highly objectionable and still not violate in any manner the provisions of the Order. As the Council stated in FLRC No. 75 P-2, " a detailed framework of statutes and regulations already protects an employee in the Federal program against arbitrary action by an agency when serious misconduct is alleged."

For the foregoing reasons, as the employee, Mr. Disier, had no protected right under the Order to assistance or representation at the nonformal investigative meeting or interview to which he was summoned by Respondent, Respondent's denial of his request for such representation did not violate Section 19(a)(1) or (6) of the Order. Statement on Major Policy Issue, FLRC No. 75 P-2 (Report No. 116, December 2, 1976);

Department of the Navy, Naval Air Rework Facility, Alameda, California, A/SLMR No. 781 (1977); United States Army Training Center Engineer and Fort Leonard Wood, A/SLMR No. 787 (1977); Social Security Administration, Great Lakes Program Center, Chicago, Illinois, A/SLMR No. 804 (1977).

Accordingly, it will be recommended that Respondent's Motion to Dismiss be granted. In view of the recommended disposition of this matter, the hearing, now set for April 19, 1977, has, by separate Order issued this day, been cancelled.

RECOMMENDATION

Having found that Respondent's denial of the request of an employee, Mr. Disier, for representation or assistance at a nonformal investigative meeting or interview to which the employee, Mr. Disier, was summoned by Respondent did not violate Section 19(a)(1) or (6) of Executive Order 11491, as amended, for the reason, as determined by the Council in Statement on Major Policy Issue, FLRC No. 75 P-2, that an employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview, it is recommended that the Complaint herein be dismissed in its entirety.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 13, 1977
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 COMMERCE,
ECONOMIC DEVELOPMENT ADMINISTRATION,
AUSTIN, TEXAS
A/SLMR No. 898

This case involved a unit clarification petition filed by the Austin, Texas, Southwestern Regional Office of the Economic Development Administration, U.S. Department of Commerce. The Activity/Petitioner sought clarification of the status of seven of its employees classified as Economic Development Representatives. In this regard, it contended that these employees have recently been assigned additional duties as supervisors which warrant their exclusion from the unit. The American Federation of Government Employees, Local 3225, AFL-CIO, (AFGE) contended that the disputed employees are not supervisors and should continue to remain in the unit.

The Assistant Secretary noted that each Economic Development Representative (EDR) heads a two person area office, and that the EDRs' duties include the analysis, assignment, direction and review of work performed by their subordinate employee, an Economic Development Assistant. He also noted that the EDRs approve the leave and vacations of their assistants, make effective performance evaluations, act as first level supervisors in resolving grievances subject to their authority and make effective recommendations as to the hiring of their assistants.

Under these circumstances, the Assistant Secretary found that employees classified as Economic Development Representative, GS-301/12-13, are supervisors within the meaning of Section 2(c) of the Order, and should be excluded from the exclusively recognized unit.

A/SLMR No. 898

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF COMMERCE,
ECONOMIC DEVELOPMENT ADMINISTRATION,
AUSTIN, TEXAS

Activity/Petitioner

and

Case No. 63-6552(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3225, 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 William J. Autry. 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 briefs submitted by the parties, the Assistant Secretary finds:

The Activity/Petitioner, hereinafter called the Activity, seeks to clarify the status of seven of its employees classified as Economic Development Representatives (EDRs). In this regard, the Activity contends that these employees have recently been assigned additional duties as supervisors which warrant their exclusion from the exclusively recognized unit. The American Federation of Government Employees, Local 3225, AFL-CIO, hereinafter called AFGE, contends that the disputed employees are not supervisors within the meaning of Section 2(c) of the Order and should continue to remain in the unit. 2/

The Economic Development Administration (EDA) was established in 1965 by the Secretary of Commerce to carry out certain provisions of the Public Works and Economic Development Act of 1965. The primary function of the EDA is the long-range economic development of areas with severe unemployment and low family income problems. The EDA has six Regional Offices, one of which is the Activity herein.

The Activity is responsible for overseeing the performance of the EDA mission in the states of Arkansas, Louisiana, New Mexico, and Texas. Within the Activity, each of seven EDRs is responsible for a particular geographic area, with the mission of providing assistance and acting as a liaison between the Activity and grant applicants, local government officials, planning organizations and state agencies. The EDRs are stationed in the following area offices: Lubbock, Texas; Austin, Texas; Laredo, Texas; Baton Rouge, Louisiana; Santa Fe, New Mexico; Little Rock Arkansas; and Oklahoma City, Oklahoma.

The record reveals that while all EDRs report to the Activity's Deputy Director in Austin, Texas, each EDR generates his own work and responds to local requests for assistance without detailed supervision from the Regional Office; that all seven EDRs work in area offices with just one other person, their Economic Development Assistant; and that these offices, with one exception, are all located significant distances from the Regional Office with telephone communication being the only regular form of contact. The Economic Development Assistants were all hired between January 1976, and January 1977, to assist the EDR in fulfilling the mission of the area office. They perform a variety of programmatic, administrative and clerical tasks.

As indicated above, each of the seven EDRs heads a two person area office which constitutes an operational unit for administering the programs of the Regional Office within their specific geographic areas. The record reveals that the EDRs' duties include the analysis, assignment, direction and review of work performed by the Economic Development Assistant through the exercise of independent judgment. The EDRs approve the leave and vacations of their assistants, make effective performance evaluations, and act as first level supervisors in resolving grievances subject to their authority. The record further reveals that the EDRs have effectively recommended the hiring of their assistants.

Under these circumstances, I find that employees classified as Economic Development Representative, GS-301/12-13, are supervisors within the meaning of Section 2(c) of the Order as they perform supervisory functions requiring the exercise of independent judgment with regard to their Economic Development Assistants. Accordingly, I shall exclude them from the exclusively recognized unit.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, Local 3225, AFL-CIO, was certified on July 31, 1973, be, and hereby is, clarified by excluding from said unit employees classified as Economic Development Representative, GS-301/12-13.

Dated, Washington, D.C.
September 20, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ The petition herein listed only six individuals in the classification sought to be clarified, while at the hearing testimony was offered as to seven. In the absence of objection or claim of prejudice by either party, I find that no prejudicial error was committed in allowing testimony as to the seventh individual.

2/ In July 1973, the AFGE was certified as the exclusive representative of a unit of the Activity's employees described as: "All nonsupervisory professional and nonprofessional employees in the Southwestern Regional Office of the Economic Development Administration" with the normal exclusions. There is no negotiated agreement between the parties.

September 21, 1977

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

NON-APPROPRIATED FUND ACTIVITY,
HEADQUARTERS, 24th INFANTRY DIVISION,
FORT STEWART, GEORGIA
A/SLMR No. 899

This case involved a representation petition filed by the American Federation of Government Employees, Local 1922, AFL-CIO, (AFGE) seeking a unit of all nonprofessional Non-Appropriated Fund (NAF) Activity employees at the Headquarters, 24th Infantry Division, Fort Stewart and Hunter Army Air Field, Georgia. The parties were in agreement generally as to the scope and composition of the claimed unit but the Activity opposed the inclusion in the claimed unit of "intermittent" employees on the basis they do not share a community of interest with regularly scheduled employees and that their inclusion would hamper effective dealings and be inimical to the efficiency of the agency's operations.

The Assistant Secretary, noting particularly the agreement of the parties as to the scope of the unit sought, found the claimed unit to be appropriate for the purpose of exclusive recognition as the employees involved share a clear and identifiable community of interest and the proposed unit would promote effective dealings and efficiency of agency operations.

The Assistant Secretary found also that the "intermittent" employees should be included in the unit found appropriate. He noted that the employees in this classification have a reasonable expectation of future employment; that a large number of the "intermittent" employees work for a substantial period of time during the year; and that the "intermittent" employees share with regular full-time and part-time employees common supervision, pay scales, job supervision, job assignments, working conditions and labor relations policies. Therefore, the Assistant Secretary concluded that they share a clear and identifiable community of interest with the regular full-time and regular part-time employees and their inclusion in the claimed unit with all other NAF employees subject to the same labor relations and personnel policies administered by Fort Stewart's Civilian Personnel Office would promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary directed that an election be conducted in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

NON-APPROPRIATED FUND ACTIVITY,
HEADQUARTERS, 24th INFANTRY DIVISION,
FORT STEWART, GEORGIA 1/

Activity

and Case No. 40-7841(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1922, AFL-CIO

Petition

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 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 the subject 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, Local 1922, AFL-CIO, herein called AFGE, seeks an election in a unit of all Non-Appropriated Fund (NAF) Activity employees employed at Headquarters, 24th Infantry Division, Fort Stewart, and Hunter Army Air Field, Georgia, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order. The parties were in agreement generally as to the scope and composition of the claimed unit. However, the Activity opposed the inclusion within the claimed unit of "intermittent" employees on the basis that they do not share a community of interest with regularly scheduled employees and that their inclusion would hamper effective dealings and be inimical to the efficiency of the agency's operations.

1/ The name of the Activity appears as amended at the hearing.

The record indicates that Fort Stewart, herein called the Fort, is the home base of the 24th Infantry Division, and that its primary function is to train and house infantry soldiers. The Fort also serves as a training base for National Guard and Army Reserve Forces. In addition to the NAF employees located at the Fort, the claimed unit includes employees of the NAF Activity at its facilities at Hunter Army Air Field, which is located some 35 miles from the Fort, and which provides airborne support for the Fort. The NAF Activity consists of facilities whose purpose is to contribute to the morale, welfare and recreation of the military personnel of the United States Army. Among the NAF Activity facilities available at the Fort there is an Officers Club, a Non-Commissioned Officers Club (NCO), a Top Five Club, a Morale Support fund, and a nursery.

The personnel policies and procedures of the NAF Activity are established by regulations and directives of the United States Army. The Civilian Personnel Office (CPO) of the Fort, which handles all personnel matters for the NAF Activity, has the authority and responsibility for implementing these policies and procedures and has final responsibility for action with regard to hiring, firing, and promotions. The employees of the various NAF activities number approximately 340 and include such job classifications as Waiters, Waitresses, Food Service Workers, and Bartenders.

Under all of the circumstances, and noting particularly the agreement of the parties as to the scope of the unit sought, I find that the claimed unit of all NAF Activity employees employeed at Headquarters, 24th Infantry Division, Fort Stewart and Hunter Army Air Field, Georgia, is appropriate for the purpose of exclusive recognition as the employees involved share a clear and identifiable community of interest and such a unit will promote effective dealings and efficiency of agency operations.

Intermittent Employees

The record reveals that the NAF Activity employs approximately 193 employees in positions which are classified as "intermittent." The Department of Army's regulations with respect to NAF civilian employees define "intermittent" employees as those having no regularly scheduled workweek or a regularly scheduled workweek of less than 20 hours a week. 2/ The "intermittent" employees with no regularly scheduled workweek are essentially "on call" employees, whose employment pattern will vary according to the vagaries of the operations sponsored by the NAF Activity. The record reveals

2/ There are only two employees with regularly scheduled workweeks of less than 20 hours. At the hearing, the AFGE sought to exclude from the claimed unit these two "intermittent" employees. As their employment status meets all of the indicia by which I have included all other "intermittent" employees in the unit found appropriate, and as no argument for their exclusion was presented, I will include them in the unit found appropriate herein.

that when these "on-call" employees develop a regular work pattern, they are converted to regular full-time or part-time status, as had happened in five instances in the six-month period prior to the hearing in this matter. Although not eligible for all the benefits available to regular employees, all the "intermittent" employees receive the same Workmen's Compensation, Social Security, and shift differential benefits as the regular full-time and part-time employees receive, they share the same supervision, are eligible for similar promotions, are eligible for similar step increases and are subject to the same labor relations policies administered by the Fort's CPO.

Under all of the circumstances, I find that the "intermittent" employees involved herein should be included in the unit found appropriate. Thus, the record reflects that employees in this classification have a reasonable expectation of continued employment; that a large number of the "intermittent" employees work for a substantial period of time during the year; 3/ and that they share with regular full-time and part-time employees common supervision, pay scales, job supervision, job assignments, working conditions and labor relations policies. In my view, therefore, they share a clear and identifiable community of interest with the regular full-time and regular part-time employees and their inclusion in the claimed unit with all other NAF employees subject to the same labor relations and personnel policies administered by the Fort's CPO will promote effective dealings and efficiency of agency operations. 4/

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 Non-Appropriated Fund Activity employees, including intermittent employees, employed at Headquarters, 24th Infantry Division, Fort Stewart and Hunter Army Air Field, Georgia, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Executive 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 employees who

3/ The record reveals that in a six month period prior to the hearing some 79 "intermittent" employees averaged 15 hours or more of work a week and some 71 "intermittent" employees averaged between 7 1/2 and 15 hours of work a week.

4/ See United States Army Infantry Center, Non-Appropriated Fund Activity, Fort Benning, Georgia, A/SLMR No. 188.

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 or not they desire to be represented for the purpose of exclusive recognition by the American Federation of Government Employees, Local 1922, AFL-CIO.

Dated, Washington, D. C.
September 21, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

September 21, 1977

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 EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
A/SLMR No. 900

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 2667 (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to bargain with the Complainant concerning the impact of a reorganization announced on September 25, 1975.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. The Respondent announced tentative reorganization plans in November 1974, and soon thereafter provided the Complainant with information concerning its plans. Subsequent to the September 25, 1975, announcement concerning the reorganization of the Respondent's Headquarters organization and prior to its effective date, the Respondent, pursuant to the Complainant's request, set up several meetings with the Complainant to discuss the impact of the reorganization. The Complainant was unable to attend these meetings because of prior commitments. After the announced effective date of the reorganization a meeting was scheduled for November 4, 1975. After a further request from the Complainant on December 16, 1975, the Respondent wrote the Complainant three times December 19, 1975, and January 5 and January 26, 1976 - requesting meetings to discuss matters concerning the reorganization. However, on February 12, 1976, the Complainant responded that it was suspending attempts to meet and confer while the Respondent implemented changes "without prior consultation."

Under these circumstances, the Administrative Law Judge found that the Complainant had not established by a preponderance of the evidence that the Respondent had failed to fulfill its obligation to bargain about the implementation of its plans and was unable to demonstrate that any impact occurred without prior bargaining because it ignored the Respondent's invitations to discuss the matter on December 19, 1975, and January 5 and January 26, 1976. Accordingly, he found that the Respondent did not violate Section 19(a)(1) and (6) of the Order.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 900

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Respondent

and Case No. 22-6691(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2667

Complainant

DECISION AND ORDER

On June 22, 1977, Administrative Law Judge John H. Fenton issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6691(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 21, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

. . . . . .
UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION :
Respondent
:
and CASE NO. 22-6691(CA)
:
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES LOCAL 2667 :
Complainant
. . . . . .

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For the Respondent

DAVID J. BUTLER
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For the Complainant

Before: JOHN H. FENTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed by Complainant on February 19, 1976, under Executive Order 11491, a Notice of Hearing on Complaint was issued by the Acting Regional Administrator for the Philadelphia Region on August 19, 1976. The complaint alleged that Respondent violated Sections 19(a)(1) and (6) of the Order by refusing to bargain with Complainant concerning the impact of a reorganization announced on September 25, 1975.

A hearing was held on September 27, 28 and 29, 1976 in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing upon the issues and to submit briefs. On the basis of the entire record, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Since July 6, 1971, the American Federation of Government Employees, AFL-CIO, has been the certified collective bargaining representative of a nationwide unit of EEOC's employees. Pursuant to a Memorandum of Understanding signed on April 28, 1975, Headquarters Local 2667 was recognized as the representative of all employees until such time as other locals were "chartered within each EEOC Region". That Memorandum also provided that Local 3555 (New York) and Local 3599 (Atlanta) "will represent all of the unit employees located within their respective regions". By letter of September 18, 1975 from AFGE's National President to EEOC's Chairman, AFGE outlined its delegation of authority to administer its national exclusive recognition. Pending the chartering of a Council, authority to deal with the Chairman on all matters national in scope was to reside in Local 2667.

Although there is much background to be set forth later, it may be said that the series of events which led to the complaint began with an announcement by Chairman Lowell W. Perry on September 25, 1975. In a memo to all employees he said that changes in the Executive Director's organizational structure were being formulated, that the reorganization was intended to achieve a realignment of the Headquarters organization, and that the details of reorganization would be published upon its implementation. Four days later Doris X. (McGruder), President of Local 2667, wrote Leroy B. Curtis, Chief, Labor Management Relations Branch, requesting as soon as possible and well in advance of implementation, a meeting about the planned reorganization. On October 7 Curtis responded, suggesting a meeting on October 8, at 10:00 a.m., in the office of Personnel Director Beverly Gary, "to discuss the impact of the pending reorganization in various components of headquarters". Ms. X. (McGruder) responded on the same day, noting a conflict with a prior commitment and requesting another date as soon as possible. On October 8, Executive Director B.G. Mathis issued EEOC

Notice N-110, announcing the reorganization of his Office. 1/ Also, apparently on October 7 or 8, the Agency rescheduled the meeting with the Union to October 9 at 2:00 p.m. On that day President Doris X. (McGruder) informed Curtis by memo that she would be unable to attend due to a previously scheduled meeting "of which he was aware". Finally, on October 30, the Union confirmed a meeting for November 4.

The evidence as to what transpired at the November 4 meeting was presented in documents. A letter from Union President David Butler to Chairman Lowell Perry, dated December 16, recites that the Union again complained that it had been denied an opportunity, prior to the October 14 implementation of the reorganization plan, to meet with management and discuss "the methods to be adopted or the impact of the decision upon employees". (Complainant's Exh. No. 5). The letter further states that the Union unsuccessfully requested information which it needed in order to assess "the potential impact the reorganization might have on employees". The letter then went on to request that EEOC freeze implementation pending negotiation, deliver voluminous information, and immediately pledge in writing its commitment to good faith bargaining. In a memo "for the record" from Leroy Curtis (Agency Exh. No. 25), he indicated that the rationale for reorganization was explained to the Union, that it was informed that implementation had not taken place and could take up to five months to complete. He also indicated that the Union was concerned with the difficulty of dealing with the new structure and with the question of steward alignment and grievance processing.

On December 19, Mr. Curtis replied to the Union's letter, advising that a meeting could be arranged to discuss the matters raised by the Union, and stating that he awaited

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1/ Notice 110 (Jt. Exh. No. 2) assigned missions, designated organization and position titles and office codes, identified key incumbent officials, and called for the preparation of detailed functional statements. Its "effective date" was October 14. On October 29, Mr. Mathis issued a memorandum to all Regional Directors establishing guidelines for the conversion of EEO Specialist (investigator) positions to generalist positions (Complainant's Exh. No. 14).

contact by the Union regarding the scheduling of such a meeting.

On January 5, 1976, Curtis wrote Butler with respect to the organization of the Office of Compliance, transmitting certain documents and requesting a meeting to discuss impact. On January 26, Curtis again wrote Butler asking that he meet on the following day to discuss the impact of the reorganization. The Union finally responded, so far as this record shows, on February 12, announcing its decision to "suspend any further attempt to meet in good faith and negotiate as required while the agency continues to implement changes without prior consultation", on the ground that it had been unsuccessful in arranging meetings with management concerning the reorganization. Seven days later it filed its complaint. This record discloses no reason for the failure of the parties to meet after November 4, 1975, notwithstanding several invitations from the Agency. 2/

Respondents' defense, in essence, is that it had prolonged discussion, beginning as early as December 12, 1974, concerning the planned reorganization, that much information was made available over the months, that a failure of communication between the three successive presidents of Local 2667 during material times left the last and presently complaining one, Butler, with the erroneous impression that consultation had not occured, and that Butler therefore precipitously filed a complaint rather than accepting Respondent's repeated offers to consult.

I conclude that Respondents' defense is well taken. Long before any duty to bargain concerning impact arose, in fact beginning with the announcement of Respondent's tentative reorganizations plans in 1974, Respondent voluntarily shared with the Union much information concerning its plans. Its first announcement in 1974 precipitated the filing of an unfair labor practice charge by then president Alicia Columna, and there followed considerable discussion and exchange of information before that charge was withdrawn in July, 1975.

2/ One may surmise that the reassignment of president Doris X. (McGruder), and the unfair labor practice charge [footnote continued on next page]

It is perhaps significant, at least in terms of the spirit of such exchanges, that Columna, upon leaving office as president of Local 2667 on August 4, 1975, wrote Curtis expressing her "appreciation for the manner in which you and your office has conducted labor-management relations duing...my tenure as President...." (Agency Exhibit 22). Examination of the voluminous documentary record introduced by the Agency reveals that it supplied enormous quantities of information relevant to its plans to reorganize and to convert from EEO specialist to generalist in the absence of any legal requirement that it do so at that point in time. I take this as strong background evidence of its desire to deal constructively with Local 2667. 3/

Conclusions

I am troubled by the fact that no discussions ensued between the September 25, 1975 announcement of reorganization and its "effective date" of October 14. However, I find no persuasive evidence that any implementation affecting the terms and conditions of employment for those in the bargaining unit in fact occurred. 4/ While the record is a confusing one, it is clear that the Union three times filed charges addressed to the same essential reorganizaiton plan. Two were resolved after extensive consultation.

2/ - continued

addressed to it, so charged the atmosphere as to gravely undermine any prospect for friendly and therefore useful discussion. See Equal Employment Opportunity Commission, A/SLMR No. 707.

3/ In this respect, the record indicates that Local 2667 was furnished with a copy of the proposed guidelines for conversion to the generalist position, was given until 5/30/75 to comment, and failed ever to do so.

4/ I should go further and say that no implementation of any kind, even as to matters which would not give rise to a bargaining obligation, occurred pior to the break-off of negotiations.

Complainant, of course, bears the burden of proof. It has in my judgment not established by a preponderance of the evidence that the Agency failed to fulfill its obligation to bargain about the implementation of its plans as they affected Complainant's constituency. Complainant was unable to demonstrate that any impact occurred without prior bargaining because it ignored the Agency's invitations to discuss the matter in Mr. Curtis' letters of December 19, 1975, January 5, and January 26, 1976. Instead of responding and attempting to sort out what, if any, bargainable implementation was in fact taking place, the Union on February 12 abruptly announced its decision to suspend any further attempts to bargain during what it assumed to be the Agency's ongoing implementation effort. The proposed changes were designed to affect higher management levels. There has been no showing that the Agency effected changes in the terms and conditions of rank and file employees without first discussing such impact. The change from EEO Specialist to Generalist is not embraced in the Complaint and, in any event, the decision was made to rewrite that job description after the Union was fully informed and failed to deliver any input for management's consideration. As the complaint was never amended in this respect, and the subject was not adequately litigated, I do not pass on the Union's contention that such changes have taken place without the required consultation. While a central concern of the Union was what it perceived as a forced realignment of stewards, or the confusion with respect to what stewards were to deal with what management officials in the new chain of command that was very slowly evolving, I cannot find on this record that the Agency was unwilling to deal constructively with such problems. The decisive fact is that Complainant never put the Agency to the test in this respect; instead it called off bargaining. The consequence of such action was that it could not establish that the Agency failed to bargain in good faith concerning the implementation of its scheme, as it might affect those in the bargining unit.

Recommendation

Having found that Respondent did not fail to meet and confer with Complainant on the impact and implementation of its reorganization plan in violation of Sections 19(a)(1) and (6) of the Order, I recommend that the Assistant Secretary dismiss the complaint.

JOHN H. FENTON
Administrative Law Judge

DATED: June 22, 1977
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,
89th ARMY RESERVE COMMAND,
WICHITA, KANSAS
A/SLMR No. 901

This case involved an RA petition filed by the 89th Army Reserve Command (89th ARCOM), which, in effect, sought a determination by the Assistant Secretary as to the impact of a reorganization and transfer of personnel and administrative functions on a unit of exclusive recognition of certain Army Reserve elements represented by the American Federation of Government Employees, AFL-CIO, Local 3330 (AFGE) and located in the states of Nebraska, Minnesota and Iowa.

As a result of a reorganization in October 1973, Nebraska employees exclusively represented by the AFGE were transferred into a newly established military command, the 89th ARCOM and were transferred from the administrative authority of the Fifth U.S. Army, to the control and authority of the Sixth U.S. Army. The 89th ARCOM encompassed Army Reserve Units in Nebraska, Kansas, North Dakota and South Dakota. In October 1976, the Civilian Personnel Office (CPO) servicing 89th ARCOM employees was changed from the Fifth Army's Fort McCoy, Wisconsin, to the CPO of the Sixth Army at Fort Riley, Kansas.

The 89th ARCOM contended that, as a result of the 1973 reorganization, the subsequent transfer of personnel and administrative functions, and the execution of a negotiated agreement which covered only bargaining unit employees in Minnesota and Iowa, the certified unit is no longer appropriate and the unit criteria contained in Section 10(b) of the Order could only be fulfilled by severance of the Nebraska employees from the existing unit and their inclusion in a unit which would comprise only 89th ARCOM employees. The AFGE, on the other hand, contended that the reorganization was only a paper exercise and that it has, and can in the future, adequately represent the needs of Nebraska unit employees, as well as the employees remaining within the jurisdiction of the Fifth Army, by negotiating a separate contract with the Sixth Army for Nebraska employees who have, in effect, been "severed" from the exclusively recognized unit.

The Assistant Secretary found that the Nebraska employees no longer share an identifiable or viable community of interest with unit employees in Minnesota and Iowa who remain in the Fifth Army and who are serviced by the CPO, Fort McCoy. In this regard, he found that Nebraska employees are subject to a different set of policies, directives, and

regulations promulgated by the Sixth Army and administered by Fort Riley, that they no longer share the same competitive areas of consideration for promotions and reduction-in-force procedures, and that there is no significant degree of interchange between 89th ARCOM employees and the employees located in Minnesota and Iowa and represented by the AFGE. The Assistant Secretary found also that the continued inclusion of the Nebraska employees in the certified unit would adversely impair both effectiveness of dealings and efficiency of agency operations. In this connection, he noted that the AFGE's negotiated agreement covered only Iowa and Minnesota employees, that the parties consider the Nebraska employees "severed" from the exclusively recognized unit, and that effective dealings and efficiency of agency operations would be promoted by including Nebraska employees in a unit which would coincide with the appropriate command structure.

Under these circumstances, the Assistant Secretary ordered that the RA petition be dismissed. In this regard, he noted that although an RA petition is an appropriate vehicle for an activity (or agency) to seek a determination of representational status of employees in a substantially changed unit, it does not follow that an election will be appropriate in each instance where some of an activity's employees had been previously employed by another activity and were included in an exclusively recognized unit. Thus, in the Assistant Secretary's view, elections in newly established units which are not substantially identifiable with any pre-existing units but, rather, essentially include employees who have been unrepresented, should result only from petitions filed by labor organizations seeking exclusive recognitions in such units. Accordingly, while the Assistant Secretary, in the instant case, had determined the impact of the reorganization and transfer of personnel and administrative functions on the unit represented by the AFGE, the particular circumstances were not found to warrant the election sought by the 89th ARCOM's RA petition.

A/SLMR No. 901

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
89th ARMY RESERVE COMMAND,
WICHITA, KANSAS

Activity-Petitioner

and

Case No. 60-4995(RA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO,
LOCAL 3330

Labor Organization

and

CIVILIAN PERSONNEL OFFICE,
FORT McCOY, SPARTA, WISCONSIN

Interested Party

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Majorie Thompson. 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 case, including a brief filed by the Activity-Petitioner, the Assistant Secretary finds:

On September 14, 1971, the American Federation of Government Employees, AFL-CIO, hereinafter called AFGE, 1/ was certified as the exclusive representative of all Wage Grade and General Schedule nonsupervisory and nonprofessional employees of the 88th Army Reserve Command, 416th Engineer Command, 300th Military Police Command, 425th Transportation Command, 89th Division (Training) and the 205th Infantry Brigade located within

1/ On May 10, 1972, pursuant to a petition for amendment of certification, the name of the exclusive representative was amended to: American Federation of Government Employees, AFL-CIO, Local 3330.

the states of Minnesota, Iowa and Nebraska. 2/ A negotiated agreement which covered only bargaining unit employees in Minnesota and Iowa was executed by the parties in March 1977.

On October 1, 1973, pursuant to an Army-wide reorganization, a new military organization, the 89th Army Reserve Command, hereinafter called the 89th ARCOM or Activity-Petitioner, was established. Its mission is to supervise and control all Army Reserve elements in the states of Kansas, Nebraska, North Dakota and South Dakota.

The reorganization resulted in the transfer of the Nebraska employees exclusively represented by the AFGE to the new command. 3/ Also, on October 1, 1973, the states of Kansas and Nebraska were transferred from the administrative authority of the Commander, Fifth U.S. Army, headquartered at Fort Sam Houston, Texas, to the authority and control of the Commander, Sixth U.S. Army, with headquarters at the Presidio, San Francisco, California. The record discloses that at the request of the Commander, Sixth Army, and in order to promote efficiency of operations, the Civilian Personnel Office, hereinafter called CPO, servicing 89th ARCOM employees was changed from the Fifth Army's CPO at Fort McCoy, Wisconsin, to the CPO of the Sixth Army at Fort Riley, Kansas. The effective date of this transfer was October 1, 1976. Thereafter, the 89th ARCOM filed the subject RA petition, which, in effect, seeks a determination by the Assistant Secretary as to the impact of the aforementioned reorganization and transfer of CPO functions on the unit exclusively represented by the AFGE.

The Activity-Petitioner contends that, as a result of the reorganization and transfer of CPO functions, the certified unit is now inappropriate and the unit critieria contained in Section 10(b) of the Order can only be fulfilled by severance of the Nebraska employees from the existing unit and their inclusion in a unit which would comprise only 89th ARCOM employees. The AFGE, on the other hand, contends that the reorganization was only a paper exercise with no actual changes in employee duties, immediate supervision or work sites, and that it has, and can in the future, adequately represent the needs of Nebraska unit employees, as well as the employees remaining under the Fifth Army, by negotiating a separate agreement with the Sixth Army for the Nebraska employees who have been, in effect, "severed" from the exclusively recognized unit.

2/ The 205th Infantry Brigade subsequently became part of the 88th Army Reserve Command and the 89th Division (Training) was deactivated in 1975.

3/ The record reflects that of the approximately 293 civilian employees employed by the 89th ARCOM, some 63 are located in Nebraska and had been included in the AFGE's bargaining unit.

The evidence establishes that, pursuant to the 1973 reorganization, the Nebraska employees are now solely within the administrative authority of the Commander, 89th ARCOM, and are subject to the policies, directives, and regulations, including labor relations policy, issued by the Sixth Army, which are interpreted and administered on behalf of the 89th ARCOM and the Sixth Army by the CPO, Fort Riley, Kansas. Iowa and Minnesota bargaining unit employees, on the other hand, remain divided among several independent commands, and are subject to a different set of policies, directives, and regulations promulgated by the Fifth Army and interpreted and administered by the CPO, Fort McCoy, which also provides labor relations guidance for the Fifth Army commander and all its serviced commands.

The record indicates that although the Nebraska employees, now within the 89th ARCOM, for the most part remain in the same location and continue to perform the same duties under the same immediate supervision as prior to the reorganization, they no longer share with the Iowa and Minnesota employees the same competitive area of consideration for promotions or the same competitive areas for reduction-in-force procedures. Nor does the record show any significant degree of interchange between 89th ARCOM employees and the employees located in Minnesota and Iowa represented by the AFGE.

Based on the foregoing, I find that, subsequent to the 1973 reorganization and the transfer of administrative and personnel functions for the Nebraska employees from the Fifth to the Sixth Army, the latter employees no longer share a clear and identifiable community of interest with the unit employees in Minnesota and Iowa who remained in the Fifth Army and who are serviced by the CPO at Fort McCoy. I find also that the continued inclusion of the Nebraska employees in the certified unit would adversely impair both effectiveness of dealings and efficiency of agency operations. In this regard, it is noted that the AFGE's negotiated agreement covers only the Iowa and Minnesota employees, that the parties consider the Nebraska employees as "severed" from the exclusively recognized unit, and that effective dealings and efficiency of agency operations would be promoted by including Nebraska employees in a unit which would coincide with an appropriate command structure within the Sixth Army.

Under the particular circumstances of this case, however, I shall dismiss the subject RA petition. Although an election pursuant to an RA petition may be deemed appropriate where one or more exclusively recognized units have been combined to form a new unit containing essentially all of the components of the previously recognized units, 4/ in my view, such an election in the 89th ARCOM, Sixth Army, would not be appropriate in the circumstances herein. While an RA petition is an appropriate

4/ Cf. Navy Public Works Center, San Francisco Bay, A/SLMR No. 628, and Idaho Panhandle National Forest, United States Department of Agriculture, A/SLMR No. 394.

vehicle for an activity (or agency) to seek a determination of the representational status of employees in a substantially changed unit, it does not follow that an election will be appropriate in each instance where, as here, some of an activity's employees had been previously employed by another activity and were included in an exclusively recognized unit. In my view, elections in newly established units which are not substantially identifiable with any pre-existing units but, rather, essentially include employees who have been unrepresented, should result only from petitions filed by labor organizations seeking exclusive recognition in such units. 5/

Accordingly, while, pursuant to the 89th ARCOM's RA petition herein, I have determined the impact of the instant reorganization and transfer of personnel and administrative functions on the unit represented by the AFGE, I find that the particular circumstances herein do not warrant an election. Therefore, I shall dismiss the instant RA petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 60-4995(RA), be, and it hereby is, dismissed. 6/

Dated, Washington, D. C.
September 21, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Laobr-Management Relations

5/ Cf. United States Coast Guard Air Station, etc., A/SLMR No. 561. As noted at footnote 3, above, the 89th ARCOM employs some 293 civilian employees of whom only 63 were previously within the AFGE unit.

6/ While I have dismissed the RA petition in the subject case, it is noted that such finding does not preclude the filing of an appropriate petition for amendment of certification for the unit in which the AFGE continues to be the exclusive representative, in order to conform the certification to the existing circumstances.

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 JUSTICE,
IMMIGRATION AND NATURALIZATION
SERVICE
A/SLMR No. 902

This case arose as a result of an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to provide documents which were necessary and relevant for the Complainant to engage in meaningful negotiations on changes in a merit promotion plan.

The Administrative Law Judge concluded that the Respondent's refusal to supply the requested documents did not violate the Order. He based his conclusion on, among other things, the fact that the survey on which the documents were based was instituted by the Civil Service Commission under statutes and Executive Orders. Further, he determined that the documents sought were not necessary and relevant to enable the Complainant to intelligently perform its bargaining functions because management's proposals were not the sole result of the documents, and such proposals remained open to negotiation.

The Assistant Secretary agreed with the Administrative Law Judge's ultimate conclusion that dismissal of the complaint is warranted. However, he did not adopt the Administrative Law Judge's conclusion or rationale for determining that the documents, formulated following a survey by a "tri-partite" team including representatives of the Agency and Activity as well as the Civil Service Commission, contained information not necessary and relevant for the Complainant to enable it to intelligently fulfill its collective bargaining obligation. Further, he noted that it is not required that the documents sought be the sole basis for negotiating proposals, or that they form the basis for fixed, final proposals before they become necessary and relevant for negotiating purposes.

Because he found, contrary to the Administrative Law Judge, that the documents contained information which was necessary and relevant, the Assistant Secretary inspected the documents in camera and compared them with a summary of the documents which was offered to the Complainant during the negotiations. The Assistant Secretary found that the summary adequately reflected the necessary and relevant information contained in the documents to which the Complainant was entitled. He, therefore, found that the Respondent had fulfilled its obligation and that no violation of Section 19(a)(1) and (6) occurred.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed.

A/SLMR No. 902

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION
SERVICE

Respondent

and Case No. 22-6276(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On March 16, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herein.

The Complainant alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to provide it with documents which were necessary and relevant for the Complainant to engage in meaningful negotiations on a merit promotion plan.

As detailed more fully by the Administrative Law Judge, the parties in May 1975, began negotiations regarding changes in a merit promotion plan which had been in existence for some time. During negotiations, the Complainant's negotiator asked whether the Respondent had used certain documents in preparing its negotiating proposals. The Respondent's chief negotiator answered that the documents referred to by the Complainant were "input" documents and that some of its proposals "flowed" from them. The Complainant sought the documents as necessary and relevant to carrying out its representational functions, and the Respondent declined contending the documents were intra-managerial communications, privileged communications, and exempted under the Freedom of Information Act.

The documents involved consist of a Personnel Management Evaluation Report, referred to hereafter as the "Report," and a Personnel Management Action Plan, referred to hereafter as the "Plan." The Report was published in 1973 after a survey of the Respondent's entire personnel structure initiated by the Civil Service Commission pursuant to law and various Executive Orders. At the request of the Department of Justice, employees of the Department of Justice, the Immigration and Naturalization Service, and of the Civil Service Commission participated equally in the survey rendering the survey team "tri-partite." Topics covered in the Report included those under consideration in the negotiations herein. The Plan, published in January 1975, was the Respondent's response to the Report and included its reactions to the suggestions made in the Report.

The Complainant filed a pre-complaint charged on May 17, 1975, alleging that the Respondent's failure to provide the disputed documents was violative of the Order. On June 20, 1975, while the negotiations were in progress, the Department of Justice offered to give the Complainant a summary of the Report. Nevertheless, on July 15, 1975, the instant complaint was filed. On September 23, 1975, the Department of Justice submitted a summary of both documents to the Complainant.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order by refusing to supply the Complainant with the requested documents. He based his conclusion, among other things, on the fact that the survey was initiated by the Civil Service Commission pursuant to statutes and Executive Orders. Further, he determined that the findings and recommendations of the documents were not necessary and relevant to enable the Complainant to intelligently perform its bargaining functions because management's proposals were not the sole result of the documents and, further, those proposals remained open to negotiation.

While I agree with the Administrative Law Judge's ultimate conclusion that dismissal of the instant complaint is warranted, I do not adopt his conclusion or rationale for determining that the disputed documents herein were not necessary and relevant. In my view, to enable a labor organization to intelligently perform its bargaining duties, it is not required that the documents sought be the sole basis for proposals, or that they form the basis for fixed, final proposals, before they become necessary and relevant to the exclusive representative for negotiating purposes. Under the circumstances of this case, I find that the documents formulated following a survey by a "tri-partite" team which included representatives from the Agency and the Activity contained information which was necessary and

relevant for the Complainant to enable it to intelligently fulfill its collective bargaining obligation. In view of this determination, I have undertaken an in camera inspection of the documents herein and compared them with the summary offered by the Respondent to the Complainant. Upon careful examination, I find that the summary adequately reflects the necessary and relevant information to which the Complainant is entitled that is contained in the disputed documents.

In view of the fact that the summary was offered to the Complainant during the course of negotiations, and that an adequate summary was, in fact, presented to the Complainant, I find that the Respondent fulfilled its obligation in this regard and that no violation of Section 19(a)(1) and (6) occurred as, in fact, the requested information was not ultimately withheld from the Respondent.

Accordingly, I shall order that the complaint in this case, alleging violations of Section 19(a)(1) and (6) of Executive Order 11491, as amended, be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6276(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 21, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE Respondent	:	
and	:	Case No. 22-6276(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Complainant	:	

Walter K. Hill, Esq.
Washington, D.C.
For the Respondent

James R. Rosa, Esq.
Washington, D.C.
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on July 17, 1975 by American Federation of Government Employees, AFL-CIO (hereinafter called Complainant Union) alleging that Department of Justice, Immigration and Naturalization Service (hereinafter called Respondent Activity) violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, the Acting Regional Administrator for Labor-Management Services issued a Notice of Hearing on Complaint on March 25, 1976. The gravaman of the complainant was that the Respondent Activity failed to negotiate in good faith, as required by the Executive Order, by refusing to provide the Complainant Union with certain documents on which proposals were based for changes in a negotiated merit promotion and reassignment plan. The complaint asserts that the refusal of the requested documents constituted an unlawful denial of information necessary and relevant for the Complainant Union to engage in meaningful contract negotiations.

A hearing was held on June 22, 1976, in Washington, D.C. on this matter. All parties were represented by counsel and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were submitted by counsel and have been duly considered in arriving at the decision in this case. Upon the entire record in this matter, 1/ including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

A. Background Facts

The Complainant Union holds national exclusive recognition as the representative of the employees of the Immigration and Naturalization Service, which in turn is a national primary subdivision of the Department of Justice. Since approximately 1969, the parties have had negotiated agreements on a nation-wide basis for two separate categories of employees of the

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1/ The official transcript herein contains numerous errors, a number of which are repetitive. For example, the phrase "Merit Promotion and Reassignment Plan" is recorded throughout the transcript as "American Motion Reassignment Plan". Similarly the sections of the Executive Order alleged to have been violated are recorded throughout the official transcript as 19A1 and 19A6 instead of 19(a)(1) and 19(a)(6). Accordingly, the transcript is hereby corrected to substitute "Merit Promotion and Reassignment Plan" in every instance where it is recorded as "American Motion Reassignment Plan". Likewise, the transcript is hereby corrected to read "19(a)(1)" and "19(a)(6)" in every instance that 19A1 and 19A6 is cited. In addition, the following corrections are hereby made to the transcript:

Page 66, line 24 - "reaccess" corrected to read "reassess"

Page 79, line 13 - "226504" is corrected to read "2265.04"

Page 97, line 8 - "is a fact that was sued" is corrected to read "is a factor that was used"

Page 99, line 21 - "E or C guidelines" is corrected to read "EEOC Guidelines"

Respondent Activity. One agreement covered the border patrol employees and the other related to all other bargaining unit employees of the Respondent Activity. In addition, the parties negotiated a separate Merit Promotion and Reassignment Plan in 1969 applicable to both categories of employees. Because of certain deficiencies in this negotiated merit promotion plan a number of grievances were generated shortly after its implementation, and the parties renegotiated the agreement in October 1970. The renegotiated plan was issued by the Respondent Activity in November 1970, as Administrative Manual §2265. 2/ This plan was in effect at the time of the dispute giving rise to this case.

By its terms, the Merit Promotion and Reassignment Plan applied to employees serving in the "Officer Corp" and bargaining unit employees who were considered part of the "Non-Officer Corp". These two categories of employees were defined in the Administrative Manual as follows:

> All positions above the training level in the classification series entitled "Border Patrol Agents", "Criminal Investigator," "Deportation Officer," "Immigration Inspector," and "Immigration Examiner" and all grade GS-10 positions entitled "Immigration Officer" comprise the "Officer Corp".
>
> All positions in other classification series and all other Immigration Officer positions comprise the "non-Officer Corp".

B. The Evaluation Survey and Action Report

Sometime in 1973, the Civil Service Commission (CSC) commenced a nation-wide review of the effectiveness of the personnel program of the Respondent Activity. This review was initiated by CSC under its authority conferred by Title 5 of the United States Code and various Executive Orders. The Department of Justice, however, insisted that officials from its personnel office and from the Respondent Activity be included as "fully participating members" of the review teams. CSC agreed to these arrangements.

2/ Complainant Union Exhibit No. 1.

The personnel management review was completed and presented to the Respondent Activity and Justice in September 1973, in a document entitled "Personnel Management Evaluation Report." The Report contained the analyses and findings of the reviewing group and recommendations for changes or improvements in specific personnel policies and practices. The Respondent Activity reviewed the Report and regarding those recommendations which it accepted, issued a "Personnel Management Action Plan" in January 1975. The Action Plan identified the accepted recommendations, set forth the specific action intended to be taken, established time targets for the proposed action and assigned official responsibility for its accomplishment. 3/

C. The 1975 Negotiations on the Merit Promotion and Reassignment Plan

In May 1975, the parties met for negotiations on the existing Merit Promotion and Reassignment Plan (Administrative Manual 2265). John Mulholland, Director of the Contract Negotiations Department of the Complainant Union, was the chief negotiator on behalf of the labor organization. Dennis Ekberg, Labor-Management Relations Specialist, was the chief negotiator for the Respondent Activity. During the course of negotiations, Ekberg proposed changes in the existing promotion and reassignment agreement. Management proposed that: (a) the area of consideration for promotion and reassignment be restricted to regions rather than Activity-wide as the current agreement required; (b) the methodology employed in evaluating candidates be changed; and (c) seniority be eliminated in the evaluation and ranking of employees who were candidates for promotion or reassignment. Mulholland questioned management concerning the need for the changes contemplated by the proposals, and Ekberg replied that there were numerous complaints about the current plan and employees were unhappy with it. According to Mulholland, he asked Ekberg how management became aware of this and was informed that it "flowed" from the Evaluation Report. After a caucus with his fellow union representatives, Mulholland returned to the bargaining table and specifically asked management if

3/ One of the areas considered by the Evaluation Report and addressed by the Action Plan was the effectiveness of the current negotiated Merit Promotion and Reassignment Plan.

their proposals were based on the Evaluation Report. 4/ Ekberg replied that the Evaluation Report was used as "an input document." He testified at the hearing that management also relied on the recommendations of 20 field managers who were brought in to help formulate the proposals on the basis of their field experience. In addition, management was assisted by responses to questionnaires submitted to regional field offices. When Ekberg stated that management had used the Evaluation Report as an "input document", the union representative asked for both the Evaluation Report and the Action Plan in order to analyze management's proposals. Ekberg refused to supply the documents on the grounds that they were (1) intra-management communications, (2) privileged communications and (3) exempted under the Freedom of Information Act. When questioned at the hearing, Ekberg stated that management took the position during the negotiations that the proposals were negotiable items, and that management was not compelled to insist upon the proposals because of anything contained in the Evaluation Report. When asked if the Evaluation Report and the Action Plan contributed, at least partially, to the formulation of management's proposals, Ekberg replied as follows:

> "We had knowledge of them. They were used in coming up with the proposals. We didn't -- you know, look at it and say this is the law that has come down from the Civil Service Commission and the proposals must be this way."

The union representatives continued to insist on production of the documents and management continued to resist this request. As a result of the refusal of management to supply the Evaluation Report and the Action Plan, the Union filed an unfair labor practice charge with the Respondent Activity on May 16, 1975; citing a violation of 19(a)(1) and (6) of the Executive Order. On July 15, 1975, the Complainant Union filed an unfair labor practice complaint with the Labor-Management Services Administration. On

4/ The union representatives were aware that management and the Civil Service Commission were conducting the evaluation review in 1973, and they were also aware that management had issued its Action Plan in 1975. However, they had never seen either document.

September 23, 1975, the Department of Justice on behalf of the Respondent Activity submitted a "sanitized summary" of the Evaluation Report and Action Plan to the Union. The summary was rejected by the union representatives as being completely unsatisfactory in assisting it to analyze management's proposals. The Complainant Union renewed its request for the original documents, while conceding that names and identification of individuals could be deleted to protect their privacy. Management refused to comply with this request on the same grounds stated during the negotiations.

Contentions of the Parties

In support of its claim to access to the Evaluation Report and Action Plan, the Complainant Union argues in very sweeping terms that the only standard to be applied in determining whether production of the documents is required is one of "necessity and relevance", i.e., whether the documents were necessary and relevant to the Union to enable it to represent its members during negotiations as required by Section 10(e) of the Executive Order. 5/ This argument specifically rules out any consideration of whether management chose to rely upon the documents during negotiations. (Complainant Union's Brief, page 3). In determining "necessity and relevancy" the Complainant Union relies heavily upon cases dealing with the private sector, and asserts there need only be a showing that the requested material is "reasonably appropriate" or "necessary" to enable the union to carry out its negotiation function by checking the accuracy of the material undergirding management's proposals. 6/ Transferring this rationale to

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5/ Section 10(e) provides, in part:

(e) 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... 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.

6/ NLRB v. Truitt Manufacturing Co., 351 U.S. 149; General Electric Co. v. NLRB, 466 F. 2d 1177; J.I. Case Co. v. NLRB, 253 F. 2d 149; NLRB v. Item Co., 220 F. 2d 956.

the public sector, the Complainant Union contends that "necessity and relevancy" are likewise controlling criteria under the Assistant Secretary 7/ and Council 8/ decisions and support its claim for the production of documents.

The Respondent Activity, however, resists on several grounds. First, it asserts compliance with the Executive Order and the Council requirements upon submission of the "sanitized summary" to the Complainant Union. It also argues that the original documents are intra-management communications privileged from disclosure, and exempted by virture of the Freedom of Information Act (FIOA). 5 U.S.C. §552(b), et seq., Finally, the Respondent Activity asserts that the Evaluation Report and Action Plan are the result of an evaluation process initiated by the Civil Service Commission pursuant to statute and is not the product of agency management. Therefore, under the Assistant Secretary's decision in U.S. Civil Service Commission, Washington, D.C., A/SLMR No. 640, the documents need not be given to the exclusive representative.

Concluding Findings

In my judgment, the Executive Order and the case law do not require as much as claimed by the Complainant Union, nor do they prohibit disclosure for the reasons asserted by the Respondent Activity in this case.

The sweep of the argument advanced by the Complainant Union closely approximates a request for an automatic determination that documents become relevant and necessary, and should be made available to the exclusive representative,

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7/ Department of Defense, State of New Jersey, A/SLMR No. 323; Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center Bureau of Retirement and Survivors Insurance, A/SLMR No. 411; United States Department of Agriculture, Forest Service, Pacific Southwest and Range Experiment Station, Berkely, California, A/SLMR No. 573; Social Security Administration, Mid-America Program Center, BRSI, Kansas City, Missouri, A/SLMR No. 619.

8/ Department of Defense, State of New Jersey, FLRC No. 73A-59, Report No. 71 (June 11, 1975).

once it is established that they have played some role in the formulation of proposals submitted by management for negotiation. I do not perceive this to be the law in either the private or the public sector. An examination of the Labor Board cases revealed that the Board in the exercise of its discretion determines whether documents and records should be produced upon request for negotiations and grievances. The Board does so under standards set by it in order to make such a determination.

Likewise, the Assistant Secretary, in the exercise of his discretion, has established criteria against which claims for access or production of documents must be measured in order to determine whether the refusal to do so is a violation of the Executve Order. In Social Security Administration, Kansas City Payment Center 9/ the Assistant Secretary stated that 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." While it is true that the Social Security case involved production of information necessary to enable the union to make a decision on whether to process a potential grievance, the same criteria must be applied to documents requested during negotiations. Accordingly, I find that the standards set forth in the Social Security case control analysis of the facts contained in the instant case.

On this basis, I find and conclude that the Complainant Union was not entitled to have access to or to inspect the Evaluation Report and Action Plan. While it is evident that management's proposals would have caused substantial changes in the negotiated merit promotion and reassignment plan, there is nothing in the record to indicate that management considered its proposals to be fixed and set by the recommendations of the Evaluation Report or the goals of the Action Plan. On the contrary, it is apparent that during the course of the discussions, management consistently stated that the proposed changes were negotiable. The mere fact that management

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9/ Department of Health, Education and Welfare, Social Security Administration, Kansas City Payment Center, Bureau of Retirement and Survivors Insurance, supra.

indicated that its proposals were formulated in part by the results of the Evaluation Report and Action Plan in no way placed any limitations on its willingness to negotiate these matters. Management never took the position that it could not negotiate or vary its proposals because they were fixed by the Evaluation Report and Action Plan. In these circumstances, it cannot be said that the failure to produce those documents prevented the Union from bargaining intelligently or impeded it in performing its representational duties imposed by the Executive Order. In my judgment, it was incumbent upon the Union at this posture of the negotiations to advance counterproposals and engage in the normal "give and take" associated with the collective bargaining process.

The Complainant Union places great emphasis on the language contained in the NASA case decided by the Council.10/ In that case agency headquarters-level representatives conducted meetings and interviews with activity-level employees in order to get opinions regarding the operation of the EEO program of the agency. The union, which was the exclusive representative, was not allowed to have observers present nor were they notified of the meetings between agency management and activity employees. The Assistant Secretary found that there was no obligation on the part of agency officials to allow union representatives to be present because no bargaining relationship existed between the agency and the union; rather it existed between the activity and the union. Since the officials of the activity had no control over agency headquarters-level representatives, he found that the bargaining obligation under the Executive Order had not been violated. He did conclude, however, that a violation of Section 19(a)(1) had been committed in that the agency representatives discussed "terms and conditions of employment" with the activity employees without having the exclusive representative present. This was held to be counter to the "purposes and policies" of the Order, and the violation was not based on the existence of a bargaining relationship.

On appeal the Council held that no violation had occurred. In so doing, the Council stated that the discussions "were a mechanism whereby agency headquarters-level management sought to evaluate the effectiveness of an agencywide program which existed totally apart from the collective bargaining relationship. The Council went on to state that "without the benefit of such information-gathering mechanisms, agency

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10/ National Aeronautics and Space Administration (NASA), Washington, D.C. and Lyndon B. Johnson Space Center (NASA) Houston, Texas, FLRC No. 74-A-95, Report No. 84 (October 24, 1975).

management would be seriously impeded in effectively carrying out its responsibility -- often mandated by statute...to conduct periodic evaluations of the effectiveness of such agencywide programs." The Council made it clear, however, that such information-gathering techniques can be employed only in certain circumstances. Those circumstances which would apply to the issues presented here were set forth as instances were management does not:

> "...deal with specific employee grievances or other matters cognizable under an existing agreement; or gather information regarding employee sentiments for the purpose of using it subsequently to persuade the union to abandon a position taken during negotiations regarding the personnel policies or practices concerned."

It is this language which the Complainant Union relies upon to buttress its claim to the requested documents in the existant case. It points out, and correctly so, that the Evaluation Report and Action Plan contained specific matters which were subject to the negotiation process, and that the information gathered by the Report was subsequently used, in part, to help formulate management's proposals for revising the negotiated merit promotion and reassignment plan.

While it presents a close question, I am not persuaded that the personnel management survey, initiated by the Civil Service Commission pursuant to statute and Executive Orders, is the type of information-gathering mechanism the Council had in mind in NASA when it set forth the circumstances that would permit the presence of union representatives -- and by extension, which would permit the Union to have access to the results. My conclusions in this regard would not be the same if the survey had been undertaken by the Respondent Activity or by its parent Agency, as in the NASA case. Here, however, the survey was initiated by an authority outside of the Agency/Activity, under mandate of statute, to evaluate on an activitywide basis the effectiveness of the personnel management program of the Respondent Activity. It was not initiated by the Activity for the purpose of undermining any gains or benefits the Union had achieved through the bargaining process. That the findings and recommendations of the survey and the Activity's action plan were among several factors considered by management in formulating its proposals for subsequent negotiations did not cause the documents, at that point, to become necessary and relevant to enable the Complainant Union to intelligently perform

its bargaining responsibilities. Management did not indicate that its proposals were the sole result of the survey or that it was required to insist upon the proposed changes in the existing program as a result of the evaluation findings and recommendations. Rather, the Respondent Activity consistently took the position the matters were negotiable. Thus, making it evident that the negotiations were not circumscribed by the Evaluation Report or Action Plan.

In these circumstances, I find that the Evaluation Report and Action Plan are not necessary or relevant to allow the Complainant Union to engage in intelligent bargaining, and that the refusal to produce the documents did not impede the Union from discharging its representational function imposed by the Executive Order.

In arriving at the above, I do not consider it necessary to consider the claim of exemption based on the Freedom of Information Act asserted by the Respondent Activity. This defense does not properly belong in this forum. It can only arise in the Federal District Court in an action brought under that particular statute. The exemptions written into the statute have no relevancy or materiality in determining entitlement to the production of documents under the Executive Order. For this reason, I also find it unnecessary to determine whether the requested documents are intra-management communications and therefore privileged from disclosure. This claim also arises under the Freedom of Information Act and cannot be asserted here.

Finally, there is one other claim asserted by the Respondent Activity which merits comment here. It is urged that since the evaluation survey was initiated by the Civil Service Commission, and under the decision of the Assistant Secretary in the Civil Service case 11/ the survey teams were not a part of and did not represent agency management. I find that case, however, to be inapposite to the facts of the instant case. There the survey or evaluation review was initiated and conducted solely by the Civil Service Commission. The facts here disclose that although the evaluation review was initiated by the Civil Service Commission, the survey groups were tripartite in composition, i.e., they were composed of representatives of the Commission, the Department of Justice and the Respondent Activity acting as full participating members. Accordingly, I consider that case to be distinguishable on its facts and its holding is not controlling here.

11/ United States Civil Service Commission, Washington, D.C., supra.

Based on the finding that the requested documents are not relevent and necessary to enable the Complainant Union to carry out its bargaining responsibilities under the Executive Order, I find and conclude that the Respondent Activity has not violated Section 19(a)(1) and (6) of the Order.

RECOMMENDED ORDER

On the basis of the foregoing findings of fact and conclusions of law, I find that Department of Justice, Immigration and Naturalization Service has not engaged in conduct which violates Section 19(a)(1) and (6) of Executive Order 11491, as amended. Accordingly, I recommend that the complaint in this case be dismissed in its entirety.

Gordon J. Myatt

GORDON J. MYATT
Administrative Law Judge

Dated: 16 MAR 1977
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
DEPENDENT SCHOOLS, EUROPE
A/SLMR No. 903

This case involved an unfair labor practice complaint filed by Dr. Heidemarie D. Shurtleff (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by declining to transfer the Complainant to a location coinciding with that offered her spouse (an administrator of the Respondent) in order to discourage union membership and as a result of the Complainant's activities as a union officer.

The evidence disclosed that at the time of the offer to her spouse, no vacancies existed for which the Complainant was qualified within commuting distance of the area where her husband would have been employed. Further, the Administrative Law Judge found that the Activity official responsible for finding a transfer position for the Complainant had no knowledge of her union activity. He, therefore, recommended that the complaint be dismissed.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 903

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS, EUROPE

Respondent

and Case No. 22-6417(CA)

DR. HEIDEMARIE D. SHURTLEFF

Complainant

DECISION AND ORDER

On June 9, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6417(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
September 21, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ At footnote 2 on page 2 of his Recommended Decision and Order, the Administrative Law Judge inadvertently referred to a Section 19(a) allegation as an "8(a)(1)" allegation. Further, at page 9, the Assistant Secretary's decision in Environmental Protection Agency, Perrine Primate Laboratory, A/SLMR No. 136, is advertently cited as A/SLMR No. 133. Such inadvertent errors are hereby corrected.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS, EUROPE 1/
Respondent

and Case No. 22-6417(CA)

DR. HEIDEMARIE D. SHURTLEFF,
Complainant

LYLE T. VENABLE
Labor Management Employees Relations Specialist
Department of Defense Dependent Schools, Europe
Directorate
APO New York 09164
For the Respondent

ERNEST J. LEHMANN
Overseas Federation of Teachers
Verona American School
APO New York 09453
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on July 13, 1976 by the Regional Administrator for Labor-Management Services Administration of the U.S. Department of Labor, Philadelphia Region, a hearing was held before the undersigned on November 8, 1976 at Sembach, Germany.

1/ The name of the employer appears as amended at the hearing.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint on October 3, 1975 by Dr. Heidemarie Shurtleff (herein called the Complainant) against Department of Defense Dependents Schools, Europe (herein called the Respondent and DODDSEUR). It was alleged therein that Respondent discriminated against Complainant and violated Section 19(a)(2) of the Order 2/ by declining to transfer her to a position as counselor or teacher to a location coinciding with that offered her spouse (who was offered a transfer to Schweinfurt as an administrator with Respondent) - all in order to discourage union membership and as a result of Complainant's activities as a union vice president.

Respondent denies the commissions of any unfair labor practices under the Order. It contends that at the date Dr. John C. Shurtleff was offered a promotion and transfer to Schweinfurt, Germany, there was no available position nearby for his wife, Heidemarie Shurtleff.

All 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, briefs were filed with the undersigned which have been duly considered.

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

Findings of Fact

1. DODDSEUR, which is composed of five districts, is under the supervision of a Directorate. Districts II, III, and IV are located in Germany. The Director of DODDSEUR and his deputy are responsible for selecting the administration throughout all districts. A superintendent directs each district, and he is responsible for the selection and reassignment of non-administrative personnel, educators and counselors.

2/ At the hearing the complaint was amended, without objection, to include 8(a)(1) based on the same allegations in the complaint.

2. Various elementary and secondary schools, Junior and Senior High Schools, are located in each district, and about 5500 teachers are employed throughout the system in Europe. About 15% of this group consists of NTE's - those temporary employees who employment is not to exceed one year. About 1100 teachers at 44 schools are employed in District IV which included, inter alia, the Towns of Schweinfurt, Bad Kissingen, Kitzingen, Nuernberg, Ansbach and Stuttgart.

3. At all times material herein, Dr. J. Mason was the Director of DODDSEUR and its five schools districts; Roger Prince was the superintendent of District III, which included Weierhof, Ramstein, Kaiserslautern and Sembach; Robert Brooks was Chief of Employment and Services - head of recruitment, replacement and promotion at the Directorate and acted on behalf of Dr. Mason; Francis J. Schwerd was Chief, Recruitment and Placement Branch, Kaiserslautern area Civilian Personnel Office, who evaluated the qualifications of educators for non-administrative positions; Walter Ingram was the superintendent of District IV, and Robert Tracy was its administrative officer who was responsible for keeping information on current vacancies in that district; Martin Frantz was a Labor-Management Employee Relations Specialist for Respondent, who was responsible for labor relations and conducted management training workshops for administrators. 3/

4. At all times material herein the teachers in DODDSEUR's school system were represented by either Overseas Education Association (OEA) or Overseas Federation of Teachers (OFT) as the exclusive bargaining representative at respective schools. OEA acted as the bargaining representative at the Sembach School, whereas OFT represented the teachers at Kaiserslautern, Ramstein, Mannheim and other schools within District III.

5. On June 6, 1975, at approximately 9:30 a.m. Dr. Mason telephoned to John C. Shurtleff, a class II teacher - principal at Weirhof and husband of the Complainant herein and informed Shurtleff that he had been selected for a promotion as a GS-11 Assistant Principal at Schweinfurt Elementary Junior High School. Upon being asked if he were interested in the promotion and transfer, Shurtleff replied in the affirmative and inquired whether his wife, Complainant herein could also be transferred. Mason said

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3/ This term included teacher-principals of schools, such as Dr. John C. Shurtleff, husband of Complainant.

that could be easily arranged and suggested Shurtleff contact Prince in that regard. Whereupon Shurtleff called Prince, related the offer made to him, and inquired if a position could be found for his wife as a counselor class II or an English teacher. Prince replied he did not know but would contact Ingram about it.

6. Later in the morning of June 6, 1975 Prince called Ingram and asked if a vacancy existed for Heidemarie Shurtleff in the Schweinfurt area as a counselor class II or teacher of Junior High School English. Ingram asked his administrative officer, Tracy, who said there was no such vacany in District IV, and Ingram informed Prince no opening was available within commuting distance of Schweinfurt. Several days later Prince so advised John Shurtleff, and the latter remarked he would not move without his wife. Prince suggested Shurtleff take the job promotion; that he would continue to work with Ingram for a job for Heidemarie, and he felt sure a vacancy would occur in the summer. Shurtleff replied he could not transfer without a guarantee that his wife would also be moved.

Complainant spoke to both Prince and Mason on June 9, 1975 re her request for a transfer, and she mentioned such areas as Kitzingen, Bad Kissingen, Bamberg, Wuerzburg and Nuernberg. Both officials confirmed the fact that nothing was available 4/, and Mason stated he had to abide by the information obtained from the superintendent with respect to the existence of job vacancies.

7. Complainant Heidemarie Shurtleff commenced employment with DODDSEUR in August 1968. She taught at the secondary level at Ramstein Junior High School - english, german and social studies in the 7th, 8th and 9th grades. In 1970 Heidemarie was promoted and transferred as a class II counselor to Stuttgart Elementary School. In 1971 she was reassigned in the same position to Sembach where she continues to counsel children, parents, teachers, and regulate the educational program for Special Education Children. Complainant taught for two years at the University of Maryland and she taught service level courses in Psychology, Counseling, Mental Health and Curriculum.

4/ Complainant's testimony that Prince remarked nothing would be available for her is refuted by the superintendent. I am persuaded that Prince did not make such a declaration and thus foreclose all future possible job openings for Heidemarie.

8. In 1973 Complainant became active in OFT. She was involved in the election campaign in the Kaiserslautern - Ramstein area, helped to charter a local at Sembach, and was elected vice-president of said union. In 1974 she became a member of the OFT negotiating team which negotiated an agreement with Respondent, and subsequently Heidemarie along with others, engaged in consultation at the Directorate and District levels. She was selected in 1974 by the union to be a member of the Federal Women's Program Committee as its representative, and Complainant so served until the fall of 1975. Complainant takes no part in the union affairs at Sembach.

Record facts show that since 1973 there have been other teachers active in OFT, including a president, secretary, and treasurer. Complainant was unaware of any discriminatory action taken by management against any personnel who were active in the union or were union officials.

9. Following her election as vice-president of OFT in 1973, Complainant attended a PTA conference at Chiemsee. Dr. Olson, Community Coordinator at the Directorate, Karlsruhe, spoke to her thereat and said he noticed Heidemarie joined a union and became an elected official of a group that vilifies the administration.

10. In 1975 Timothy Kelley, Complainant's superintendent, told her that she could no longer be on the Federal Women's Program Committee as the union representative - that she could not attend the workshop in that capacity. Complainant had attended 4 or 5 meetings previously as a committee member and participated in planning for schools, curriculum, etc. There were representatives from 7-8 schools with the District serving on said committee.

Prince, who had welcomed Heidemarie to the committee when she was appointed thereto, testified, and I find, that a new committee was formed and Complainant was not appointed by OFT to serve thereon; that the FWPC is awaiting the selection of the union representative; and that if Heidemarie is designated by OFT as its representative, she would be entitled to serve as a member thereof.

11. A Joint Labor-Management Committee monthly meeting was held at Karlsruhe in the spring of 1975. At this meeting Peter J. Migliaccio 5/, who is an administrator, teacher -

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5/ The complaint herein was filed by Migliaccio, on behalf of Heidemarie Shurtleff, as OFT, EEO representative and District union representative.

Assistant Principal, Naples Elementary School, Naples, Italy, discussed with Frantz what the latter considered to be excessive grievances and unfair labor practices in the Naples area. Migliaccio said he didn't consider them excessive; that they were just dissatisfied employees expressing their feelings, and that Naples isn't the only place where there are dissatisfied employees. Frantz replied there are a lot of dissatisfied employees wherever you find a union investigator - "for instance, like Heidemarie Shurtleff". He also inquired why they couldn't control her, stating Heidemarie was ruining the credibility of the union. Migliaccio replied she is not ruining it from "our point of view", and added that if she's the vice-president, people naturely go to an officer to seek advice. 6/

12. A workshop meeting of principals and administrators was held on July 7, 1975. Its purpose was to discuss the Order, unions, and how to handle union representatives who may be bothering principals. An unidentified individual setting behind John Shurtleff stated to Frantz, who presided over the workshop, they would be glad to stick the knife in the back of the union if he would back them up. Frantz testified, and I find, he did not hear that statement, and the record reflects he made no retort thereto. Shurtleff further testified someone said that the principals should remember they evaluate the union person coming to a particular school. There is no showing that Frantz or a management representative made this statement or that it was acknowledged by Respondent, and I do not impute it to the latter.

13. In respect to transfer of personnel, DODDSEUR has adhered to the practice and policy of trying to find a vacancy for the spouse of the administrator who may be offered a position at a different location. About 50% of the time no position is available for the spouse at the time an offer is made to the primary administrator, but nearly

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6/ Frantz testified he had a conversation with Migliaccio at this meeting re the changes and grievances filed against Respondent, and that he was seeking to gain information to help resolve the problems. There was, however, no denial by Frantz of the statements attributed to him by Migliaccio. Accordingly, I credit the latter's version of this conversation.

all are placed at a later date. 7/ The record reflects that Respondent cannot accept an arrangement when the administrator offered a transfer insists it be made dependent upon a guarantee of a job move for his spouse. This is due to the fact that the transfer affects other moves and schools have to be staffed within a short period of time.

14. Respondent's records indicate that in June 1975 Complainant was eligible for the position of english teacher, secondary and junior high school level. Schwerd testified that a determination was made that Complainant did not qualify to teach social studies - that she did not have the necessary credentials since a minimum of 20 hours was required in this area, whereas Heidemarie had but 9 hours in History. 8/

15. The record reflects that in June 1975 there were several job openings at various locations for teachers in the school system of DODDSEUR. Thus, a counselor position was vacant at Nuernberg, as well as a dorm counselor thereat due to the transfer of such occupant to the daytime staff. Another opening occurred at Nuernberg High School when Janet Russell, a teacher of spanish and social studies, was replaced by Carolyn Duck who returned after one year's leave of absence.

16. Federal Personnel Manual Chapter 3-51, subchapter 4, section 4.4 defines a local cummuting area as including a population center and surrounding localities in which people live and reasonably can be expected to travel back and forth daily from home to work. No rule prevails which would be arbitrarily applied to the maximum limit of the commuting area. The determination of such area is governed by common practice, what can be reasonably expected based on availability and cost of public transportation, convenience or adequacy of highways, and travel time to and from work.

7/ Subsequent to the charge herein, or the complaint being filed, Complainant and her husband, John C. Shurtleff, were offered transfers to Frankfurt Junior High and Hanau High respectively in August 1975, and to Bahrain, an island in the Persian Gulf, in June 1976. Since both offers were made after the instant charge and complaint, circumstances surrounding the proposed transfers as well as refusal by the Shurtleffs are deemed immaterial and not determative. Accordingly, no further findings are made with respect thereto.

8/ Standards for the evaluation were based on DODDSEUR's requirements.

17. Testimony by Ingram reveals that he did not consider Complainant for job openings at Nuernberg because of the commuting time involved. The schools in Nuernberg are located in Furth and the distance between Schweinfurt and Nuernberg is 115 kilometers - 71 miles over secondary roads. Ingram did not view Complainant, in any event, as qualified for dorm counselor at Nuernberg since particular hours in Psyschology were required, nor did he deem her qualified to replace Janet Russell since she did not have the language background. The District III superintendent considered, as reasonably within the Schweinfurt area, teaching possibilities for Heidemarie as follows: Junior High, grades 1 through 9, and kindergarten at Bamberg; High School, grades 7 through 12, at Wuerzburg; and Elementary School, kindergarten through 8th grade, at Kitzingen. The record reflects, base on this superintendent's testimony, there were no vacancies in June 1975 at these three schools.

18. In respect to Bad Kissingen, Ingram did not consider Complainant for that area since it is a school of kindergarten through grade 6. Since he was told by Prince that Heidemarie was a counselor and teacher of english, social studies, this signified she should be placed somewhere between 7th and 12th grades.

19. No OFT schools are located in Ingrams's District IV, and the superintendent neither had contact with that union nor engaged in any consultation with them. Ingram testified, and I find, he was unaware of the fact that Complainant had been involved in the union election at Ansbach High School several years earlier, nor did he know of her union activities. 9/

9/ The May-June issue of "The Overseas Schools Newspaper" contains a front page article of DODDSEUR-OFT negotiations with practices of several union negotiators, including Complainant. Ingram testified he was not sure whether he, read that issue. On the basis of the foregoing, I do not impute to Ingram knowledge of Complainant's union activities on behalf of OFT.

Conclusions

It is contended by Complainant that she was discriminatorily denied a transfer from Sembach in District III to a District IV school, as a teacher or counselor, on June 9, 1975 when her husband was offered a promotion and transfer from Weierhof (III) to Schweinfurt (IV) as an Assistant Principal. Complainant asserts the denial was due to her activities as vice-president of OFT, as well as her participation on behalf of the union in consultations or negotiations with management. She adverts to various statements made by a DODDSEUR official evincing anti-union animus, and further insists there were vacancies which she could have filled at other schools within the area to which John Shurtleff would have been assigned. Therefore, it is argued, the failure to effect a transfer for Complianant in June 1975 constituted discrimination under the Order in violation of 19(a)(1) and (2) thereof.

Section 19(a)(2) of the Order protects an employee from discriminatory treatment at the hands of an employer where it occurs as a result of the individual's union activities. Thus, a failure to promote an employee was held violative of the aforesaid section of the Order when the employer permitted an employee's activities as union steward to play a role in determining her fitness for such promotion. Department of the Army, U.S. Army Infantry Center, CPO, Fort Benning, Georgia, A/SLMR No. 515. In each instance, as in the case at bar, the issue as to whether unionism played a part in management's conduct toward an employee is largely factual in nature. Thus, a resolution of such issue requires a careful examination of the facts at hand and a weighing of the relevant evidence in regard thereto.

In support of his contention, Complainant's representative cites two cases in which, it is averred, the Assistant Secretary found a violation of Section 19(a)(2) of the Order based on allegedly parallel situations: Department of Defense, National Guard, Texas Air National Guard, A/SLMR No. 336; Environmental Protection Agency, Perrine Primate Lab, A/SLMR No. 133. In the former case the Assistant Secretary found he had no jurisdiction to decide whether an employee was denied reenlistment for discriminatory reasons. He concluded that since the individual followed an appeals procedure, the issue could have been raised therein - and hence the matter was barred by Section 19(d) of the Order.

The Environmental Protection case, supra, involved acts of harassment and intimidation directed toward the president of the union as a reprisal for intervening in an administrative leave problem of another individual. The discriminatee's union activities were restricted, and she received disparate treatment at the hands of management.

An analysis of the record herein convinces me that the instant case is distinguishable from the Environmental Protection case, and that there is a substantial difference between the two factual presentations. In the cited case the individual's union activities were a focal point of concern to the employer, and resulted in her receiving warnings about them. There is no showing herein that Complainant's activities as vice-president of the OFT local were ever restricted, curtailed, or hampered in any way. Moreover, other teachers held official positions in that union and were as active as Heidemarie Shurtleff. Nevertheless, it does not appear that Respondent reprimanded or intimidated those individuals, or discriminated against them in any manner. No evidence exists to show that Complainant was treated disparately or singled out by DODDSEUR for reprimands, warnings, or censure, due to her postion with OFT as its representative.

Reference is made in the record to comments by unidentified individuals at a workshop meeting on July 7, 1975 of principals and administrators held for the purpose of dealing with the union representatives. There were certain voluntary statements made by several of those in attendance, i.e. that they would be glad to stick the knife in the back of the union if management would support them. Record facts do not reveal that Frantz, who conducted the meeting, heard the remark or that he in any way either adopted or concurred in the statement. Accordingly, I do not hold Respondent responsible for that utterance or similar comments, made by other individuals in attendance.

Complainant testified she was not allowed to continue as a member of the Federal Women's Program Committee in 1975 as a result of her principal, Timothy Kelley, telling her she could not attend as a union representative. While such a restriction by management might tend generally to support a discriminatory motive toward this employee, the record discloses that a new committee had been formed and OFT had not yet selected its designee. Thus, I am persuaded that any inference of discrimination in this regard is rebutted by the unrefuted explanation given by Prince as to why Heidemarie was told not to attend as the union representative.

Certain statements were also made by Frantz in the spring of 1975, at a Joint Labor-Management meeting, re the existence of dissatisfied employees in view of Complainant's being a union instigator. At this meeting Frantz also asked union representative Migliaccio why they couldn't control Heidemarie, and remarked she was ruining the union. Under certain circumstances reference by management to an employee as a "union instigator" could well give rise to a conclusion that such remarks manifested an illegal motive for any subsequent action taken toward such employee. In the instant matter, however, Heidemarie had been active for several years and dealt with management in negotiations. Nevertheless, there is no evidence of any retaliation directed toward her because of her union activities. Moreover, these remarks were not made by the District IV superintendent who, as the record reveals, had no knowledge of Complainant's unionism. Accordingly, and though such a statement is not to be condoned, I do not find it to be sufficiently probative of discriminatory motivation, especially in view of the explanations recited for the failure to offer Heidemarie a transfer to accompany her husband in June 1975. 10/

Past practice and experience shows that in 50% of the instances where a job offer is made to the primary administrator, no vacancy exists at the time for the spouse so that both can be transferred together. Thus, the absence of a job opening for Complainant in District IV, at the time her husband was selected for a promotion and transfer to Schweinfurt, is not deemed unusual or indicative of any disparate treatment toward Heidemarie Shurtleff. However, it is argued that there were vacancies 11/ in District IV which Complainant was qualified to fill, and the failure to appoint her was traceable to a discriminatory motive.

10/ See Department of the Air Force, 439 2d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 537. In the cited case it was held that comments re filing of charges by the union president, and query as to what could be done to stop it, were not coercive or violative of 19(a)(1).

11/ The record reveals that, at times, some teachers may learn of impending moves by other teachers which could create vacancies in particular areas. Since these are not officially communicated to management and not listed as vacancies, I do not consider such "potential" openings as definite and available vacancies for Complainant or any other teacher in the employer's school system.

Record testimony establishes that there were some vacancies at Nuernberg in June 1975. The superintendent of District IV testified that he did not consider that a suitable location for Complainant since it was 70 miles distant from Schweinfurt - the area to which Heidemarie's husband would be reassigned. While Complainant may well have thought otherwise, I cannot deem Ingram's conclusion so unreasonable as to be labeled "pretextuous" under the circumstances. A distance of this nature may well be excluded from consideration in effecting a transfer of husband and wife. Moreover, the job opening for dorm counselor at Nuernberg required a particular number of hours in Psychology as a prerequisite. Thus, this job opening was, in the mind of Ingram, not suitable for Complainant in view of her qualification as a counselor.

The record is not supportive of an intent by the District IV superintendent to foreclose Complainant from being considered, in any event, for a transfer to his district. Consideration was given to possibilities in this regard for openings in Bamberg Junior High, Wuerzburg High, and Kitzingen elementary schools. No evidence controverts the lack if any vacancies thereat as testified to by Ingram. In respect to Bad Kissingen, the superintendent determined that since it was a school of kindergarten through grade 6, it lay out side the scope of Complainant's interest and background - Junior High or Secondary schools.

The foregoing constrains me to conclude that, contrary to the contention that Heidemarie was not considered for any transfer from Sembach, attempts were made to locate an opening for her in June 1975 to accompany her husband; that DODDSEUR did not hermetically seal its mind to the granting of a transfer to Complainant in retribution for any of her actions as a union adherent on behalf of OFT. Had there been continual denials or refusals by Respondent to effect a transfer for this teacher, one might be more than suspicious - and, along with anti-union utterance, such conduct could well give rise to an inference of discrimination. In the case at bar, the record reflects that in nearly all instances of this nature openings do ultimately occur for the spouse. However, Dr. John Shurtleff did not see fit to accept the job promotion and await the outcome of this likelihood. While his refusal to transfer without his wife may be understandable, it does not lie with Complainant to characterize DODDSEUR's inability to find a vacancy for her at that precise time period as discriminatory under the Order. Contrariwise, I am persuaded, on the basis of the foregoing,

that there were no vacancies on June 5, 1975 for which Complainant was qualified in District IV that would have been within reasonable commuting distance from Schweinfurt. In any event, and quite apart from the conclusions in this regard, I would be reluctant to substitute my judgment for that of the supervisors in District IV concerning the foregoing. Accordingly, and in light of my determination that no illegal motive was responsible for a failure to transfer Complainant with her husband, I conclude that Respondent did not violate Section 19(a)(1) and (2) of the Order.

RECOMMENDATION

Upon the basis of the foregoing findings and conclusions it is hereby recommended that the complaint herein be dismissed in its entirety.

WILLIAM NAIMARK
Administrative Law Judge

Dated: 9 JUN 1977
Washington, D.C.

September 21, 1977

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

UNITED STATES DEPARTMENT OF DEFENSE,
3245th AIRBASE GROUP, UNITED STATES
AIR FORCE
A/SLMR No. 904

This case involved a petition for amendment of certification (AC) filed by the National Federation of Federal Employees, Professional Local 1384 (Petitioner) seeking to amend its certification to reflect the result of a reorganization. The reorganization, effected by the Air Force Systems Command, essentially removed two divisions intact from the Air Force Cambridge Research Laboratory and created the Deputy for Electronic Technology, placing it under different first line operational direction. The remaining divisions became the Air Force Geophysics Laboratory. The Petitioner claimed that the reorganization had no more effect on its exclusive unit other than to require a change in its unit designation from Air Force Cambridge Research Laboratory to Deputy for Electronic Technology and Air Force Geophysics Laboratory.

The National Association of Government Employees, Local R1-8 (NAGE) and the National Federation of Federal Employees, Local 975 (NFFE) intervened in the proceeding contending that certain of the employees of the Petitioner's unit accreted to their units as a result of the reorganization. The Activity expressed no objections to the amendment sought by the Petitioner.

The Assistant Secretary agreed with the amendment sought by the Petitioner. Thus, he found that the employees of the two organizational entities continued after the reorganization to share a clear and identifiable community of interest separate and distinct from other employees of the Activity. In this regard, he noted that subsequent to the reorganization the employees of both organizations continued to perform the same job functions, pursuant to the same mission, in the same location, with no substantial change in working conditions, immediate supervision, job contact or personnel policies. Further both organizations continued under the same overall operational command and enjoy a degree of interchange of employees as a result of an administrative memorandum providing for the exchange of services. Moreover, he found that the existing bargaining unit continued to promote effective dealings and efficiency of agency operations as the employees continued to enjoy common personnel policies and practices and the same areas of consideration for reductions-in-force and promotions, and the Activity Commander continued to exercise substantial authority for labor relations and personnel matters affecting such employees.

Accordingly, and noting the long history of effective labor relations in the unit, as well as the fact the Activity did not oppose the amendment sought by the Petitioner, the Assistant Secretary found that the unit certification should be amended to reflect the change in designation sought by the Petitioner.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

UNITED STATES DEPARTMENT OF DEFENSE,
3245th AIRBASE GROUP, UNITED STATES
AIR FORCE 1/

Activity

and

Case No. 31-9957(AC)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, PROFESSIONAL LOCAL 1384 2/

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 975

Intervenor

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R1-8

Intervenor

DECISION AND ORDER AMENDING CERTIFICATION

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer William Koffel. 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 National Federation of Federal Employees, Professional Local 1384, herein called the Petitioner, the National Federation of Federal Employees, Local 975, herein called NFFE, and the National Association of Government Employees, Local R1-8, herein called NAGE, the Assistant Secretary finds:

1/ The name of the Activity appears as amended at the hearing.

2/ The name of the Petitioner appears as amended at the hearing.

The Petitioner filed the subject petition seeking to amend its certification to reflect the result of a reorganization affecting its unit, which it maintained was merely a change in the unit designation from "Air Force Cambridge Research Laboratory" to "Air Force Geophysics Laboratory and Deputy for Electronic Technology." 3/ The NAGE and the NFFE intervened, contending that certain of the employees in the Petitioner's unit, as a consequence of the reorganization, accreted to their respective units. 4/ The Activity, while remaining neutral at the hearing, took the position that it had no objection to the amendment sought by the Petitioner.

The Hanscom Air Force Base Complex (Complex), where the unit in question is located, is under the administrative direction of the Commanding Officer of the 3245th Air Base Group. The latter is under the operational direction of the Commanding Officer of the Electronic Systems Division (ESD), which is the major component of the Complex. Prior to January 1, 1976, the Air Force Cambridge Research Laboratory (AFCRL), which was under the overall supervision of the Air Force Systems Command, was the other major component of the Hanscom Complex, employing approximately 1000 of the 2800 civilian employees located at the Complex. While both the ESD and the AFCRL were under the operational command of the Air Force Systems Command, the record reflects that there was little or no interaction or job contact between employees of the ESD and the AFCRL with respect to their missions or day-to-day activities. In this regard, the primary mission of the AFCRL was basic research, while the mission of the ESD is the development and implementation of technological systems for the Air Force.

Effective January 1, 1976, two divisions of the AFCRL, which employ approximately 200 employees, were redesignated as the Deputy for Electronic Technology (DET) by the Air Force Systems Command, and were assigned to the operational command of the Rome Air Development Center

3/ The unit for which the Petitioner was certified as the exclusive representative on October 8, 1970, included: "All nonsupervisory General Schedule, and nonsupervisory professional employees of the Air Force Cambridge Research Laboratories serviced by the Central Civilian Personnel Office, L.G. Hanscom Field, Bedford, Mass.; excluding management officials, supervisors, security guards and Federal personnel employees except those in a purely clerical capacity."

4/ The NAGE is the exclusive representative of all Wage Grade employees serviced by the Civilian Personnel Office, Hanscom Air Force Base, and all nonprofessional General Schedule employees serviced by the Civilian Personnel Office, Hanscom Air Force Base, excluding those represented by the Petitioner. NFFE Local 975 is the exclusive representative of all professional General Schedule employees serviced by the Civilian Personnel Office, Hanscom Air Force Base, excluding, among others, those employees represented by the Petitioner.

(RADC) located at Griffiss Air Force Base, New York. 5/ The purpose of the redesignation was to place the two divisions of the AFCRL involved primarily in command control and communication development and application research under the direction of the RADC, which has this technological area as its primary mission. In addition, effective January 15, 1976, the remaining divisions of the AFCRL were redesignated as the Air Force Geophysics Laboratory (AFGL), which continued under the same operational command.

The record reflects that the only change resulting from the January 1 and 15 redesignations was that the DET and the AFGL now report to the Air Force Systems Command through different operational chains of command, and that there was little change in their day-to-day activities. Thus, all of the employees of both the DET and the AFGL continue, after their respective redesignations, to perform the same work, in the same location, under the same supervision, and continue to have little job related contact with other Complex employees. Most of the employees of the DET and AFGL work in the same buildings and use the same laboratory facilities, which are separated from other facilities of the Hanscom Complex. Moreover, through a memorandum signed by both the DET Director and the AFGL Director, at the direction of the Air Force Systems Command, the AFGL agreed to provide the necessary laboratory support services to the DET in return for the DET providing the AFGL with certain manpower.

In addition, the record reveals that, after the redesignations, the Complex Commander continues to exercise full authority for personnel and related administrative services provided to the DET and AFGL through the Central Civilian Personnel Office located at the Complex, including the authority under Air Force Regulations for the negotiation of labor-management agreements, and acting as the final step in any negotiated grievance procedure. Further, the area of consideration for both reductions-in-force and merit promotions for employees of both the DET and the AFGL continues to be base-wide under current Air Force Regulations.

Based on all the foregoing circumstances, I find that the employees of the DET and the AFGL continue, after the administrative reorganization, to share a clear and identifiable community of interest separate and distinct from other employees of the Complex. Thus, the evidence establishes that subsequent to the reorganization the employees of both organizations continued to perform the same job functions, pursuant to the same mission, in the same location, with no substantial change in their working conditions, immediate supervision and job contacts or personnel policies. In addition, as a consequence of the memorandum signed by both organizations, there is a degree of interchange of personnel between the DET and the AFGL and both the DET and the AFGL continued, subsequent to the reorganization, under the same overall operational command.

5/ The RADC is under the operational direction of the Commanding Officer of the ESD and under the administrative direction of the Commanding Officer of Griffiss Air Force Base.

Moreover, I find that the existing bargaining unit continues to promote effective dealings and efficiency of agency operations. Thus, all unit employees continue to enjoy common personnel policies and practices, the same area of consideration for both reductions-in-force and promotions, and the Complex Commander continues to exercise substantial authority for labor relations and personnel matters affecting such employees.

Accordingly, and noting also the long history of effective labor relations in the unit, as well as the position of the Activity, which is not in opposition to the amendment sought herein, I find that the Petitioner's existing certification should be amended to include all nonsupervisory professional and nonprofessional General Schedule employees of the Deputy for Electronic Technology and the Air Force Geophysics Laboratory serviced by the Central Civilian Personnel Office, Hanscom Air Force Base, Bedford, Massachusetts.

ORDER

IT IS HEREBY ORDERED that the unit description sought to be amended herein for which the National Federation of Federal Employees, Professional Local 1384 was certified as exclusive representative on October 8, 1970, be, and it hereby is, amended to read: All professional and nonprofessional General Schedule employees of the Deputy for Electronic Technology and the Air Force Geophysics Laboratory serviced by the Central Civilian Personnel Office, Hanscom Air Force Base, Bedford, Massachusetts, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, security guards and supervisors as defined in the Order.

Dated, Washington, D.C.
September 21, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

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

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION,
BOSTON, MASSACHUSETTS
A/SLMR No. 905

This case involved two RA petitions filed by the Defense Contract Administration Services Region, Boston, Massachusetts, (DCASR) which, in effect, sought a determination by the Assistant Secretary as to the impact of a reorganization on certain units of exclusive recognition represented by the National Association of Government Employees, Locals R1-76 and R1-181 (NAGE).

As a result of a reorganization in November 1976, the Defense Contract Services District, Hartford, Connecticut, (DCASD), was disestablished and replaced by two Defense Contract Administration Services Management Areas, (DCASMAs) in Hartford and in Bridgeport. Prior to the reorganization, the DCASD, Hartford, was comprised of four Defense Contract Administration Services Offices (DCASOs), including an area office at Bridgeport exclusively represented, along with the Hartford District Office employees, by the NAGE Local R1-76, and three offices at plant sites, DCASO, Avco, exclusively represented by the NAGE Local R1-181, DCASO, Hamilton Standard, represented by the American Federation of Government Employees, AFL-CIO, Local 1906 (AFGE), and DCASO, General Electric, Burlington, exclusively represented by the NAGE Local R1-170.

The DCASR took the position that the 1976 reorganization changed the character and scope of the exclusively recognized units so as to render them inappropriate, and that, as a result of the reorganization, there now existed two separate units, DCASMA, Hartford and DCASMA, Bridgeport. The NAGE Locals R1-76 and R1-181, did not object to the unit descriptions as defined by the DCASR. However, they disagreed as to whether Local R1-76 is the exclusively recognized representative in both DCASMAs.

In Case No. 31-10642(RA) the Assistant Secretary found that the unit exclusively represented by the NAGE Local R1-76 at the Hartford, DCASD, while diminished in personnel and geographic area, continued, after the reorganization, to remain appropriate for the purpose of exclusive recognition. He noted that the employees in the Hartford, DCASMA, continued to share a clear and identifiable community of interest and that the unit will continue to promote effective dealings and efficiency of agency operations by establishing a unit structure which coincides with the Activity's command structure and which constitutes the level at which

agreements may be negotiated. In the Assistant Secretary's view, the reorganization did not essentially alter either the mission or type of duties performed. He noted that personnel policies and practices, including promotions, classifications and training, are still established within regional headquarters. He also noted that bargaining unit employees continue to be serviced by the DCASR Personnel Office concerning personnel matters and labor relations guidance continues to flow from DCASR headquarters. Accordingly, the Assistant Secretary ordered that the petition in Case No. 31-10642(RA) be dismissed.

In regard to the petition in Case No. 31-10651(RA) covering the newly established DCASMA, Bridgeport, the Assistant Secretary noted that after the reorganization the DCASO, Bridgeport, physically moved to the offices of the DCASO, Avco, which was disestablished, and they were designated as the DCASMA, Bridgeport. He found that the employees of the former DCASO, Bridgeport, exclusively represented by NAGE Local R1-76, and the employees of the former DCASO, Avco, exclusively represented by NAGE Local R1-181, have become so intermingled within the DCASMA, Bridgeport, that neither unit, DCASO, Avco, nor DCASO, Bridgeport, is separately appropriate. The Assistant Secretary found that all the employees of the DCASMA, Bridgeport, perform their duties pursuant to policies and procedures established by the DCASR, Boston, and they are serviced by the DCASR Personnel Office. He noted that the employees involved enjoy common supervision, are subject to the same personnel policies and working conditions, perform their duties within the same geographic area and share the same areas of consideration for promotions and reduction-in-force procedures. Under these circumstances he found that they shared a clear and identifiable community of interest separate and distinct from other employees of DCASR, Boston. He also found that the petitioned for unit of all the employees of the DCASMA, Bridgeport, would promote effective dealings and efficiency of agency operations by reducing unit fragmentation and by establishing a bargaining unit which coincides with the Activity's organizational structure and which constitutes the level at which agreements may be negotiated. Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION,
BOSTON, MASSACHUSETTS

Activity-Petitioner

and

Case No. 31-10642(RA)

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, R1-76

Labor Organization

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION,
BOSTON, MASSACHUSETTS

Activity-Petitioner

and

Case No. 31-10651(RA)

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL R1-181

Labor Organization

and

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, LOCAL R1-76

Labor Organization

DECISION, ORDER AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated hearing 1/ was held before Hearing Officer

1/ The American Federation of Government Employees, AFL-CIO, Local 1906, hereinafter called AFGE Local 1906, petitioned for an election [Case No. 31-10614(RO)] in a unit of Nuclear Core Division employees of the (Continued)

Carol C. Blackburn. 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 Defense Contract Administration Services Region, Boston, Massachusetts, hereinafter called DCASR or Activity-Petitioner, filed RA petitions seeking a determination by the Assistant Secretary with respect to the effect of a reorganization on certain existing exclusively recognized units. In Case No. 31-10642(RA), the Activity-Petitioner contends that certain exclusively recognized units are now inappropriate as a result of a reorganization in which the Defense Contract Administration Services District, Hartford, Connecticut, hereinafter called DCASD, Hartford, was disestablished as a separate administrative entity, and which resulted in, among other things, the establishment of two separate Defense Contract Administration Services Management Areas, hereinafter called DCASMA(s), in Hartford and Bridgeport, Connecticut. 2/ In Case No. 31-10651(RA), the Activity-Petitioner contends that as a result of the aforementioned reorganization, the exclusively recognized unit at the Defense Contract Administration Services Office at the Avco Corporation facilities, Stratford, Connecticut, hereinafter called DCASO, Avco, represented by the National Association of Government Employees, Local R1-181, hereinafter called NAGE Local R1-181, has lost its organizational identity and is no longer appropriate. Under the current circumstances, the Activity-Petitioner contends that the Avco unit employees should now be included within the DCASMA, Bridgeport, unit.

1/ Quality Assurance Directorate of the Defense Contract Administration Services Region, Boston, Massachusetts, which case was originally consolidated for hearing with the above numbered RA petitions. Prior to the hearing, AFGE Local 1906 and the Activity entered into a consent agreement for an election and the case was severed from the hearing in this matter.

2/ The Activity-Petitioner contends that the appropriate units are as follows:

> All professional and nonprofessional employees of the Defense Contract Administration Services Management Area (DCASMA), Hartford, Connecticut, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order.
>
> All professional and nonprofessional employees of the Defense Contract Administration Services Management Area (DCASMA), Bridgeport, Connecticut, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order.

DCASR, Boston, is one of nine regions of the Defense Logistics Agency, formerly the Defense Supply Agency. It provides contract administration services in support of the Department of Defense and other Federal agencies, and encompasses a geographic area which includes the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York (except New York City and adjoining counties). The DCASR is headed by a Regional Commander, a military officer, whose office is located at the DCASR headquarters in Boston. Reporting to the Commander and located at headquarters are several offices and directorates which are responsible for planning and monitoring all regional operations. The offices are concerned primarily with matters regarding planning, administration, contract compliance and security problems and the directorates oversee matters regarding contract administration, production, and quality assurance.

Prior to the reorganization of November 1, 1976, there were two Defense Contract Administration Services Districts (DCASD) within the DCASR, Boston. They were the DCASD, Rochester, and the DCASD, Hartford, 3/ the subject of the instant petitions. The DCASD, Hartford, encompassed a geographic area which included the states of Connecticut and Vermont, and areas of western Massachusetts and eastern New York. Within the DCASD, Hartford, were four Defense Contract Administration Services Offices, (DCASO), including an area office at Bridgeport, which was within NAGE Local R1-76's unit, and three offices located at plant sites--DCASO, Avco, at Stratford Connecticut, 4/ DCASO, Hamilton Standard, at Windsor Locks, Connecticut, 5/ and DCASO, General Electric, Burlington, at Burlington,

3/ The record reveals that on January 11, 1968, the National Association of Government Employees, Local R1-76, hereinafter called NAGE Local R1-76, was recognized as the exclusive representative for a unit of all eligible nonprofessional employees under the jurisdiction of DCASD, Hartford, with the exception of DCASO, Avco, represented by NAGE Local R1-181, and a DCASO, at the Hamilton Standard facilities represented since October 1971, by AFGE Local 1906. The record reflects that the parties have entered into negotiated agreements in the past and that a new agreement is awaiting renegotiation pending the disposition of the instant case. In addition, prior to the reorganization, the DCASD, Hartford, included the DCASO, General Electric, Burlington, represented exclusively by NAGE Local R1-170 since 1969.

4/ As indicated above, the record reflects that on November 5, 1969, NAGE Local R1-181 was granted exclusive recognition for a unit of all eligible employees of DCASO, Avco, and that it has a currently effective negotiated agreement with the Activity covering the unit employees.

5/ The record indicates that pursuant to the reorganization, the DCASO, Hamilton Standard, is no longer an independent entity but is now only a resident branch of DCASMA, Hartford. All of the employees, except

(Continued)

Vermont.

Subsequent to the reorganization, the record reveals that the DCASD, Hartford, was disestablished and replaced by the two DCASMAs, Hartford and Bridgeport. In addition, the former three-tier chain of command--(1) the DCASR, (2) the DCASD, and (3) the DCASO--has become a two-tiered administrative structure consisting of the DCASMA's in Hartford and Bridgeport and a Defense Contract Administration Services Plant Representative Office (DCASPRO) in the General Electric Plant in Burlington, Vermont, which all report directly to the DCASR. 6/ The evidence indicates that the DCASMA's and DCASPRO are, like the DCASR, commanded by military officers, and perform essentially the day-to-day operations of the DCASR within their assigned geographic areas.

The Activity-Petitioner contends essentially that the bargaining units should coincide with the structure of the secondary field activities, the DCASMA, Hartford, and the DCASMA, Bridgeport. The NAGE Locals R1-76 and R1-181 do not object to the unit descriptions as defined by the DCASR. However, they disagree as to whether NAGE Local R1-76 is the exclusively recognized representative in both DCASMAs. NAGE Local R1-76 contends that its bargaining unit is still appropriate, that it is the exclusive representative of both DCASMAs and that NAGE Local R1-181 has lost its separate identity at Avco. On the other hand, NAGE Local R1-181 argues that it still maintains the support of a majority of DCASMA, Bridgeport, employees and should continue to represent them.

Case No. 31-10642(RA)

The record reveals that, as a result of the reorganization, there has been a substantial decrease in both personnel and the geographic area of responsibility for the former DCASD, Hartford, now DCASMA, Hartford, with

5/ the Chief and his secretary, remain at the same duty stations performing the same duties; however, the Chiefs of each of the three functional entities of quality assurance, production support and contract administration now report to their respective DCASMA Division Chief in Hartford. The DCASR had filed an RA petition for the Hamilton Standard unit in view of the reorganization; however, the petition was severed from the instant proceeding pending the disposition of a unit consolidation petition filed by the AFGE for all its units in DCASR, Boston.

6/ As the DCASPRO, General Electric, Burlington, is independent of the two DCASMAs and reports directly to the DCASR, Boston, it was not made subject to the instant RA petitons.

a corresponding transfer of personnel and geographic responsibility to the DCASMA, Bridgeport. Prior to November 1, 1976, DCASD, Hartford, employed approximately 690 persons. 7/ Subsequent to the reorganization, approximately 384 employees remain at the DCASMA, Hartford, and approximately 201 employees are now employed by the DCASMA, Bridgeport. In addition, the record shows that the DCASMA, Bridgeport, now has the responsibility for contract administration in southern Connecticut and added responsibilities in contract employment compliance and in industrial security which the former Bridgeport area office did not have.

With respect to the mission and duties performed by the DCASMA, Hartford, employees, the record reflects that the reorganization has not, except for the change in its geographic area of responsibility, essentially altered either the mission or type of duties performed. Those employees previously employed at the Hartford Office, for the most part, remain in the same location and continue to perform the same duties under the same immediate supervisors. Further, they are subject to the same personnel policies and practices established by the DCASR, Boston, such as promotions, classifications and training, and there have not been significant changes in the area of consideration for promotions and the competitive areas for reduction-in-force procedures. Moreover, the record indicates that under DCASMA, Hartford, bargaining unit employees continue to be serviced by the DCASR Personnel Office concerning personnel matters 8/ and primary responsibility and guidance in labor relations matters continue to flow from the DCASR headquarters. However, the record reflects that while DCASR, Boston, provides guidance on labor relations policy and provides Section 15 approval of all negotiated agreements, DCASMA and DCASPRO Commanders have been delegated considerable authority for administering labor relations policies within their commands and are free to negotiate agreements and consult with the exclusive bargaining representative.

7/ Prior to the reorganization, DCASD, Hartford, was comprised of 11 military officers and some 679 civilian employees who were employed as follows:

Hartford Office - 478 employees
DCASO, Bridgeport - 160 employees
DCASO, Avco - 46 employees
DCASO, Hamilton Standard - 34 employees
DCASO, G.E. Burlington - 22 employees

8/ There is an individual personnel specialist assigned to handle personnel matters for all of the DCASR secondary field activities but no on-site personnel office except at regional headquarters.

Under all of the above circumstances, I find that the RA petition in Case No. 31-10642(RA) which seeks an election in the DCASMA, Hartford, should be dismissed. Subsequent to the reorganization, the DCASMA, Hartford, employees remaining from the DCASD, Hartford, continue, in general, to fulfill the same duties with no substantial change in job functions, immediate supervision, or terms and conditions of employment as the former DCASD, Hartford, employees. Thus, I find that the former, DCASD, Hartford, unit, exclusively represented by the NAGE Local R1-76, although diminished, in part, by the loss of some former unit employees, and geographic responsibility, continues as DCASMA, Hartford, to remain an identifiable and viable bargaining unit with a clear and identifiable community of interest. Additionally, I find that such a unit will continue to promote effective dealings and efficiency of agency operations by establishing a unit structure which coincides with the Activity's command structure and which constitutes the level at which agreements may be negotiated, thus establishing clear parameters for negotiations. Accordingly, I find that the NAGE Local R1-76's unit located in the DCASMA, Hartford, remains appropriate, albeit reduced, and, therefore, I shall order that the instant RA petition be dismissed. 9/

Case No. 31-10651(RA)

The evidence establishes that, pursuant to the reorganization, the former DCASO, Bridgeport, was assigned additional personnel and responsibilities and was redesignated as the DCASMA, Bridgeport, under a Commander reporting directly to the DCASR, Boston. The record further reveals that the DCASMA, Bridgeport, physically moved to the offices of the DCASO, Avco, which was disestablished. The result of this change was that the employees of DCASO, Avco, formerly represented by NAGE Local R1-181, and the employees of DCASO, Bridgeport, formerly represented by NAGE Local R1-76, now share common supervision and have become so physically intermingled in the newly established DCASMA, Bridgeport, (now located at Avco) that neither the DCASO, Avco, unit nor the DCASO, Bridgeport, unit is separately appropriate.

All of the employees of the DCASMA, Bridgeport, perform their duties pursuant to policies and procedures established by the DCASR, Boston, and under a Commander whose authority is co-equal to that of the Commander, DCASMA, Hartford. They are serviced by the DCASR Personnel Office and

9/ While it has been found that the exclusively recognized unit herein continued, after the reorganization, to remain appropriate for the purpose of exclusive recognition, it is noted that such a finding would not preclude the filing of an appropriate petition for amendment of recognition in order to conform the recognition to the existing circumstances.

guidance in labor relations matters is similarly provided by regional headquarters. The DCASMA, Bridgeport, Commander has, as does his DCASMA, Hartford, counterpart, the authority to negotiate agreements with the exclusive bargaining representative, subject to Section 15 approval at the DCASR. The record reflects that there is no evidence of any degree of interchange between employees of the DCASMA, Bridgeport, and other commands within the DCASR and that certain of the employees of the newly established DCASMA have changed areas of consideration for promotion and reduction-in-force procedures coinciding with the new administrative organization. Moreover, the evidence establishes that the Bridgeport employees enjoy common supervision, are subject to the same personnel policies and similar working conditions, and perform their duties within the same geographic area. Under these circumstances, I find that the employees of DCASMA, Bridgeport, share a clear and identifiable community of interest separate and distinct from other employees of DCASR, Boston.

Further, I find that the petitioned for unit of all the DCASMA, Bridgeport, employees will promote effective dealings and efficiency of agency operations by reducing unit fragmentation and by establishing a bargaining unit which coincides with the Activity's organizational structure and which constitutes the level at which agreements may be negotiated. Additionally, the petitioned for unit would foster a better bargaining relationship by enabling the Commander, DCASMA, Bridgeport, who is responsible for the negotiations of agreements in the DCASMA, to administer a single negotiated agreement and to negotiate with a single labor organization.

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, of DCASMA, Bridgeport, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors 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 DCASMA, Bridgeport, excluding all nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Voting Group (b): All nonprofessional employees of the DCASMA, Bridgeport, excluding all professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors 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 R1-76, National Association of Government Employees; by Local R1-181, National Association of Government Employees; or by neither of these labor organizations.

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 R1-76, National Association of Government Employees; by Local R1-181, National Association of Government Employees; or by neither 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 R1-76, National Association of Government Employees; Local R1-181, National Association of Government Employees; or neither 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 DCASMA, Bridgeport, excluding all nonprofessional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

(b) All nonprofessional employees of the DCASMA, Bridgeport, excluding all professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors 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 of the DCASMA, Bridgeport, excluding management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 31-10642(RA) be, and it hereby is, dismissed.

DIRECTION OF ELECTION

An election 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 shall vote whether they desire to be represented for the purpose of exclusive recognition by Local R1-76, National Association of Government Employees; by Local R1-181, National Association of Government Employees; or by neither of these labor organizations.

Dated, Washington, D. C.
September 22, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

September 22, 1977

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

BUREAU OF LAND MANAGEMENT,
RIVERSIDE DISTRICT OFFICE AND
DESERT PLAN STAFF,
RIVERSIDE, CALIFORNIA
A/SLMR No. 906

This case arose as a result of a petition filed by the American Federation of Government Employees, AFL-CIO, Local 1061 (AFGE) seeking an election in a unit of all professional and nonprofessional employees of the Riverside District Office and the California Desert Plan Staff (DPS) of the Bureau of Land Management. The Activity contended that the proposed unit was inappropriate because it would contain two separately identifiable units of employees who do not share a community of interest and that such a unit would not promote efficiency of agency operations and effective agency dealings. The Intervenor, the National Federation of Federal Employees, Local 119 (NFFE) asserted that its present unit composed of Riverside District nonprofessional employees was an appropriate bargaining unit.

The Assistant Secretary found that the unit petitioned for by the AFGE was inappropriate for the purpose of exclusive recognition. In this regard, he noted that while the Riverside District Office and the DPS are both components of the California State Office, located in geographic proximity to each other, they have separate missions, different job classifications, do not enjoy integrated operations or job contacts, and do not experience significant transfer or interchange of personnel. Under these circumstances, the Assistant Secretary found that the unit sought by the AFGE lacked a clear and identifiable community of interest and, moreover, noting the authority and autonomy of the respective Directors of the District and the DPS, found that the proposed unit could not reasonably be expected to promote effective dealings and efficiency of agency operations.

However, the Assistant Secretary found that the employees of the District and the employees of the DPS, separately, would constitute units appropriate for the purpose of exclusive recognition. In this regard, the Assistant Secretary found that in each organizational component the respective employees enjoy a common mission, common supervision, have generally uniform job classifications, duties and functions, and enjoy common personnel policies and practices, and essentially similar working conditions. Under these circumstances, the Assistant Secretary found that the employees of the District and employees of the DPS, separately, share a clear and identifiable community of interest separate and distinct from each other and other state employees of the Bureau of Land Management. Moreover, noting the position of the Activity that each unit separately would constitute an appropriate unit and the fact that each Director has substantial personnel authority, the Assistant Secretary found that separate units would promote effective dealings and efficiency of agency operations.

Accordingly, the Assistant Secretary ordered elections in the units found appropriate.

A/SLMR No. 906

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BUREAU OF LAND MANAGEMENT,
RIVERSIDE DISTRICT OFFICE AND
DESERT PLAN STAFF,
RIVERSIDE, CALIFORNIA

Activity

and

Case No. 72-6537(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1061

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 119

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 Thomas R. Wilson. 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 briefs filed by the Activity and the Intervenor, 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 1061, herein called AFGE, seeks an election in a unit of all professional and nonprofessional employees of the Riverside District Office and the California Desert Plan Staff, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order. The Activity contends that the proposed unit is inappropriate because it is composed of two separately identifiable units of employees who do not share a community of interest and that such a unit would not promote efficiency of agency operations and effective dealings. The Intervenor, National Federation of Federal Employees, Local 119, hereinafter called NFFE, asserts that its present unit, composed of all the Riverside District nonprofessional employees, is the appropriate bargaining unit. 2/

The Bureau of Land Management manages the national resource lands and their resources. It also administers the mineral resources connected with acquired lands and the submerged lands of the Outer Continental Shelf. The Bureau organization consists essentially of a headquarters in Washington, D. C. and one detached headquarters office having Bureau-wide support responsibilities for State, District, and Outer Continental Shelf offices. The Riverside District is one of six operational districts within the State of California and has the responsibility for administering approximately 9.5 million acres of Federal land within five Southern California counties. Due to its vast area, the Riverside District has four area offices, two of which are located within the District Office Building in Riverside, with the other two offices being located at Barstow and El Centro. 3/ The District has approximately 70 employees in the following 33 classifications: Maintenanceman, Soil Scientist, Biological Technician, Clerk Typist, Public Contract Specialist, Outdoor Recreation Planner, Cartographic Aid, Natural Resource Specialist, Dispatcher, Wildlife Biologist, Mining Engineer, Landscape Architect, Laborer, Warehouseman, Records Management Specialist, Range Conservationist, Accounts Maintenanceman, Information Specialist, Plan Physiologist, Botanist, Electronic Technician, Technical Publication Editor, Realty Specialist, Archaeologist, Geographer, Range Technician, Clk-Dict-Mach-Transcriber, Contract Representative, Geologist, Civil Engineering Technician, Voucher Examiner, Meteorologist, and Recreation Technician.

The District is supervised by a District Director who is the selecting official for all personnel hired by the District up to GS-9. The State Director is the selecting official for GS-11 and above. The District Director establishes local policy regarding personnel and labor relations for his District, but he has no authority over Desert Plan Staff (DPS) personnel.

The record reveals that the DPS is a special staff task force, responsible to the California State Director, whose mission is to prepare a long-range comprehensive plan for the allocation of land uses and resources within the California Desert, as required by the Federal Land Policy and

1/ At the hearing, the Activity requested a postponement of one week in order to gather and prepare evidence concerning the professional status of Range Conservationists and Outdoor Recreation Planners of the Riverside District Office. This request was denied by the Hearing Officer. In view of the fact that no evidence was introduced at the hearing with regard to these classifications, I will make no determination with regard to the professional status of the employees involved.

2/ The NFFE intervened solely on the basis of its exclusively recognized unit, and did not express an interest in representing the professional employees of the Riverside District or the professional and nonprofessional employees of the Desert Plan Staff.

3/ The sought unit includes all four area offices.

Management Act of 1976 (FLPMA). This plan must be completed by September 30, 1980. The DPS functions as an integrated operational unit and includes professional, technical, administrative and management personnel. At the time of the hearing, the Riverside District provided certain administrative services to the DPS; however, it is anticipated that such services will be discontinued or substantially modified when the DPS moves to separate quarters. 4/ The DPS is headed by a Desert Plan Director who receives policy direction and guidance from the State Director. Operational practices and procedures follow Bureau of Land Management Manual requirements unless deviations therefrom are approved by the State Director.

The DPS Director is the approving official for all staff hiring decisions up to and including GS-9. The State Director has approval authority for the hiring of personnel above GS-11. The DPS contains approximately 30 employees in the following classifications: Outdoor Recreation Planner, Zoologist, Archaeologist, Cartographic Aid, Wildlife Biologist, Soil Scientist, Range Conservationist, Computer Specialist, Landscape Architect, Community Planner, Geologist, Urban Planner, Cartographic Technician, Secretary, Clerk-Typist and Clerk-Stenographer.

The DPS functions extend beyond the Riverside District to include a portion of the California Desert in the Bakersfield District. Personnel positions in the DPS are filled by the state personnel office in Sacramento and directives involving both the DPS and Riverside District employees are signed by both the Desert Plan Manager and Riverside District Director. While both the District and the DPS use similar techniques in the collection of data, each utilizes its data in a different way; i.e., interim management verses comprehensive long-range planning.

Based on all the foregoing, I find that the unit sought by the AFGE, including all professional and nonprofessional employees of both the Riverside District and the DPS, is not appropriate for the purpose of exclusive recognition under the Order. Thus, as noted above, while the District and the DPS constitute components of the California State Office and are located in geographic proximity to each other, they are engaged in totally separate missions. As a consequence, the employees in each component generally have different job classifications and functions, do not enjoy integrated operations or job contacts, and do not experience significant transfer or interchange. Under these circumstances, I find that the employees of the District and the DPS do not share a clear and identifiable community of interest. Moreover, noting the delegation to the respective Directors of significant authority and autonomy with respect to personnel and labor relations policies, I find that the claimed unit could not reasonably be expected to promote effective dealings and efficiency of agency operations.

However, I further find, under all the above circumstances, that the employees of the District and the employees of the DPS, separately, would

4/ It appears from the record that the future quarters of the DPS will be in a separate building but still within Riverside, California.

constitute units appropriate for the purpose of exclusive recognition under the Order. Thus, in each of the organizational components, the respective employees enjoy a common mission, common supervision, have generally uniform job classifications, duties and functions, and enjoy common personnel policies and practices and essentially similar working conditions. Under these circumstances, I find that the employees of the District and employees of the DPS, separately, share a clear and identifiable community of interest separate and distinct from other employees of the Bureau of Land Management and from each other. Moreover, noting particularly the position of the Activity with respect to the appropriateness of the units, and the fact that the respective Directors in both the District and the DPS appear to have been delegated substantial authority in labor relations matters concerning employees in their respective organizations, I find that such units will promote effective dealings and efficiency of agency operations.

Accordingly, I shall direct separate elections to be conducted in the following units which I find to be appropriate for the purpose of exclusive recognition under the Order: 5/

> All professional and nonprofessional employees of the Riverside District Office of the Bureau of Land Management, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.
>
> All professional and nonprofessional employees of the Desert Plan Staff of the Bureau of Land Management, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

As noted above, the units found appropriate include professional employees. However, the Assistant Secretary is prohibited by Section 10(b)(4) of the Order from including professional employees in any unit with nonprofessional employees unless a majority of the professional employees votes for inclusion in such unit. Accordingly, the desires of the professional employees must be ascertained.

Having found that the professional and nonprofessional employees of the Riverside District Office and the professional and nonprofessional employees of the Desert Plan Staff may constitute separate appropriate units, I shall not make any final determinations at this time, but shall first ascertain the desires of such employees by directing elections in the following voting groups:

5/ The parties stipulated that temporary employees of both the District and the DPS share in the community of interest enjoyed by the regular full-time employees of each organization. However, as there is no evidence in the record whether or not such employees have a reasonable expectancy of continued employment, I shall make no finding as to their eligibility.

(a) All professional employees of the Riverside District Office of the Bureau of Land Management, excluding nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order.

(b) All employees of the Riverside District Office of the Bureau of Land Management, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

(c) All professional employees of the Desert Plan Staff of the Bureau of Land Management, excluding nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

(d) All employees of the Desert Plan Staff of the Bureau of Land Management, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

The nonprofessional employees in voting group (b) shall vote whether they desire to be represented by the American Federation of Government Employees, AFL-CIO, Local 1061, the National Federation of Federal Employees, Local 119, or neither. The employees in professional voting group (a) will be asked two questions on their ballots: (1) whether or not they wish to be included with 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, AFL-CIO, Local 1061. In the event that a majority of the valid votes in voting group (a) are cast in favor of inclusion with the nonprofessional employees, and the majority of valid votes in voting group (b) are not cast for the NFFE, 6/ the votes of voting group (a) shall be combined with the votes of voting group (b).

Unless a majority of the votes of voting group (a) are cast for inclusion in the same unit as the nonprofessional employees in voting group (b), or if the majority of votes in voting group (b) are cast in favor of the NFFE, a separate professional unit will be established and an appropriate certification will be issued by the Area Administrator indicating whether or not the American Federation of Government Employees, AFL-CIO, Local 1061 was selected by the professional employees.

The employees in the nonprofessional voting group (d) will be polled whether or not they desire to be represented by the American Federation of Government Employees, AFL-CIO, Local 1061. The employees in the professional voting group (c) will be asked two questions on their ballots: (1) whether or not they wish to be included with the nonprofessional employees in voting group (d) 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, AFL-CIO, Local 1061. In the event that a majority of the valid ballots of voting group (c) are cast in favor of inclusion in the same unit as the nonprofessional employees in voting group (d), the ballots of voting group (c) shall be combined with those of voting group (d).

Unless a majority of the valid votes of voting group (c) are cast for inclusion in the same unit as the nonprofessional employees of voting group (d), 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 or not the American Federation of Government Employees, AFL-CIO, Local 1061 was selected by the professional employees.

The unit determinations in the subject case are based in part, then, upon the results of the elections among the professional employees and/or the results of the election among the nonprofessional employees in voting group (b). However, I will now make the following findings in regard to the appropriate units:

1. If a majority of the professional employees in voting group (a) votes for inclusion in the same unit as the nonprofessional employees in voting group (b), and/or a majority of the nonprofessional employees in voting group (b) does not vote for the National Federation of Federal Employees, Local 119, 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 Riverside District Office of the Bureau of Land Management, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

2. If a majority of the professional employees in voting group (a) does not vote for inclusion in the same unit as the nonprofessional employees in voting group (b), and/or the majority of employees in voting group (b) votes for the National Federation of Federal Employees, Local 119, I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

> (a) All professional employees of the Riverside District Office of the Bureau of Land Management, excluding nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

6/ The NFFE intervened in the instant petition solely on the basis of its existing recognition as the exclusive representative of the nonprofessional employees of the District [voting group (b)] and does not seek to represent any other group of employees involved herein. Accordingly, the NFFE will appear on the ballot only with respect to that group. If a majority of valid votes in voting group (b) are cast for the NFFE, the votes in voting group (a) will not be combined with the votes of voting group (b).

(b) All employees of the Riverside District Office of the Bureau of Land Management, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

3. If a majority of the professional employees in voting group (c) votes for inclusion in the same unit as the nonprofessional employees in voting group (d), 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 Desert Plan Staff of the Bureau of Land Management, excluding management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

4. If a majority of professional employees in voting group (c) does not vote for inclusion in the same unit with the nonprofessional employees in voting group (d), I find that the following two groups of employees will constitute separate units appropriate for the purpose of exclusive recognition within the meaning of Section 10 of the Order:

(a) All professional employees of the Desert Plan Staff, excluding nonprofessional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

(b) All employees of the Desert Plan Staff, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

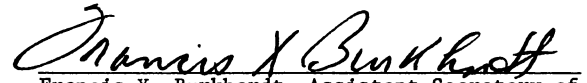
DIRECTION OF ELECTIONS

Elections 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 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 to vote in voting group (b) shall vote whether they desire to be represented for the purpose of

exclusive recognition by the American Federation of Government Employees, AFL-CIO, Local 1061, the National Federation of Federal Employees, Local 119, or neither. Those eligible to vote in voting groups (a), (c) and (d) 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 1061.

Because the above Direction of Elections involves units substantially different than that 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 elections, because the units found appropriate are substantially different than it originally petitioned for, I direct that the Activity, as soon as possible, shall post copies of the 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 units I have herein found appropriate. Such Notice shall conform in all respects to the requirements of Section 202.4(c) and (d) 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 elections among the employees in the units found appropriate.

Dated, Washington, D. C.
September 22, 1977



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

September 22, 1977

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. NAVAL STATION,
U.S. NAVAL BASE,
DEPARTMENT OF THE NAVY,
CHARLESTON, SOUTH CAROLINA
A/SLMR No. 907

This case involved a representation petition filed by the Federal Employees Metal Trades Council of Charleston, Metal Trades Department, AFL-CIO (MTC) for a unit of all employees of the Telephone Services Division, Communications Department, U.S. Naval Station, U.S. Naval Base, Charleston, South Carolina. The Activity contended, among other things, that the unit is not appropriate as it does not include employees who share a community of interest separate and distinct from the remaining unrepresented General Schedule (GS) employees at the Activity, and that such fragmentation would not promote effective dealings and efficiency of agency operations. The MTC, on the other hand, maintained, among other things, that the unit sought is appropriate as the claimed employees have a community of interest separate and distinct from the other employees at the Activity.

The record revealed that the employees in the petitioned for unit are serviced by the same Consolidated Civilian Personnel Office as the remaining unrepresented GS employees, and that all the GS employees enjoy common personnel policies and practices, including the same area of consideration for promotions and reduction-in-force procedures, common overall mission and supervision, and generally similar working conditions. Under these circumstances, the Assistant Secretary found that the claimed employees did not have a clear and identifiable community of interest separate and distinct from the other GS employees of the Activity. Further, noting that labor relations authority is vested in the Activity Commander, the Assistant Secretary concluded that the claimed unit would not promote effective dealings and efficiency of agency operations, but, rather, would result in fragmentation of the Activity's GS employees. Accordingly, he ordered that the petition be dismissed.

A/SLMR No. 907

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. NAVAL STATION,
U.S. NAVAL BASE,
DEPARTMENT OF THE NAVY,
CHARLESTON, SOUTH CAROLINA

Activity

and

Case No. 40-7631(RO)

FEDERAL EMPLOYEES METAL TRADES
COUNCIL OF CHARLESTON, METAL
TRADES DEPARTMENT, 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 Otis Chennault. 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, Federal Employees Metal Trades Council of Charleston, Metal Trades Department, AFL-CIO, herein called MTC, seeks an election in a unit composed of all employees of the Telephone Services Division, Communications Department, U.S. Naval Station, U.S. Naval Base, Charleston, South Carolina, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, guards and supervisors as defined in Executive Order 11491, as amended. The Activity contends that the proposed unit is inappropriate as it excludes certain other employees of the Activity who share a community of interest with those in the claimed unit. It contends further that the resulting fragmentation would not promote effective dealings and efficiency of agency operations and that only an activity-wide unit of all unrepresented General Schedule (GS) employees would be appropriate. The MTC asserts that the proposed unit is appropriate as the claimed employees are the only employees at the Activity providing telephone services. In the MTC's view, an activity-wide unit would not promote effective dealings and efficiency of agency operations as the employees' diverse skills, working hours, locations and functions would made it difficult to negotiate an agreement.

The mission of the Activity is to provide logistical support for all shore and sea commands assigned to the Charleston Naval Base. Headed by a Commanding Officer, it is organized into 11 Departments and 4 Staff Offices. The claimed unit is located in the Telephone Services Division, one of three divisions of the Communications Department, which provides message traffic and telephone services for the Activity and the entire Charleston Naval Complex. The Activity employs approximately 338 Civil Service employees, 800 Non-Appropriated Fund employees and 500 military personnel. At the time of the hearing herein, three exclusively recognized units were in existence at the Activity. The MTC represents an activity-wide unit of all Wage Grade employees, and also a unit of all police officers. In addition, the International Association of Fire Fighters, Local 56, represents a unit of firefighters.

The record reveals that the claimed unit, which includes 14 employees physically located in two buildings approximately two miles apart, provides telephone operator service and compiles, revises and publishes the telephone book for the entire Complex. In addition, there are approximately 87 other unrepresented GS employees assigned to various departments throughout the Activity. All GS employees enjoy generally similar working conditions and uniform personnel policies and practices. In this latter regard, the record discloses that all GS employees are serviced by the Consolidated Civilian Personnel Office (CCPO) of the Naval Supply Center, Charleston, South Carolina, pursuant to a cross servicing agreement between the Activity and the Naval Supply Center. In addition, all GS employees are in the same area of consideration for promotion and reduction-in-force procedures, and the Activity's Commanding Officer has been delegated full labor relations authority for employees under his command.

Based on all of the foregoing circumstances, I find that the unit sought herein is not appropriate for the purpose of exclusive recognition under Section 10 of the Order. In my view, the claimed GS employees do not constitute a clear and identifiable grouping of employees. In this regard, the evidence establishes that all of the GS employees at the Activity, including those in the unit sought, enjoy common overall mission and supervision, generally similar working conditions, and uniform personnel policies and practices. Accordingly, I find that the claimed unit does not include all employees at the Activity who share a clear and identifiable community of interest. Further, noting the delegation of labor relations authority to the Activity Commander, I find that the sought unit would not promote effective dealings or efficiency of agency operations, but, rather, would result in fragmentation of the Activity's GS employees. In view of the above, I shall dismiss the petition herein.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 40-7631(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 22, 1977

Francis X. Burkhardt, 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 DEFENSE,
U.S. NAVY, NORFOLK NAVAL SHIPYARD
A/SLMR No. 908

This case arose as a result of an unfair labor practice complaint filed by Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by denying union representation to four probationary employees at meetings where disciplinary action was discussed; the Respondent violated Section 19(a)(2) of the Order by discouraging employees from joining the Complainant by denying representation to four probationary employees at meetings where contemplated disciplinary action was discussed, while permitting union representation to career employees in similar circumstances; and the Respondent violated Section 19(a)(6) of the Order by unilaterally establishing and implementing a system for disciplining probationary employees different from that established by the negotiated agreement for disciplining career employees.

The Administrative Law Judge found that under the Assistant Secretary's prior holdings the Respondent did not violate the Order as alleged and reluctantly recommended that the complaint be dismissed in its entirety. In reaching this determination, he found that although the individual interviews involving the four probationary employees were "formal" in nature, they did not pertain to "grievances, personnel policies and practices or other matters affecting general working conditions of employees in the unit" within the meaning of Section 10(e) of the Order. Further, while the Respondent accorded probationary employees less rights than non-probationary employees upon the imposition of discipline, and such distinction makes union membership less attractive to probationary employees, there was no violation of Section 19(a)(2) of the Order because Respondent's conduct was not based on, or motivated, at least in part, by the union membership or activity of the employees involved. The Administrative Law Judge also found that the Complainant's allegation that the Respondent violated Section 19(a)(6) of the Order by the unilateral promulgation of Instruction 12300.1 was not properly before him because, although the Complainant amended the complaint to include an allegation of Section 19(a)(6) in this regard, it did not amend the factual allegations to include the basis of the alleged violation. Finally, the Administrative Law Judge determined that Section 19(d) of the Order and the Assistant Secretary's Report No. 49 did not preclude him from deciding the matter.

The Assistant Secretary deferred his decision in the subject case pending the Federal Labor Relations Council's (Council) Statement On Major Policy Issue concerning the representation rights of employees under the Order. The Council's statement was issued on December 2, 1976.

While agreeing with the Administrative Law Judge's conclusion with respect to the Section 19(a)(2) allegation, the Assistant Secretary found that the meetings called by management for the purpose of notifying the four probationary employees in question of their terminations were formal discussions within the meaning of Section 10(e) of the Order. In this regard, he noted particularly that the meetings involved the termination of probationary employees, who, except in a limited number of instances not relevant in this case, have no statutory appeal rights and, therefore, no right of representation upon appeal from an agency action. Additionally, he noted that the meetings were called specifically for the purpose of terminating the employees and not for investigatory purposes. Under the circumstances, he viewed such meetings as not only substantially affecting personnel policies and practices as they related to the specific employees' security, but also substantially affecting personnel policies and practices as they pertained to other employees in the bargaining unit.

Accordingly, the Assistant Secretary found that the Respondent's refusal to allow the Complainant to participate in the meetings involved and its denial of the employees' request for representation at such meetings were violative of Section 19(a)(1) and (6) of the Order and issued an appropriate remedial order.

A/SLMR No. 908

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE,
U.S. NAVY, NORFOLK NAVAL SHIPYARD

Respondent

and Case No. 22-5283(CA)

TIDEWATER VIRGINIA FEDERAL EMPLOYEES
METAL TRADES COUNCIL, AFL-CIO

Complainant

DECISION AND ORDER

On March 4, 1975, Administrative Law Judge Milton Kramer issued his Recommended Decision 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 Recommended Decision.

On July 24, 1975, the Assistant Secretary informed the Complainant and the Respondent that it would effectuate the purposes and policies of the Order to defer his decision in the subject case pending the Federal Labor Relations Council's (Council) resolution of a major policy issue which has general application to the Federal Labor-Management Relations program.

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

On December 2, 1976, the Council issued its Statement On Major Policy Issue, FLRC No. 75P-2, Report No. 116, finding, in pertinent part, that:

1. An employee in a unit of exclusive recognition has a protected right under the last sentence of Section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the

request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and

2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with Section 11(a) 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 Recommended Decision and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herein.

The amended complaint herein alleges that the Respondent violated Section 19(a)(1),(2),(5) and (6) of the Order. In essence, the Complainant contends that the Respondent violated Section 19(a)(1) and (6) of the Order by denying union representation to four probationary employees at meetings where disciplinary action was discussed and imposed; the Respondent violated Section 19(a)(2) of the Order by discouraging employees from joining the Union by denying representation to four probationary employees at meetings where disciplinary action was discussed and imposed, while permitting union representation to career employees in similar circumstances; and the Respondent violated Section 19(a)(6) of the Order by unilaterally establishing and implementing a system for disciplining probationary employees distinct from that established by the negotiated agreement for disciplining career employees.

As noted above, the Administrative Law Judge recommended that the instant complaint be dismissed in its entirety. In reaching this determination, he noted that while a rounded system of labor relations would entitle an employee, in a situation such as was involved herein, to have his union represent him at his meeting with management, he was bound by previous decisions of the Assistant Secretary. Accordingly, he found that although the individual meetings involving the four probationary employees were "formal" in nature, they did not pertain to "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit" within the meaning of Section 10(e) of the Order. Further, while the Respondent accorded probationary employees less rights than non-probationary employees upon the imposition of discipline, and such distinction makes union membership less attractive to probationary employees, in the Administrative Law Judge's view, there was no violation of Section 19(a)(2) of the Order because the Respondent's conduct was not based on, or motivated, at least in part, by the union membership or activity of the employees involved.

With respect to the Complainant's allegation that the Respondent violated Section 19(a)(6) of the Order by the unilateral promulgation of Instruction 12300.1 1/, the Administrative Law Judge concluded that such allegation was not properly before him because, although the Complainant amended the complaint to include an allegation of 19(a)(6) in this regard, it did not amend the factual allegations to include the basis of the alleged violation. Further, the Administrative Law Judge determined that Section 19(d) of the Order and the Assistant Secretary's Report No. 49 did not preclude him from deciding the matters before him.

In its exceptions, the Complainant argued that the Administrative Law Judge erred in finding that the individual meetings with each of the four employees involved herein were not "formal discussions" within the meaning of Section 10(e) of the Order; that the employees were entitled to representation under the provisions of the parties' negotiated agreement; and that the Administrative Law Judge erred in finding that the Respondent's denial of a probationary employee's right to be represented did not violate Section 19(a)(2) 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 Recommended Decision, and I shall repeat them only to the extent necessary.

Employees Banks, Cox, Harold and Knecht, probationary employees in their first year of employment, were employed in the Respondent's Shop 51, which is part of the bargaining unit represented exclusively by the Complainant. During the 12 hour shift on March 3 and 4, 1974, they were assigned certain duties by their supervisor. Upon completion of their assignment, and while following the specific instructions of their supervisor to await, upon completion of the assigned task, his return, they were discovered sleeping by Foreman Eldridge, who reported the incident in writing to Shop 51 Superintendent Robert B. McDonald. On March 5, 1974, pursuant to Article 31 of the parties' negotiated agreement, McDonald ordered Walton, the administrative officer of Shop 51, to appoint a supervisor other than Eldridge to conduct a "pre-action investigation." 2/

1/ Instruction 12300.1 dealt with the procedure for terminating temporary and probationary employees.

2/ Article 31, Disciplinary and Adverse Actions, reads, in pertinent part: Section 2

> "When it is determined by the supervisor having authority that formal disciplinary or adverse action may be necessary, an investigator will normally be appointed within 5 workdays to conduct a pre-action investigation of the incident or knowledge of the incident by the supervisor. . . . The investigator assigned will conduct whatever inquiry is necessary to determine and document the facts. In all cases . . . a discussion will be held with the employee as part of the pre-action investigation. It is agreed that during any discussion held with the employee as part of the pre-action investigation the employee shall be advised of his right to be represented by the cognizant steward. If the employee declines representation, the cognizant steward or appropriate chief steward in his absence shall be given the opportunity to be present to represent the Council . . . ."

Walton designated Gay, a foreman in Shop 51, to conduct the "pre-action investigation." Gay held a meeting on March 5 with the four employees and the Complainant's Chief Steward for Shop 51, White. Gay asked each man if he wanted White to represent him and they all replied in the affirmative. Gay informed the men of the charges against them, and the purpose of the investigation. White asked for a couple of days to prepare to represent the men, and Gay agreed.

On March 7, 1974, Gay told White that Superintendent McDonald had taken over the matter. McDonald had done so because he had been advised by Walton that since the employees were probationary, there was no necessity for a "pre-action investigation" under the provisions of NAVSHIPDNOR/SURSHIPFIVE Instruction 12300.1, which provided for the termination of probationary employees. 3/ Thereafter, McDonald, pursuant to NAVSHIPDNOR/SURSHIPFIVE Instruction 12300.1, scheduled individual meetings with the employees involved on March 8, 1974, for the purpose of terminating their employment and gave the Complainant advance notice of these meetings. In the absence of White, Brock, a steward in Shop 51, represented the Complainant. Before the meeting, McDonald told Brock that because the men were probationary employees they were not entitled to be represented at the meetings, but that he could represent the Complainant as an observer. McDonald met with each employee individually and in each case informed the employee that he was not entitled to representation but that the Complainant was entitled to an observer. During the course of the meetings Brock tried to speak several times, but McDonald stopped him each time and told him that he was only an observer and could make a statement for the Complainant at the end of the meeting. Each meeting took about five minutes and resulted in the termination of all four employees because they failed to meet the standards for satisfactory performance. 4/

3/ On August 16, 1973, Respondent issued NAVSHIPDNOR/SURSHIPFIVE Instruction 12300.1, which provided for the termination of probationary employees by the Branch or Shop Head for conduct after appointment. The Instruction made no mention of any "pre-action investigation" as described in Article 31, Section 2 of the parties' negotiated agreement.

4/ Superintendent McDonald's testimony, in part, as to what occurred at each meeting is as follows:

Q. "What did you say?"

A. "When the employee came in I informed them why he was there, for the purpose of removal action, that he was not entitled to union representation, but that the union representative was there as an observer only. And at the end of our conversation he would be given an opportunity to make any statement he wished for Council." (Tr. pp. 86.)
(Continued)

When Brock was permitted to speak, he stated that the employees were entitled to be represented by the Complainant, and that termination was too harsh for the offense with which the men were charged.

In agreement with the Administrative Law Judge, I find that Respondent's refusal to afford the probationary employees involved herein union representation during the meetings in question did not, standing alone, constitute a violation of Section 19(a)(2) of the Order. Thus, while the Respondent's disparate treatment of probationary employees and career employees may have had the effect of making union membership less attractive to probationary employees, there was no evidence that such conduct was based on, or motivated, at least in part, by union membership considerations. Accordingly, I find that the Respondent's conduct in this matter was not violative of Section 19(a)(2) of the Order.

However, I disagree with the conclusion of the Administrative Law Judge that the March 8, 1974, meetings called by management for the purpose of notifying the probationary employees in question of their termination were not formal discussions within the meaning of Section 10(e) of the Order. 5/ In this regard, I note particularly that the meetings involved the termination of probationary employees who, except in a limited number of instances not relevant here, have no statutory appeal rights and, therefore, no right of representation upon appeal from an agency

4/ Q. "Did you ask the employees any questions during the course of their interviews?"

A. "No. I simply told them that I had received a written report that they were sleeping on the job, and that since they were on a one-year probation, I felt that their employment had not met the requirements of satisfactory performance, or satisfactory conduct, [and] as a result I was going to remove them." (Tr. pp. 86, 87.)

5/ Section 10(e) of Executive Order 11491, as amended, 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 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."

action. 6/ Additionally, the meetings which were held herein were called specifically for the purpose of terminating the probationary employees and not for investigatory purposes. 7/ Such meetings not only substantially affected personnel policies and practices as they related to the specific employees' job security, but they also substantially affect personnel policies and practices as they pertain to other employees in the bargaining unit. Thus, the union representative whose representation the probationary employees were seeking would, in effect, be safeguarding not only interests of the particular employees involved, but also the interests of others in the bargaining unit by exercising vigilance to make certain that the agency does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other probationary employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like meeting where such discipline is imposed.

Further, in my view, such right of union representation will effectuate the purposes and policies of the Order by allowing the individual employee who may be too fearful or inarticulate to relate accurately what occurred, or too ignorant of the law of the shop to raise extenuating factors, the benefit of a knowledgeable union representative. In view of the probationary status of the employees in this case and their lack of appeal rights, this, indeed, may be their only opportunity for knowledgeable union representation.

Accordingly, I find that the meetings of March 8, 1974, called for the explicit purpose of terminating probationary employees, were formal discussions within the meaning of Section 10(e) of the Order. Consequently, the Respondent's refusal to allow the Complainant, the exclusive representative of the unit employees involved, the right to participate in such discussions was violative of Section 19(a)(6) of the Order. 8/ Further, noting the vested derivative right of representation at formal meetings under Section 10(e) when the employee

6/ Compare the Federal Labor Relations Council's Statement On Major Policy Issue, FLRC No. 75P-2, Report No. 116, dated December 2, 1976, at page 5, where the Council, noting that a detailed framework of statutes and regulations already protect an employee in the Federal program against arbitrary action by an agency when serious misconduct is alleged, held that an employee does not have a protected right under the Order to representation at a nonformal investigative meeting or interview to which he is summoned by management.

7/ See footnote 4 above.

8/ In agreement with the Administrative Law Judge, I view the right of an exclusive representative to be represented at such discussions to mean the right to be represented as a participant and not merely as, (Continued)

deems such representation imperative for the protection of his own employment interests, I find that the Respondent's denial of the employees' request for union representation at the March 8th meetings was violative of Section 19(a)(1) of the Order. 9/

ORDER 10/

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, U. S. Navy, Norfolk Naval Shipyard shall:

1. Cease and desist from:

(a) Conducting formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

(b) Interfering with, restraining, or coercing employees in the exercise of their rights assured by the Order by failing to grant their request for representation by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, at formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

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

(a) Notify the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, of, and give it the opportunity to be represented at, formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

8/ in this case, an observer. Being permitted to be present only as an observer would frustrate not only the labor organization's interest in the discussions but could also frustrate the fulfilling of its obligation imposed by the second sentence of Section 10(e), the obligation to represent the interests of all employees in the unit.

9/ See the Federal Labor Relations Council's Statement On Major Policy Issue, cited above.

10/ Under the particular circumstances of this case, in view of the nature of the violation herein, I find that a remedial order requiring a return to a status quo ante is unwarranted.

(b) Post at its facility at the U.S. Navy, Norfolk Naval Shipyard, 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. Navy, Norfolk Naval Shipyard 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.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 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. 22-5283(CA), insofar as it alleges violation of Section 19(a)(2) and (5) of the Order, be and it hereby is, dismissed.

Dated, Washington, D. C.
September 23, 1977

Francis X. Burkhardt, 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 conduct formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without giving the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, the employees' exclusive representative, the opportunity to be represented at such discussions by its own chosen representative.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Order by failing to grant their request for representation by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, at formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

WE WILL notify the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, of, and give it the opportunity to be represented at, formal discussions concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

_____
(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 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 DEFENSE U. S. NAVY NORFOLK NAVAL SHIPYARD Respondent	:	
and	:	Case No. 22-5283(CA)
TIDEWATER VIRGINIA FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO Complainant	:	

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For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

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DECISION

Statement of the Case

This case arises under Executive Order 11491, as amended. It was initiated by a complaint dated April 15, 1974 and filed April 17, 1974. The complaint alleged that on March 8, 1974 the head of Shop 51 held a discussion with four Shop 51 employees; that the discussion contemplated disciplinary action; and that the employees were denied representation by the Union. Such conduct was alleged to be in violation of Sections 19(a)(2) and (5) of the Executive Order. Under date of May 7, 1974 the Respondent filed an answer to the complaint with the Assistant Area Director.

Pursuant to a Notice of Hearing by the Assistant Regional Director dated June 17, 1974 and Order Rescheduling Hearing dated July 17, 1974, hearings were commenced August 22, 1974 in Norfolk, Virginia. At the beginning of the hearing, upon motion made and granted, the complaint was amended to allege that the conduct alleged in the complaint constituted also violations of Sections 19(a)(1) and (6). At the end of that day the hearing was recessed to September 3, 1974 for closing arguments which were had on that date in Washington, D. C. Both sides were represented by counsel at the hearings both in Norfolk and Washington. Timely briefs were filed by the parties on October 4, 1974.

Facts

William S. Banks, Jr., Allan Cox, Charlie Harold, and George P. Knecht, Jr. were probationary employees of the Respondent in their first year of career conditional appointments. Banks was employed on November 12, 1973, Cox on January 14, 1974, Harold on January 28, 1974, and Knecht on February 4, 1974. All four were employed in Shop 51, the electrical shop. They were employed in the unit represented by the Complainant.

On March 3, 1974 they began a 12-hour tour of duty beginning at 7:30 p.m. and ending at 7:30 a.m. on March 4. About 8:00 p.m. on March 3 their foreman, Jordan, told them and about five other employees to go with him to the aircraft carrier "Forrestal" to do some work on that ship. They finished that task about 10:30 p.m. Jordan told them to wait on the ship until they heard from him, and Jordan left. At 3:00 a.m. on March 4 they had not yet heard from Jordan. About that time Hosea Eldridge, another foreman in Shop 51 but not the foreman of these men, came by and later reported in writing to Superintendent Robert B. McDonald, the head of Shop 51, that these men had been asleep at that time. This was about five hours after the men had completed their task on the Forrestal and were waiting on the Forrestal for further

word from Jordan pursuant to Jordan's instruction. McDonald told Walton, the administrative officer of Shop 51, to appoint a supervisor other than Eldridge to conduct a "pre-action investigation" of Eldridge's charges.

Pursuant to such instruction, Walton designated Robert Gay, another foreman in Shop 51, to conduct the "pre-action investigation". Such an investigation, in accordance with the agreement between the Complainant and the Respondent, is held when discipline is contemplated. 1/ The purpose of such an investigation is for the investigator to ascertain the facts of the incident and report them to the person contemplating the imposition of discipline.

Gay arranged a meeting with the four men for March 5. Pursuant to advice from the Personnel Office, Bernard W. White, the Complainant's Chief Steward for Shop 51, was present. White had no previous knowledge of the incident. Gay asked each of the four men whether he wanted White to represent him and they all replied in the affirmative. Gay then said that the four men were charged with sleeping on the job, and that the purpose of the meeting was for Gay to develop the facts and report them to McDonald. White asked for a couple of days postponement of the investigation because he knew nothing of the matter and was unprepared to represent the four men. Gay acquiesced. Two days later White was told by Gay that McDonald had taken over the matter. McDonald had done so because on March 6 Walton had advised him that the four men were all in their first year of employment, were therefore probationary employees, and that the pre-action investigation procedure was not required.

The current "Negotiated Agreement" was signed by the parties on August 22, 1973, was approved on September 24, 1973, and by agreement of the parties became effective October 9, 1973. Article 31, Section 2 of the agreement provides for a pre-action investigation "when it is determined by the supervisor having authority that formal discipline or adverse action may be necessary". It does not distinguish between probationary and other employees in this respect, although it does make such distinction with respect to other steps in the discipline procedure. 2/ On August 16, 1973 the Respondent had issued Instruction 12300.1. It provides for termination of probationary employees by the Branch or Shop Head for conduct after appointment without mention of any pre-action investigation. On the basis of the advice he received from Walton and Instruction 12300.1, McDonald rescinded his request for a pre-action investigation.

1/ Exh. C-1, p. 71.

2/ See, e.g., Section 3 and Section 6 of Article 31, Exh. C-1.

On March 8, 1974 McDonald had individual meetings with each of the four men. White was advised by McDonald of the meetings but could not attend and sent H. D. Brock, a union steward in Shop 51, to attend on behalf of the MTC. McDonald told Brock, as he had told White, that because the men were probationary employees they were not entitled to be represented at the meetings but that the Union could have a representative present as an observer. This was before the individual meetings began. The four men were then called in one at a time. McDonald told each of them that they were not entitled to representation but that MTC could have a representative present as an observer. McDonald told each of them also that the purpose of the meeting was for McDonald to get their version of the facts pertaining to the charges Eldridge had made against them. McDonald testified, and I find, that:

> "When the employee come in I informed them why he was there, for the purpose of removal action, that he was not entitled to Union representation, but that the Union representative was there as an observer only. And at the end of our conversation he would be given an opportunity to make any statement he wished for the Council." 3/

During the discussions Brock tried to speak several times but McDonald stopped him each time and told him he was there only as an observer for the Union and would be permitted to make a statement for the Metal Trades Council at the end.

At the end of each meeting McDonald told the employee that he had not met the standards for satisfactory performance and that McDonald was going to remove him from his job, that the actual separation would be several days later, and in the meantime the employee was to return to his job. Brock then was permitted to speak and said that he believed the man was entitled to be represented by the Union and that termination was too harsh for the offense with which the man was charged. Each meeting lasted about five minutes.

McDonald, at all relevant times, was a member of Local 734 of the International Brotherhood of Electrical Workers, a constituent of the Metal Trades Council and the representative of the unit within which the four men were employed. There is no evidence of any anti-union animus by McDonald or anyone else; indeed, there is no evidence that any of the four dischargees were Union members or active in Union affairs.

A period of several days was required for McDonald's decision to have the employment of the four men terminated

3/ Tr. 86.

carried out. The employment of all four was terminated effective March 15, 1974 "due to sleeping during working hours". 4/ Each of the men was told, and in accordance with Civil Service Commission regulations, that as a probationary employee he could appeal his termination to the Civil Service Commission only on the grounds that his termination was based on such grounds as race, religion, sex, and the like.

On April 16, 1974, the day before the complaint in this case was filed, the Union presented a grievance on behalf of one Montgomery who was a career-conditional employee in his probationary first year of employment, the same status as the four men here involved. Montgomery had also been removed by McDonald after a discussion at which he was not permitted to have representation but at which a representative of MTC was permitted to be present as an observer. Representation was denied to Montgomery, and the Union's representative was permitted only observer status, on the same grounds that the Respondent took such position in this case.

The Respondent does permit union representation to non-probationary employees in the unit at a pre-action interview at which discipline is contemplated.

Contentions of the Parties

The Complainant contends:

1. The denial of representation to the four men violated Sections 19(a)(1) and (6) of Executive Order 11491, as amended, because Section 10(e) of the Executive Order gives the Union the right to represent employees in the unit at meetings the purpose of which may be the termination of employment of individual employees.

2. The Respondent violated Section 19(a)(2) by discouraging probationary employees from joining the Union by denying representation to probationary employees at such meetings while permitting representation to other employees in similar circumstances.

3. The Respondent violated Section 19(a)(6) by unilaterally establishing and implementing a system for disciplining probationary employees different from the system for disciplining other employees.

4. The fact that the Respondent's conduct may also be in violation of the contractual discipline procedure and that the Union had commenced a grievance on behalf of another employee in the same circumstances the day before filing the complaint in this case does not bring this case within the provisions of the second sentence of Section 19(d) of the Executive Order prohibiting the pursuit of the same issue under both the grievance procedure and the unfair labor

4/ Exh. C-4.

practice procedure of the Executive Order.

The Respondent contends:

1. The filing of the grievance on behalf of the fifth employee the day before filing the complaint in this case precludes the Complainant from pursuing the unfair labor practice remedy on behalf of the four employees here involved.

2. The policy expressed by the Assistant Secretary in Report No. 49, that where an unfair labor practice complaint is predicated on a disagreement over the proper interpretation of a collective agreement which provides a procedure for resolving the disagreement, the parties will be left to the contract remedy, calls for the dismissal of the complaint.

3. The Complainant had no right under the Executive Order to represent the four employees, and the employees had no right to representation under the Executive Order, at the pre-discipline meetings.

4. Denying representation to probationary employees at pre-discipline discussions while permitting representation to other employees was not unlawful discrimination in violation of Section 19(a)(2).

5. The termination of the probationary appointments of the four employees was not the imposition of discipline but was part of the process of continuing evaluation of probationary employees.

Discussion and Conclusions

I. Whether the Complainant is Pursuing Both the Grievance Procedure and an Unfair Labor Practice Over the Same Issue

The second sentence of Section 19(d) of the Executive Order provides:

> "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."

The day before the complaint in this case was filed, the Complainant filed a grievance under the contract grievance procedure. The grievance arose because an employee, Montgomery, a probationary employee in Shop 51, was called in to see McDonald who was contemplating separating Montgomery from his employment. Montgomery asked for a Union representative, and McDonald told Brock, who apparently was present, that as a probationary employee Montgomery would not be permitted to

have Union representation at the discussion. 5/ The merits of the propriety of the procedure followed in the Montgomery case are the same as the merits of the propriety of the procedure followed in the termination of the four employees here involved.

The Respondent argues that: the Montgomery grievance raised the "issue" of whether a probationary employee is entitled to representation by the Complainant at a discussion with the deciding official on whether his probationary appointment should be terminated and the "issue" of whether the Complainant has a right to be "represented" at such discussion; the same issues are raised in this proceeding under the unfair labor practice procedure of the Executive Order by a complaint filed a day later than the filing of the grievance in the Montgomery case; ergo, the Complainant made an irrevocable election in the Montgomery instance to pursue the contract grievance procedure for the resolution of such issues and is precluded by the above-quoted provision of Section 19(d) of the Executive Order from pursuing the unfair labor practice procedure of the Executive Order with respect to the four employees. I cannot subscribe to such verbal literalism.

To be sure, the second sentence of Section 19(d) literally speaks in terms of "issues" that may be raised under the grievance procedure or the unfair labor practice procedure. The Respondent candidly concedes that its position is predicated on Section 19(d) being "issue oriented" and not "incident oriented". 6/

It is antithetical to the common-law tradition to find that one who is wronged (assuming he was wronged) and pursues one remedy against the wrongdoer is bound, unto eternity or a change in the contract or a change in the remedial legislation, whichever first occurs, to pursue the same remedy against the same wrongdoer if the same wrong should again be committed. The termination of the appointment of Montgomery does not raise the same issues in a realistic sense, or may not, as the termination of the appointments of the four employees. The record does not show why Montgomery was terminated.

I conclude that the second sentence of Section 19(d) refers not to issues in the abstract but issues in the same

5/ Exh. R-1, Attachment No. 2. The grievance form showed that H.D. Block, an electrician, was the grievant and was signed by him as the "employee". It was signed by him also as the "chief steward". Whatever nomenclature may have been used, I have found above in the text that the grievance was presented by the Complainant. The particular appellations used by those interested should not be governing.

6/ Brief, p. 30.

incident. Accordingly, presenting the issues by the grievance procedure in the Montgomery case did not preclude the Complainant from presenting the same issues in the cases of the four employees in an unfair labor practice proceeding.

II. Whether the Policy Expressed in Report No. 49 Precludes Entertainment of the Complaint

In Report No. 49, issued February 15, 1972, the Assistant Secretary said that:

> "...where a complaint alleges as an unfair labor practice, a disagreement over the interpretation of an existing collective bargaining agreement which provides a procedure for resolving the disagreement, the Assistant Secretary will not consider the problem in the context of an unfair labor practice but will leave the parties to their remedies under their collective bargaining agreement."

The policy announced in Report No. 49 does not have the broad sweep given to it by the Respondent's interpretation. Of course, not all contract violations are unfair labor practices. Where there is a bona fide disagreement over the meaning of a contractual provision and the Respondent acts in accordance with its interpretation, Report No. 49 would govern and the parties will be left to their remedies under their collective bargaining agreement. However, where one party initiates a course of conduct clearly inconsistent with the terms of the collective agreement, such conduct constitutes an attempted unilateral change in the agreement and would be not only in violation of the agreement but a violation of Section 19(a)(6) or 19(b)(6) and would be entertained as an unfair labor practice. Veterans Administration Hospital, Charleston, South Carolina and Service Employees International Union, A/SLMR No. 87, at page 5, August 3, 1971.

Although the Charleston Veterans Hospital case antedated Report No. 49, that Report was not intended to rescind the principle followed in that case. In NASA, Kennedy Space Center and American Federation of Government Employees the Assistant Secretary expressly so stated. A/SLMR No. 223 at page 3, December 4, 1972. See also Veterans Administration Center, Bath, New York and Local 491, National Federation of Federal Employees, A/SLMR No. 335, January 8, 1974.

In Department of the Air Force, Base Procurement Office, Vandenburg Air Force Base and National Federation of Federal Employees, Local 1001, A/SLMR No. 485, February 4, 1975, the Respondent filed with the Assistant Regional Director a motion to dismiss on the ground that the dispute was essentially a

matter of contract interpretation subject to resolution under the negotiated grievance procedure, the same contention as is made here. The Assistant Regional Director denied the motion stating that the issues went beyond merely contract interpretation and that Section 19(d) of the Executive Order gave the Complainant the election of proceeding by way of the grievance procedure or by way of complaint of an unfair labor practice. The motion was renewed before the Administrative Law Judge. In his Report and Recommendation Judge Devaney recommended that the motion be denied on two grounds one of which was that the second sentence of Section 19(d), especially in view of the explicit language of the Report and Recommendation on the Amendment of Executive Order 11491, clearly and unambiguously gave the aggrieved party the option to pursue his grievance under the grievance procedure or to pursue a remedy by way of an unfair labor practice complaint under the Order. The Assistant Secretary denied the motion without considering this point.

I conclude that the policy expressed in Report No. 49 does not preclude deciding this case under a complaint of an unfair labor practice. For this reason, and based on the conclusion reached under the preceding caption, the Respondent's Motion to Dismiss is denied.

III. The Termination of the Employment of the Four Employees Was the Imposition of Discipline

As an original proposition, it would appear beyond cavil that terminating a probationary employee's employment, during the probationary period, "due to sleeping during working hours", the reason given for "termination during probation" in the "Notification of Personnel Action", 7/ was the imposition of discipline for sleeping during working hours. Certainly this is so in any ordinary usage of words. But the Respondent argues, and even introduced evidence, that the terminations here involved were not disciplinary in nature. The argument, which has some support in Civil Service Commission regulations, 8/ is that a probationary employee is, during the period of probation, under a process of continuing examination and evaluation, and that termination during that period is part of the examining and evaluating process and not the imposition of of discipline and not reviewable. 9/ It would follow, in accordance with the Respondent's arguments, that whatever

7/ Exh. C-4.

8/ Exh. R-4, subch. 8, pp. 315-27 ff.

9/ Except on special grounds not relevant here, such as alleged termination because of sex, religion, race and the like.

rights an employee may have to a union representative to appear on his behalf with respect to discipline, he does not have the right to have a representative appear on his behalf on his examination.

Whatever legalese or personnelese the Commission or personnel officers may employ cannot change the fact that terminating a probationary employee's employment prior to the end of the probationary period "due to sleeping during working hours" is imposing discipline for sleeping during working hours. Involuntary termination of employment for misconduct is not only discipline, it is the ultimate discipline.

IV. The Respondent's Disparate Procedure in Disciplining Probationary and Non-Probationary Employees Is Not Unlawful Discrimination in Violation of Section 19(a)(2)

The Complainant argues that by permitting the Union to be present at a "pre-action investigation" of a permanent employee and recognizing the right of such an employee to have a union representative represent him at such a meeting, while denying such right to probationary employees, the Respondent makes union membership less valuable and less attractive to probationary employees, thereby discourages probationary employees from joining the Union, and therefore violates Section 19(a)(2) of the Executive Order. I find such conclusion unsound, although it has some literal validity.

Section 19(a)(2) makes it an unfair labor practice for agency management to:

> "encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, promotion, or other conditions of employment;"

The right to have a union representative act on behalf of an employee at the imposition of discipline or at a pre-discipline investigation is a condition of employment. And the Respondent does discriminate between probationary and non-probationary employees in that condition of employment. And that discrimination does make union membership less attractive to probationary employees. But I conclude that such discrimination is not in violation of Section 19(a)(2).

I conclude that not all discrimination in conditions of employment that makes union membership less valuable and therefore discourages membership would be in violation of Section 19(a)(2) of the Executive Order. I believe that for the discrimination to be proscribed it must be based on or motivated by, at least in part, union membership or activity or sympathy, that it must have a union relationship.

If the Respondent permitted all employees to be represented by the Union at the imposition of discipline and at discipline investigations, except employees named Smith, such disparate procedure would make union membership less valuable to employees named Smith and perhaps discourage them from seeking membership. But I believe that such procedure, however reprehensible otherwise, would not violate the proscription of Section 19(a)(2). The same result would follow if the discrimination were based on sex or religion or race instead of surname. The discrimination would be wrong and probably remediable, but not under Section 19(a)(2) or any other provisions of the Executive Order. I find the discrimination involved here, against employees whose status is that of probationary employee, to be of that nature.

Furthermore, the complaint alleges no facts pertaining to discrimination in a condition of employment based on employee status. There is no intimation that union animus is involved in this case. I conclude there was no violation of Section 19(a)(2) of the Executive Order.

V. The Unilateral Establishment and Implementation of a Separate System for Disciplining Probationary Employees

On August 16, 1973, the Respondent issued Instruction 12300.1 10/ concerning the termination of temporary employees or employees in a probationary period. It provides for termination of a probationary employee by the Branch or Shop Head, for conduct after appointment, after discussion with the employee. It does not mention any pre-action investigation or any representation of the employee at the discussion or otherwise. The Instruction was issued without negotiation or consultation with the Complainant. The Complainant argues that such promulgation was of a "personnel policy or practice" that was negotiable and that its unilateral promulgation without negotiation or consultation was a violation of Section 19(a)(6) of the Executive Order.

The complaint in this case states that the "Basis of the Complaint" is as follows:

> "On March 8, 1974 Mr. McDonald Shop 51 head held a discussion with four (4) Shop 51 Employees. Disciplinary action was contemplated.
>
> "Mr. McDonald denied these people representation."

There is not a word in the complaint to indicate that the Respondent improperly issued the Instruction or failed or refused to negotiate or consult about anything. Indeed, the complaint as filed does not even allege that Section 19(a)(6) was involved. At the beginning of the hearing the complaint

10/ Exh. R-3.

was amended to allege a violation of Section 19(a)(6) without amendment of the factual allegations. 11/ Indeed, the Complainant does not even contend in its brief on this point that the alleged violation vitiated the termination of the four employees; the only relief it seeks for this alleged violation is that the Secretary find that the Activity unlawfully refused to negotiate in unilaterally promulgating the Instruction. 12/

Since the complaint does not allege any facts pertaining to the Instruction or its promulgation, the issue is not properly before me and is not considered.

VI. The Denial of Representation to the Four Employees and the Refusal to Permit the Complainant to Represent Them

McDonald denied to the Complainant the right to be represented other than as an observer at his discussion with each of the four employees and denied to each of the four employees the right to be represented by the Complainant at his discussion with McDonald concerning his alleged sleeping during a tour of duty at the end of which discussion McDonald told him his employment would be terminated. The Complainant was permitted to have a representative present as an observer and not as a participant; when the representative, Brock, tried to speak during the discussions McDonald stopped him and told him he could only observe and would be permitted to make a statement at the end of the discussions.

The last sentence 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."

The right of a labor organization to be represented at such discussions means the right to be represented as a participant, not merely as an observer. Being permitted to be present only as an observer would frustrate not only the labor organization's interests in the discussion but could also frustrate its fulfilling its obligation imposed by the second sentence of Section 10(e), the obligation to represent the interests of all employees in the unit. Should agency

11/ Tr. 10.

12/ Complainant's Brief, page 29.

management deny to a labor organization the opportunity to be represented at such discussions as a participant, it would violate the proscription of Section 19(a)(6) against refusing to confer. And since all employees in the unit have the right to have the Union fulfill its obligation of the second sentence of Section 10(e) to represent them, it would also violate Section 19(a)(1).

The questions here, then, are whether the four discussions between McDonald and the four employees were formal discussions and if they were whether they concerned "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit".

I conclude that the discussions were "formal" in nature within the meaning of Section 10(e). Each discussion was with the Head of Shop 51, several supervisory levels above the employee. It was held pursuant to a formal Instruction promulgated by the Commander of the Activity, the Norfolk Naval Shipyard. The subject was a charge of serious misconduct by the employee, and, in accordance with the Instruction, the employee was to be told at the discussion whether he was to be retained. 13/ A discussion in which the employee's job is at stake and at which a decision is to be made, and communicated to the employee, whether he will be retained or terminated as an employee, cannot be characterized as an informal discussion.

The discussions here meet the test of formal discussions within the meaning of Section 10(e) of the Executive Order. There remains the question of whether they concerned "grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit."

Were this a case of first impression, I would conclude that the employees were entitled to be represented at the discussions by the Complainant and that the Complainant was entitled to be represented as a participant. Before the decision in Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 438, there were numerous decisions on both sides of the line separating discussions between an employee and higher level at which the labor organization was or was not entitled to be represented and at which the employee was entitled to be represented and discussions at which he was not entitled to be represented by the labor organization. 14/ But in view

13/ Exh. R-3, sec. 3(b).

14/ Probably the most significant for present purposes were U. S. Army Headquarters, U. S. Army Training Center, Infantry, Fort Jackson Laundry Facility, A/SLMR No. 242; Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 279; Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336; Department of Health, Education and Welfare, Social Security Administration, Great

of the decision in that case, I am constrained to conclude that the discussions here involved, although formal in nature, do not fall within the provisions of Section 10(e) of the Executive Order.

In the National Aviation Facilities Experimental Center case an employee was called by the Chief of the Division, several supervisory steps above the employee, to a meeting with him. When she arrived he told her he wanted to discuss the basis on which he believed he should issue a formal letter of reprimand to her. The employee stated she did not want to discuss the matter without her representative. The Chief denied her request. An official reprimand was issued the next day. The Administrative Law Judge concluded that the discussion was a formal discussion and governed by Section 10(e) and that the failure to afford the Union an opportunity to be represented at the discussion violated Sections 19(a)(1) and 19(a)(6) of the Executive Order. The Assistant Secretary disagreed. He did not, at least not expressly, disagree that the discussion was a formal discussion; as in this case the discussion was required by regulation. Noting the absence of a pending grievance, he held that the meeting pertained merely to the application of certain regulations to an individual employee and had no wider ramifications and hence did not involve matters encompassed within Section 10(e).

The only difference of significance between that case and this case is the degree of discipline imposed. In both cases the discipline imposed was formal discipline. I can find no indication anywhere, nor can I conclude a priori, that the degree of formal discipline imposed is determinative of whether the representative had a right to be present or the employee had a right to have the representative represent him at the critical meeting.

It could be argued that the National Aviation Facilities Experimental Center case is distinguishable from this case on the ground that in that case the employee, after the imposition of discipline, could present its imposition as a grievance and that in the grievance procedure the Union unquestionably would have the right to be represented and she would have the right to have the Union represent her. In this case the employee, as a probationary employee, could not have a second bite. But to predicate a difference in result on such distinction would in effect hold that probationary employees have greater rights to representation at formal meetings at which discipline is to be imposed than permanent employees. Such a result is nowhere indicated in the Order, nor do I find it otherwise sustainable.

14/ (continued) Lakes Program Center, A/SLMR No. 419; Internal Revenue Service, Mid-Atlantic Service Center, A/SLMR No. 421.

Nor may this case be distinguished on the ground that here there were four discussions with four employees with all having the same result, and that taken together they established a personnel policy or practice that probationary employees who slept during duty hours would have their employment terminated. That was the result in each instance, but it was not established as a personnel policy or practice in the unit. McDonald was not a personnel officer nor was he shown to have had authority to establish personnel policies or practices. He was the Head of Shop 51, only one of numerous components of the Respondent Activity. He did not establish a policy or practice even for Shop 51. He simply reached a conclusion and acted in each case. In any future case, even in Shop 51, McDonald or any one else would not be bound to reach the same result because of what was done in this case.

A rounded system of labor relations would entitle the employee, in a situation such as was involved here, to have his Union represent him at his meeting with management. For that reason perhaps the Executive Order should, since it can, be interpreted to confer such right. But I do not write on a clean slate. Such a suggestion was made by the Administrative Law Judge in the Texas Air National Guard case 15/ and rejected by the Assistant Secretary. I conclude from the decisions of the Assistant Secretary that it is his position that the meetings between an employee and management at which the labor organization is entitled by virtue of the Executive Order to be represented are only those spelled out, however loosely, in the Executive Order. I am bound by those decisions, and cannot find the meetings here involved to fall within the Executive Order.

This conclusion is not affected by the recent decisions of the Supreme Court on February 19, 1975 in National Labor Relations Board v. J. Weingarten, Inc., 43 Law Week 4275, and International Ladies' Garment Workers' Union v. Quality Manufacturing Company, 43 Law Week 4282. In those cases the Supreme Court upheld decisions of the National Labor Relations Board which had been set aside by the Courts of Appeals for the Fourth and Fifth Circuits. So far as relevant here, the facts in those two cases were identical. An employee was called in by management for an interview which the employee reasonably feared might result in the imposition of discipline. The employee requested union representation. The request was denied, and results unfortunate for the employee eventuated as a proximate consequence. The N. L. R. B., departing from its earlier precedents, held that the employer violated Section 8(a)(1) of the National Labor Relations Act which declares it an unfair labor practice for an employer to interfere with,

15/ See the ALJ Decision, p. 12, fn. 23, A/SLMR No. 336.

restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act. The right guaranteed by Section 7 that the N. L. R. B. found had been interfered with was "the right...to engage in concerted activities for the purpose of...mutual aid or protection." The Supreme Court held that such construction of that provision of Section 7 was a permissible construction and that the Courts of Appeal "impermissibly encroached upon the Board's function," the "'special function of applying the general provisions of the Act to the complexities of industrial life'" "in light of changing industrial practices and the Board's cumulative experience." 43 Law Week at 4279.

Those decisions are not persuasive of the result I should reach in this case. There is no provision in the Executive Order like the above-quoted excerpt from Section 7 of the National Labor Relations Act. But more fundamentally, the Supreme Court held in those decisions that the Board's "newly arrived at construction of Section 7" was a permissible construction, as had been its earlier contrary construction over a period of some thirty years, arrived at in the light of its greater accumulation of expertise in changing industrial practices. I read the decisions of the Assistant Secretary in the cases cited above in footnote 14 and in the National Aviation Facilities Experimental Center case as expounding the application of his expertise in this field in the manner described above in discussing those cases. Perhaps, in the application of his now greater expertise, he will reach a new construction of the Executive Order. But until then I am bound by his past decisions.

Accordingly, I must conclude that the complaint should be dismissed.

Recommendation

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: March 4, 1975
Washington, D. C.

September 23, 1977

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,
INTERNAL REVENUE SERVICE,
INDIANAPOLIS, INDIANA
A/SLMR No. 909

This case involves an unfair labor practice complaint filed by the National Treasury Employees Union and its Chapter 49 (NTEU) alleging that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by unfairly and inaccurately evaluating the job performance of the President of the NTEU Chapter, restricting her job responsibilities, and by reimplementing the security restrictions in its Classification Section, the President's work area, without notifying the Complainant.

The Respondent maintained that the Union President's performance evaluation was equitable, fair and without any showing of anti-union animus and that it was not obligated to bargain with the Complainant concerning the decision to reinstitute the security restrictions in the Classification Area as such decision is not negotiable under Section 11(b) of the Order. It contended, further, that the Complainant was made aware at meetings in October 1974, and June 1975, that the restrictions were going to be reinstituted but there was no request for bargaining.

The Administrative Law Judge, noting that performance evaluations are subjective evaluations by supervisors, found insufficient evidence to establish that the Union President's performance evaluation was discriminatory or motivated by anti-union animus and recommended that the complaint, in this regard, be dismissed. With regard to the allegation concerning the Respondent's reinstitution of security restrictions without notifying the Complainant, the Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by not formally notifying the Complainant and giving it an opportunity to meet and confer on the procedures to be observed in implementing the reinstitution of security measures in the Classification Area and on the impact of the decision on adversely affected employees. In this regard, he noted that the Complainant was never specifically or sufficiently informed when the security restrictions would be reinstituted.

In adopting the findings, conclusions and recommendations of the Administrative Law Judge, the Assistant Secretary noted that although the Respondent notified the Complainant in October 1974, of its intention to reinstitute security restrictions, it never specified when it intended to take such action. Under these circumstances, and noting the length of time between the "notice" afforded the Complainant and the action by Respondent in November 1975, the Assistant Secretary found that the Respondent failed in its duty under the Order to specifically notify the Complainant of its decision, and provide the Complainant an opportunity to bargain about the impact and implementation of the decision. Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from the action found violative, and to take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
INDIANAPOLIS, INDIANA

Respondent

and

Case No. 50-13140(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 49

Complainant

DECISION AND ORDER

On April 21, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order 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 Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

The Administrative Law Judge found, and I concur, that the Respondent violated Section 19(a)(1) and (6) of the Order by reinstituting security restrictions in November 1975, without first notifying the Complainant and affording it a reasonable opportunity to bargain concerning the impact and implementation of the decision. In the instant matter, although the Respondent apparently informed the Complainant of its intention to reinstitute the security restrictions at a meeting held on October 10, 1974, a year before the resumption of the security restrictions, it never specified when such action would take place. Similarly, at the parties' June 1975, meeting no indication was given by the Respondent as to when the Classification Section would be moved or when the security restrictions would be enforced. Under these particular circumstances, and noting the length of time between the "notice" afforded the Complainant

and the action by the Respondent in November 1975, I find that the Respondent failed in its obligation under the Order to afford the Complainant specific notice of its intentions, 1/ and to provide the Complainant with a reasonable opportunity to bargain over the procedures to be observed in implementing its decision to reinstitute the security measures, and on the impact of its decision on adversely affected employees.

ORDER 2/

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana, shall:

1. Cease and desist from:

(a) Reinstituting security restrictions without notifying the National Treasury Employees Union, Chapter 49, the exclusive bargaining representative, and affording it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be observed in implementing such change, and on the impact the change will have on adversely affected employees.

(b) 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 policies of Executive Order 11491, as amended:

(a) Upon request by the National Treasury Employees Union, Chapter 49, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in reinstituting the security restrictions which became effective in November 1975, and on the impact of the change on adversely affected employees.

1/ Compare Department of the Navy, Marine Corps Supply Center, Barstow, California, A/SLMR No. 692, and Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, A/SLMR No. 771.

2/ In its exceptions, the Respondent contended that the Administrative Law Judge's proposed remedy is, in effect, a return to the status quo ante and should not be required as a part of the remedial order herein. In my view, where, as here, there has been an improper failure to meet and confer over the impact and implementation of a management decision which is not within the ambit of Section 11(a) of the Order, generally it will not effectuate the purposes and policies of the Order to require a return to the status quo ante as part of the remedial order. See Department of the Treasury, Internal Revenue Service, Manhattan District, A/SLMR No. 841.

(b) Post at the Internal Revenue Service, Indianapolis, Indiana, 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 District Director of the Indianapolis District 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 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 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. 50-13140(CA), insofar as it alleges violations of Section 19(a)(2) of the Order, be, and it hereby is, dismissed.

Dated, Washington, D.C.
September 23, 1977

Francis X. Burkhardt, 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 reinstitute security restrictions without notifying the National Treasury Employees Union, Chapter 49, the exclusive bargaining representative, and affording it a reasonable opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures to be observed in implementing such change, and on the impact the change will have on adversely affected employees.

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.

WE WILL, upon request by the National Treasury Employees Union, Chapter 49, meet and confer, to the extent consonant with law and regulations, concerning the procedures used in reinstituting the security restrictions which became effective in November 1975, and on the impact of the change on adversely affected employees.

_____
(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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Rm. 1060 Federal Bldg., 203 S. Dearborn St., Chicago, Ill. 60604.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana Respondent and National Treasury Employees Union and NTEU Chapter 49 Complainant	Case No. 50-13140(CA)

David J. Markman
Columbus, Ohio
For the Respondent

Lesley M. Guyton, Esq.
Washington, D.C.
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed April 1, 1976, by National Treasury Employees Union and NTEU Chapter 49 (hereinafter called the Union) alleging that Department of the Treasury, Internal Revenue Services, Indianapolis, Indiana (hereinafter called the Activity) violated Section 19(1),(2) and (6) of the Executive Order 11491, as amended, the Regional Administrator of Labor-Management Services Administration for the Chicago Region issued a Notice of Hearing on complaint on September 16, 1976. The complaint alleged that the Respondent Activity engaged in discriminatory treatment of the president of the local chapter of the Union in the following manner:

(a) Unfairly and inaccurately evaluating her job performance because of her union activities.

(b) restricting her job responsibilities by taking away work she previously performed and refusing to inform her of changes in procedures and programs.

(c) refusing to assign her work to perform.

(d) interfering with her right and the right of other employees to discuss job or union-related matters by restricting her right to meet and confer with employees.

A hearing was held on the issues in this case on November 18, 1976, in Indianapolis, Indiana. All parties were represented by counsel and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were submitted by counsel and have been duly considered in arriving at the decision in this case. 1/ The Union brief withdrew that portion of the allegations relating to the restriction of job responsibilities and the refusal to assign work to Ms. Brickens. Accordingly, no findings will be made on this aspect of the Complaint.

Upon the entire record in this matter, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

Chapter 49 of the Union is the exclusive representative of all district bargaining unit employees of the Respondent Activity within the state of Indiana. It has held this status since July 1971. The labor organization and the Activity are parties to a Multi-District Agreement between the National Treasury Employees Union and the Internal Revenue Service.

1/ The time for filing briefs was orginally set for December 20, 1976. Because of the failure of the official reporter to supply copies of the transcript to the parties the time for submitting briefs was extended on three different occasions. The final extension was until March 25, 1977.

Ms. Jenny Brickens has been the President and Chief Steward of Chapter 49 since it first achieved exclusive recognition. She is employed as a clerk-stenographer for the Returns Program Manager in the Classification Area of the Audit Division. Among other things, her duties initially included preparing statistical reports on audit programs, initial screening of informants' letter, maintaining control and records on special audit programs as well as general clerical duties for the Returns Program Manager. 2/

Ms. Brickens first supervisor and the person under whom she worked the longest period of time was Robert Rawley. He was the Returns Program Manager from mid-1968 until July 1974, when he retired. 3/ Rawley was succeeded by Robert Padilla, for a period fo approximately a month. On August 4, 1974, Robert Bennett became the Returns Program Manager and was Brickens' supervisor during the time that the issues arose in this case.

Under the IRS regulations the Classification Area was considered a restricted area. (Respondent Activity Exhibit No. 1). This means that access was limited solely to authorized employees. The requirements set forth in the IRS Manual regarding "restricted areas" states as follows:

2/ The above recital of Ms. Brickens' duties is in general terms and does not purport to include all of her job-related responsibilities. Her job description is in evidence as Complainant Union's Exhibit No. 2. However, a number of the duties set forth in the job description have been changed or removed because of changes in IRS procedures or consolidation of functions for reasons of efficiency.

3/ Rawley retired to Florida and an affidavit given by him was received in evidence, over the objection of the Respondent Activity. (Complainant Union Exhibit No. 1). The affidavit is considered herein only insofar as it relates to Rawley's satisfaction with Brickens job performance and the freedom of access employees had to come into Brickens' area to discuss job-related problems with her.

241 Restricted Area

> A restricted area is an area to which access is limited to authorized employees. Restricted areas shall be prominently posted as such and shall be separated from non-restricted areas by physical barriers which will eliminate free access. Bank-type partitions, rows of file cabinets or similar barriers will suffice for this purpose. The number of entrances to a restricted area should be kept to a minimum and each entrance should be controlled....

From 1972 to July 1974, the Returns Program Office was located in the Consolidated Building. This was several blocks away from the main offices of the Activity which were in the old Federal Building. Although Ms. Brickens' office was a part of the Classification Division, the regulations requiring the restriction of her area were not enforced because the actual classification of returns was being performed in the old Federal Building. This was the same situtation which prevailed prior to 1972 when the Returns Program Office was located in the Century Building -- away from the main IRS offices. The testimony and record evidence indicates that while Ms. Brickens was located in the Century and Consolidated Buildings, all employees were free to come to her desk to discuss job-related matters with her in her capacity as union president and chief steward.

In July 1974, the Returns Program Office was moved into the old Federal Building and physically relocated in the Classification section. However, the employees continued to have unrestricted access to Ms. Brickens on union matters until sometime in 1974. There is dispute in the testimony as to how and to what extent management curtailed this practice. Ms. Brickens testified that in October there was publicity over informational picketing taking place outside the building, and a news reporter was directed to her as the chief union official. According to Brickens, this incident resulted in Vernon Dawson, Chief of the Administration Division, informing her that unauthorized persons were not allowed in the restricted area. Brickens testified that he did not mention employees of the Activity, and she interpreted his restriction to apply to non-IRS personnel. However, on cross-examination she acknowledged that after the incident she met with individuals in designated conference rooms

outside the area and that she may have met with employees in these conference rooms. Dawson and Bennett testified that in October 1974, Dawson began to enforce the restricted area requirements and so informed Brickens. Dawson stated that he provided several conference rooms outside the area to Ms. Brickens to allow her to confer with employees who were not authorized to enter the Classification Section. He also informed her that if the conference rooms were occupied, he would make other space available to her. In view of Brickens' acknowledgement that she did meet with individuals in the conference room and that she may have met with employees there, I credit the testimony of Dawson and Bennett regarding this arrangement.

In December 1974, the Respondent Activity moved its entire operation into the new Federal Building. Management had been meeting regularly with the union representatives for more than a year prior to discuss the details and the impact of the move upon the employees. Brickens did not recall any discussion regarding enforcement of the security arrangements for the Classification Section, but a joint summary of a meeting held on October 10, 1974, discloses that this subject was considered by the parties. (Respondent Activity Exhibit No. 2). The matter was of concern to management because "anyone wishing to see the union president" (Brickens) had "to go through the Returns Classification Area." Dawson testified that he informed Brickens there had been an oversight in the planning, and the Classification Area would be open and exposed when they first moved into the new building. He stated this could not be corrected until the building was fully occupied and the contractor turned control over to GSA. Because Dawson's testimony in this regard is consistent with the jointly signed summary, I credit his account of this meeting.

After the Respondent Activity moved into the new Federal Building, the restrictions for the Classification Area were not enforced by management. The area was not partitioned off due to the planning oversight, and employees were free to come to Brickens' desk to discuss matters with her that required union advice or assistance.

Brickens' desk was located near the entrance to Bennett's office. Her discussions with employees, both in person and on the telephone, were a cause of concern and irritation to Bennett. On one occasion, when an employee from another section was seated beside Brickens' desk discussing a matter

nvolving an investigation of her conduct, Bennett called that employee's supervisor to ascertain if she had advised him that she was going to see the union official. This was a requirement contained in the negotiated agreement. On another occasion, on a Saturday, Bennett was in the office and decided to move Brickens' desk away from the entrance to his office to a position closer to the doorway leading to the public hallway. Mattingly, Vice President of the union was in the office that day and offered to assist Bennett. Mattingly testified that Bennett volunteered that he was moving Brickens' desk to get her away from him as "he was tired of listening to people come in and talk to Jenny", and "he didn't know what he could do, but he was tired of carrying all of that dead time in his unit." As a partial solution to this problem, he moved Ms. Brickens' desk further away so her union business would be more private and he would not be disturbed by her telephone conversations. 4/

The year 1975 was an unfortunate period personally for Ms. Brickens. She was compelled to take leave from her job at various times due to death in her family, serious illness of her husband, and her own personal illness. In September 1975, Bennett completed his first supervisor's promotion appraisal evaluation of Brickens. He rated her as a "satisfactory" employee and assigned her a numerical rating of 3 on all of the evaluation factors. 5/ In all of her prior appraisals by Rawley, dating back to 1970, she was rated "satisfactory", but the numerical rating assigned to the evaluation factors were generally higher than 3. 6/ Brickens took issue with Bennett's appraisal and refused to sign it. She told him she felt his assessment of her job performance was too low. 7/

4/ See attachment to Assistant Secretary Exhibit No. 1-C.

5/ A rating of 3 is a satisfactory rating under the terms of the negotiated agreement.

6/ Assistant Secretary Exhibit 1-C; Complainant Union Exhibit Nos. 3, 4 and 5.

7/ When questioned at the hearing, Bennett testified that at no time did he take into account Brickens' absence from the job; whether union-related or for personal reasons. He stated that his evaluation was based on the employee's job performance, and absences, regardless of reason, did not effect the evaluation either way.

Sometime in November 1975, Ms. Brickens was on extended leave because her husband had suffered a stroke. While she was out, Bennett and the Chief of the Audit Service Branch issued a joint memorandum to the audit managers reminding them that the Service Branch and the Classification Area were security areas with access limited to authorized personnel. The memorandum stated that enforcement of the security requirements had been "rather relaxed due to our physical layout", but that the regulations would now be enforced as the remodeling had been completed. The remodeling referred to in the memorandum consisted of erecting partitions to wall off an area on the same floor, and moving the Returns Classifications Section and the Audit Service Branch within that space. 8/ The following day, Bennett issued a memorandum to the employees under his supervision (Assistant Secretary Exhibit 1-C, Attachment 6) reminding them of their responsibility to see that the security regulations were enforced. The only exceptions made to the restrictions were for the secretaries of the division chief and the examination branch chiefs. This was to allow them access to the coffee maker to get coffee for their respective supervisors.

It is clear there was no discussion between management and the union representatives in Ms. Brickens' absence regarding the reimposed security restrictions. Management indicated that it felt there was no need to discuss the matter because Ms. Brickens was the only representative of the Union affected by the security limitations. Therefore, a decision was made to wait until she returned to work before informing her of the renewal enforcement of the regulations.

When Ms. Brickens returned in December 1975, she was told by Dawson and Bennett that the security restrictions would be enforced again. She mentioned to Dawson that it would impede her in her representational duties as union president and chief steward because it would make it difficult

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8/ This had been the subject of a discussion at a labor-management meeting in June 1975. Ms. Brickens testified that nothing was said at this meeting about enforcing the access restrictions. However, Dawson recalled that it was mentioned and the notes summarizing that meeting (although not signed by Brickens) indicated there was discussion on "shifting the Service [Audit] Branch and the Returns Classification" section. (Respondent Activity Exhibit No. 3).

for employees to get to her. She asked if the area where her desk was located could not be carved out as an exception to the security requirements. Dawson said this was not permissable under the regulations, but that management would provide her with the use of three conference rooms which were adjacent to her office off of the public hallway. Management stated that if these rooms were occupied at the time she needed to confer with the employees, another room would be secured for her. Ms. Brickens continued to object that the security requirements would make it impossible for her to carry out her duties as union president.

On December 30, 1975, the union officials and management met to discuss a number of matters. During the course of discussion Ms. Brickens again raised the subject of the reimposition of the security restrictions and the limitation it would place upon the employees seeking to confer with her. Management took the position that the IRS regulations could not be altered, and reaffirmed that arrangements were made for the use of one of the three available conference rooms. Management indicated that it was aware it would be an inconvenience to Ms. Brickens in carrying out her union activities, but it had no choice other than to place these restrictions into effect. (Respondent Activity Exhibit No. 5).

Contention of the Parties

The Union contends that the performance evaluation by Bennett on September 15, 1975, was based on improper considerations relating to her position and involvement as an officer of the labor organization. The Union further contends that the resumption of the security of restrictions for the Classification Area in November 1975, constituted a change in existing practices whereby the Activity permitted employees to freely meet and confer with Ms. Brickens, as the chief representative of the labor organization. It is argued that the Activity had an obligation to notify the Union prior to changing the practice and afford it an opportunity to negotiate on the impact the resumed restrictions would have upon the employees and Ms. Brickens.

The Activity argues that the evaluation appraisal was not discriminatory as there was no showing that the rating was motivated by anti-union animus on the part of Bennett. As to the renewed enforcement of the security restrictions, the Activity takes the position that

under Section 11(b) of the Order 9/ the duty to bargain concerning the security restrictions is specifically excluded from the negotiating process. While the Activity acknowledges that there is a duty to negotiate on the impact of the decision to enforce the security regulations, it contends that the union officials never requested negotiations for this purpose; although they were aware that the restrictions were going to be resumed.

Concluding Findings 10/

Considering first the allegation that the performance appraisal of Ms. Brickens was discriminatory motivated, I find and conclude that the record evidence does not support this claim. The testimony shows that Ms. Brickens, as the senior union official responsible for representing the unit employees throughout the entire state, received numerous visits and telephone calls from employees on job-related problems. The affidavit of Rawley indicates that he did not find this to be an irritant, nor did he feel that it interfered with her job responsibilities while he was her supervisor. It is evident, however, that the conversations, both in person and on the telephone, were a source of annoyance and irritation to Bennett. On one occasion he called the supervisor of a visiting employee to ascertain whether she had received permission to make such a visit to the union official, as required by the negotiated agreement. He also moved Ms. Brickens' desk from the close proximity to his office to a position nearer to the public hallway when the offices were relocated to the new

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9/ Section 11(b) of the Order states in pertinent part:

> 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... its internal security practices. (Emphasis supplied).

10/ As noted, no findings are made herein concerning the withdrawal of duties or the failure to assign work to Ms. Brickens.

Federal Building. However, there is a distinction between irritation on the part of a supervisor over numerous visits and conversations relating to union matters and actions which manifest anti-union animus. At no time did Bennett interfere with Ms. Brickens performance of her responsibilities as a union official. Indeed, it might be said that the relocation of her desk was as much for her convenience as his, since it afforded her more privacy in her conversations both on the telephone and face to face with employees. Nor can it be said that when Bennett contacted the supervisor of one of the employees who was conversing with Ms. Brickens, that he was doing anything other than ascertaining whether the requirements of the negotiated agreement were being followed.

It is well understood that a performance evaluation is a subjective appraisal by a supervisor. Department of Transportation, Federal Aviation Administration, Houston Area Office-Southwest Region, A/SLMR No. 126 (January 24, 1972). The mere fact that all of Ms. Brickens' prior appraisals by Rawley were numerically higher than the appraisal given by Bennett on September 15, 1975, does not, in the absence of evidence of antipathy toward her because of her union activities, indicate that the appraisal was discriminatory motivated. It should be noted that both Bennett and Rawley considered her to be a satisfactory employee and their ratings reflected this judgement. On the basis of the record evidence, I find that the Union has failed to establish that Bennett's evaluation of Ms. Brickens was anything other than his honest assessment of her performance of her job duties. 11/

Accordingly, I find and conclude that the record does not support a finding that the evaluation appraisal of Ms. Brickens was discriminatory, or that her rating was lowered because she was involved in activities on behalf of the labor organization. For this reason, I find that the Union has failed to sustain the burden of proof by a perponderance of the evidence as required by Section 203.15 of the Regulations, and that this allegation of the complaint must be dismissed.

The issue regarding the resumption of the security restrictions for the Classification Area presents a closer question in my opinion. It is clear from all of the testimony and the evidence in this record that prior to moving into the

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11/ Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, A/SLMR No. 523 (June 24, 1975).

new Federal Office Building, management officials were very lax about enforcing the limited access requirements as they related to the Returns Program Section. This was due, in part, to the physical arrangements when that section was located in the Century and Consolidated buildings. The creditable testimony of Dawson indicates that the actual classification of tax returns was being performed in the old Federal Building, and there was no real need to impose the restrictions on the section where Ms. Brickens was employed. Although the restrictions were enforced for approximately a month when the Returns Program Unit moved into the Old Federal Building, they were relaxed by necessity when the entire office moved into the new building because of the failure to plan for the partitioning-off of the Audit Branch and the Classification Area. While it is not clear that management specifically informed the Union that the security requirements would be reinstated once in the new office building, there is indication -- at least in June 1975 -- that management did advise the union representatives that the Audit Branch and the Classification Area would be moved once partitions were installed.

However, it is management's conduct after the June meeting which gives rise to the central issue on this aspect of the case. Once the remodeling was completed, management immediately issued a memorandum indicating that the restrictions were reimposed. Ms. Brickens was absent from work for personal reasons at the time the memoranda were issued to audit managers and employees in the Classification Section. It is evident that none of the union officials were formally notified of the decision prior to its implementation, and thus were not afforded an opportunity to consult and confer on the impact the restrictions would have on unit employees who had enjoyed unlimited access to the Chief Steward. Management's explanation for this action was that Ms. Brickens was the only person affected and there was no need to discuss the matter until she returned to work. In my opinion, this conduct falls short of the obligations imposed upon management by the Executive Order. When an agency action falls within the scope of Section 11(b) of the Order, there is still an obligation to give reasonable notice to the exclusive representative to afford it amply opportunity to request bargaining -- not on the decision, but on the procedures involved and the impact on employees adversely affected--

prior to its implementation. 12/ In the instant case there was no advance notification, nor was this failure justified by the fact that Ms. Brickens was on leave at the time. There were other union officials available, and the decision affected employees generally as well as Ms. Brickens in her capacity as president and chief steward. Although the Activity asserts that the Union was notified of this action during the meeting in June 1975, I do not find that the union officials were specifically informed that the security limitations would be resumed at this meeting. They were advised that the Audit Branch and the Classification Area would be moved once the partitions were installed. If this implied that the security arrangements would then be enforced, I find that it was not specific or sufficient notification to satisfy the requirements under the Order. Nor did the subsequent discussion with Ms. Brickens cure the violation. In each of these discussions management presented the union with a fait accompli, and there was no meaningful bargaining on procedures or impact. I am not unmindful that management made available to the Union the conference rooms outside the restricted area. But this was solely management's decision -- made without consulting or conferring with the union representatives. It is entirely possible that the parties would have agreed to the solution directed by management, or they may not have, but that is not the issue here. It is the opportunity to engage in meaningful negotiation in situations as presented by this case, that the Order preserves in order to foster harmony in labor-management relations.

Accordingly, I find that the Activity violated Section 19(a)(6) of the Executive Order by resuming enforcement of the security restricitons in November 1975, without first notifying the Union and affording it a reasonable opportunity to negotiate on the procedures involved and the impact on the employees adversely affected by the decision. 13/ This

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12/ Cf. Department of the Treasury, Internal Revenue Service, Brookhaven Service Center, A/SLMR No. 814 (March 29, 1977); Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656 (May 28, 1976).

13/ I do not find that the facts of this case are controlled by the recent decision in Internal Revenue Service, Brookhaven Service Center, supra. There is no question here that the Activity's action caused a change by restricting access which was previously permitted.

conduct also has a concommitant coercive effect upon and interfered with the rights assured employees under Section 19(a)(1) of the Order. I do not find, however, that the above conduct violates Section 19(a)(2) of the Order. It is evident from the circumstances of this case that the conduct was not intended to discourage union membership nor did it have such an effect.

Having found that the Respondent Activity has engaged in conduct which violates Section 19(a)(1) and (6), I shall recommend that the Assistant Secretary adopt the following Recommended 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 203.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that Department of the Treasury, Internal Revenue Service, Indianapolis, Indiana, shall:

1. Cease and desist from:

   (a) Resuming enforcement of security area restrictions required by regulations without first notifying National Treasury Employees Union and NTEU Chapter 49, as the exclusive bargaining representative, and affording it a reasonable opportunity to consult and confer on the procedures involved and the impact of the security restrictions on employees adversely affected by them.

   (b) In any like or related manner interfere with, restrain, or coerce 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) Notify National Treasury Employees Union and NTEU Chapter 49 of any intended resumption of enforcement of security restrictions and, upon request, consult and confer in good faith on the procedures involved and the impact on employees adversely affected thereby.

(b) Post at the Internal Revenue Service, Indianapolis, Indiana, 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 Administration Division and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicious 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 203.27 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.

Gordon J. Myatt
GORDON J. MYATT
Administrative Law Judge

Dated: 21 APR 1977
Washington, D.C.

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 resume enforcement of security area restrictions without first notifying National Treasury Employees Union and NTEU Chapter 49 and affording that labor organization a reasonable opportunity to consult and confer on the procedures involved and the impact of the resumption on employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employes in rights assured by Executive Order 11491, as amended.

WE WILL notify the above labor organization of any resumption of security area restrictions and afford it a reasonable opportunity, upon request, to consult and confer on the procedures involved and the impact of that decision on employees.

_____
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 any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor Management Services Administration, United States Department of Labor, whose address is: Room 1033 - B Federal Building 230 S. Dearborn Street, Chicago, Illinois 60604.

September 23, 1977

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 COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
NATIONAL WEATHER SERVICE, CENTRAL, WESTERN AND SOUTHERN REGIONS
A/SLMR No. 910

Petitions were filed by employees of the three activities involved seeking to decertify the Incumbent-Intervenor, National Association of Government Employees, Councils of Central, Western, and Southern Regions Locals (NAGE), as the exclusive representative in three units containing professional and nonprofessional employees. The National Weather Service Employees Organization, MEBA, AFL-CIO (NWSEO) was granted intervention in each case. The NAGE indicated its opposition to any election conducted which provided for a self-determination election for the professional employees, contending that Section 10(b)(4) of the Order requires such an election only upon the establishment of a unit and, therefore, such an election is only required where either a new professional-nonprofessional employee unit, or a change in the established unit, is proposed. It refused to enter into consent election agreements providing for such a self-determination election.

This matter was brought before the Assistant Secretary pursuant to a Regional Administrator's Order Consolidating and Transferring Cases pursuant to Section 206.5(a) of the Assistant Secretary's Regulations solely for the purpose of determining, under the particular circumstances involved herein, whether the professional employees should be granted a self-determination election.

The Assistant Secretary found that, under the particular circumstances herein, the elections to be conducted in this matter are subject to the requirements of Section 10(b)(4) of the Order. Accordingly, he ordered the cases remanded to the appropriate Regional Administrator for further processing in accordance with his finding that any election conducted in the subject cases must provide for a self-determination election for the professional employees.

A/SLMR No. 910

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U. S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION, NATIONAL WEATHER
SERVICE, CENTRAL REGION

Activity

and Case No. 60-4612(DR)

WALTER VAN ETTEN, AN INDIVIDUAL

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
COUNCIL OF NWS CENTRAL REGION LOCALS

Intervenor

and

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION, MEBA, AFL-CIO

Intervenor

U. S. DEPARTMENT OF COMMERCE,
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION, NATIONAL WEATHER
SERVICE, WESTERN REGION

Activity

and Case No. 61-3239(DR)

ELWYN E. ANDERSON, AN INDIVIDUAL

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
COUNCIL OF WESTERN REGION LOCALS

Intervenor

and

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION, MEBA, AFL-CIO

Intervenor

U. S. DEPARTMENT OF COMMERCE,
NATIONAL WEATHER SERVICE,
SOUTHERN REGION,
FORT WORTH, TEXAS

Activity

and

Case No. 63-6532(DR)

JOHN FRANCIS MORTON, AN INDIVIDUAL

Petitioner

and

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
IND., NAGE COUNCIL OF SOUTHERN REGION LOCALS

Intervenor

and

NATIONAL WEATHER SERVICE EMPLOYEES
ORGANIZATION, MEBA, AFL-CIO

Intervenor

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator Cullen P. Keough's Order Consolidating and Transferring Cases to the Assistant Secretary pursuant to Section 206.5(a) of the Assistant Secretary's Regulations solely for the purpose of determining whether, under the particular circumstances involved herein, the professional employees in each of the existing professional-nonprofessional employee units in the above-named cases should be granted the option of separately expressing their desires respecting their continued inclusion in such units. 1/

Upon the entire record in the subject cases, including the briefs filed by the National Association of Government Employees, Councils of Central, Western, and Southern Regions Locals (NAGE) and by the Activity

1/ Notice was given by the Regional Administrator in the Order Consolidating and Transferring Cases of his intent to sever the above-captioned cases subsequent to the decision of the Assistant Secretary.

in Case No. 60-4612(DR), the Assistant Secretary finds:

The petitions in the above-named cases were filed by individual employees seeking to decertify the NAGE which currently is the exclusive bargaining representative in three units containing professional and nonprofessional employees. The NAGE and the National Weather Service Employees Organization, MEBA, AFL-CIO (NWSEO) were granted intervention in each of the subject cases.

The NAGE indicated its opposition to the consent election agreements herein which provide for a self-determination election for the professional employees. In this regard, it contends that Section 10(b)(4) of the Order 2/ requires a self-determination election only upon the establishment of a unit, and that a self-determination election, therefore, is only required where either a new professional-nonprofessional employee unit, or a change in the established unit, is proposed. It further argues that a self-determination election for the professional employees herein could only serve to encourage fragmentation of existing bargaining units. In Case No. 60-4612(DR), the Activity takes the position that fragmentation would result if a self-determination election for the professional employees is ordered, but states that it will comply with the Assistant Secretary's determination.

Under the particular circumstances, I find that the elections to be conducted in the cases herein are subject to the requirements of Section 10(b)(4) of the Order. Particularly noted in this connection was the Assistant Secretary's holding in Indian Health Service Area Office, Window Rock, Arizona, and Public Health Service Indian Hospital, Fort Defiance, Arizona, Department of Health, Education and Welfare, A/SLMR No. 778, which involved a challenge to the status of an incumbent labor organization in an existing professional-nonprofessional employee unit. In that case, the Assistant Secretary concluded that where an election is ordered in an existing mixed unit of professional and nonprofessional employees, the professional employees must be given the option to decide whether they wish to continue in a combined professional and nonprofessional employee unit, regardless of the fact that they have already enjoyed the opportunity of such separate expression in a prior election for a mixed unit of professional and nonprofessional employees. 3/

2/ Section 10(b)(4) provides that a unit shall not be established "if it includes both professional and nonprofessional employees, unless a majority of the professional employees vote for inclusion in the unit."

3/ In reaching this disposition, it was noted that the consolidation procedures established by the Federal Labor Relations Council provide that in every case where a consolidation of units would mix both professional and nonprofessional employees, all of the involved professionals, including those already in mixed units, should be given a separate self-determination election on the issue of being included in the proposed consolidated unit with nonprofessionals.

Accordingly, I shall order that the subject cases be remanded to the appropriate Regional Administrator for further processing in accordance with my finding that any election conducted in the above-named cases must provide for a self-determination election for the professional employees.

ORDER

IT IS HEREBY ORDERED that the subject cases be, and they hereby are, remanded to the appropriate Regional Administrator.

Dated, Washington, D.C.
September 23, 1977

Francis X. Burkhardt, 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

GENERAL SERVICES ADMINISTRATION,
REGION 4
A/SLMR No. 911

This case involved a representation petition filed by the National Federation of Federal Employees, Local 1766 (NFFE) seeking a unit of all Federal Protective Officers and guards employed by the General Services Administration, Region 4 (Activity). The Activity took the position that the only appropriate unit would consist of a region-wide residual unit of all GSA employees not covered by current negotiated agreements.

The Assistant Secretary found that the unit sought was appropriate for the purpose of exclusive recognition. In this regard, he noted that the petitioned for unit was a functionally distinct group of employees who shared a clear and identifiable community of interest separate and distinct from the other employees of the Activity as the employees in the claimed unit shared a common mission, performed the same job functions, received specialized training, wore uniforms and, if qualified, carried firearms in the performance of their duties. The Assistant Secretary further noted that the establishment of such a unit would promote effective dealings and efficiency of agency operations inasmuch as the unit had been previously represented by another labor organization, and there was no evidence that the scope and character of this pre-existing unit had changed subsequent to its initial certification.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

A/SLMR No. 911

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 4

Activity

and

Case No. 40-07852(RO)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1766

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 Annette Allen. 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 case, including the brief filed by the Petitioner, 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 1766, hereinafter called NFFE, seeks an election in a unit of all Federal Protective Officers (FPOs) and guards employed by the General Services Administration (GSA), Region 4, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined in the Order. 1/ The Activity contends that the petitioned for unit is not appropriate for the purpose of exclusive recognition because the claimed employees do not possess a clear and identifiable community of interest separate and distinct from other employees of Region 4 of the GSA; such a unit would not promote effective dealings and efficiency of agency operations; and the intent of the Federal Labor Relations Council to establish broader and more comprehensive units would not be effectuated by establishing the proposed unit. It further asserts that the only appropriate unit would consist of a region-wide residual unit of all GSA Region 4 employees not covered by current negotiated agreements. 2/

The Activity, headquartered in Atlanta, Georgia, and covering an eight state area, 3/ is organizationally comprised of four services: Public Buildings Service; Automated Data and Telecommunications Service; National Archives and Records Service; and Federal Supply Service. All of the employees in the claimed unit are employed in the Federal Protective Service Division of the Public Buildings Service, which is responsible for the protection of personnel and property under the control or jurisdiction of GSA. In this connection, such employees perform patrol duties, respond to emergency situations, and investigate bomb threats and other crimes occurring in buildings under the control of the GSA.

Federal Protective Officers have an internal ranking structure in which the highest ranking FPO, a GS-11 captain, reports directly to the Director of the Federal Protective Service Division. Assisting the captain are two GS-9 lieutenants, each having jurisdiction over a four state zone. Ranking below the lieutenants are GS-7 sergeants and GS-6 corporals with the remaining FPOs and guards at the GS-4 and GS-5 levels.

Successful completion of an eight week academy training course is one of several prerequisites applicants must meet prior to becoming full-fledged FPOs. 4/ Applicants must also initially take a battery of tests, a physical examination, and undergo a background investigation. After meeting the above-noted requirements, FPOs are assigned to one of many duty stations located throughout Region 4. Additionally, FPOs may volunteer for a special operations response team which requires additional training and entitles members to wear a special arm patch. FPOs and guards wear special uniforms and, if qualified, carry firearms in the performance of their duties.

Labor relations matters are handled by the Region's Personnel Division, which also administers personnel policies for all employees within Region 4. In addition to an employee handbook governing GSA employees, there exists a separate handbook containing rules and regulations applicable only to Federal protective personnel, whose tour of duty, unlike other employees, consists of three eight hour shifts during each 24 hour period.

1/ The International Federation of Federal Police was previously certified as the exclusive representative of the claimed employees and entered into a negotiated agreement with the Activity. However, subsequently it disclaimed interest in such unit.

2/ The record reveals that there are currently some 17 exclusively represented units in Region 4.

3/ Region 4 encompasses the states of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee.

4/ In this connection, GSA guards, of which there are two in Region 4, are those individuals who have not completed this academy training course, but in other respects have similar duties and responsibilities and are subject to the same supervision as FPOs.

Under all of the circumstances herein, I find the claimed unit of all FPOs and guards in Region 4 is appropriate for the purpose of exclusive recognition. In my view, such a region-wide unit constitutes a functionally distinct group of employees within the meaning of Section 10(b) of the Order who share a clear and identifiable community of interest separate and distinct from other employees of the Activity. 5/ In this regard, the record reveals that FPOs and guards share a common mission, perform the same job functions, share common supervision and are subject to common personnel policies which are administered by the Region's Personnel Division. Additionally, FPOs receive special training and they, along with guards, wear uniforms and, if qualified, carry firearms in the performance of their duties.

Further, I find that such a region-wide unit will promote effective dealings and efficiency of agency operations. In this connection, the record reveals that a region-wide unit of FPOs and guards was previously represented exclusively by the International Federation of Federal Police and covered by a negotiated agreement. In the absence of evidence that the scope and character of this pre-existing unit have changed by virtue of events subsequent to its initial certification, I reject the Activity's contention that the only appropriate unit in these circumstances would consist of a region-wide residual unit of all currently unrepresented Region 4 employees. Rather, I find that the bargaining history in this unit demonstrates that it will promote effective dealings and efficiency of agency operations.

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 Federal Protective Officers and guards employed by the General Services Administration, Region 4, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order.

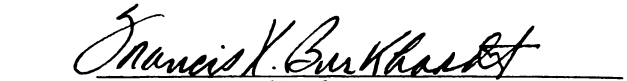
DIRECTION OF ELECTION

An election by secret ballot shall be conducted, 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

5/ See Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629, FLRC No. 76A-91; Department of the Interior, Bureau of Reclamation, Boulder Canyon Project, Boulder City, Nevada, A/SLMR No. 688; and Department of the Navy, U.S. Naval Station, San Diego, California, A/SLMR No. 627.

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 by the National Federation of Federal Employees, Local 1766.

Dated, Washington, D.C.
September 30, 1977



Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

October 4, 1977

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

WARNER ROBINS AIR LOGISTICS CENTER,
ROBINS AIR FORCE BASE, GEORGIA
A/SLMR No. 912

These cases involved two unfair labor practice complaints filed by the American Federation of Government Employees, Local 987, AFL-CIO (Complainant). One complaint alleged that the Respondent violated Section 19(a)(1), (2) and (6) of the Order by its unilateral implementation of its last negotiation offer regarding the amount of official time available to stewards for representational purposes when the issue was pending before the Federal Service Impasses Panel (FSIP). The second complaint alleged that the Respondent violated Section 19(a)(1) and (6) of the Order by its unilateral implementation, after the Complaint's request for negotiations, of a system for recording stewards' use of official time for representational activities.

Regarding the first complaint, the Administrative Law Judge found that no overriding exigency existed to permit the implementation of an impassed issue while pending before the FSIP, citing U.S. Army Corps of Engineers, A/SLMR No. 673, and he therefore concluded that the Respondent violated Section 19(a)(1) and (6) of the Order. He recommended dismissal of the Section 19(a)(2) allegation.

The Administrative Law Judge recommended dismissal of the second complaint concluding that there is an arguable basis under the parties' negotiated agreement for the Respondent's position that "consultation" (as defined in the agreement) rather than negotiation fulfilled its obligations before implementing the record keeping system. Therefore, the Administrative Law Judge found the case involved differing and arguable interpretations of the agreement, rather than a clear unilateral breach which could be the basis for an unfair labor practice finding.

Noting particularly the absence of exceptions regarding the second case, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and he ordered that the Respondent cease and desist from the conduct found violative of the Order in the first case and that it take certain affirmative actions with respect thereto.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

WARNER ROBINS AIR LOGISTICS CENTER,
ROBINS AIR FORCE BASE, GEORGIA

Respondent

and

Case Nos. 40-7514(CA) and
40-7585(CA)

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

Complainant

DECISION AND ORDER

On May 4, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject cases, including the Respondent's exceptions and supporting brief, and noting particularly that no exceptions were filed in connection with Case No. 40-7585(CA), I hereby adopt the findings, 1/ conclusions and recommendations of the Administrative Law Judge.

1/ At page 5 of his Recommended Decision and Order, the Administrative Law Judge inadvertently used the word "overtime" rather than "official time." This inadvertent error is hereby corrected.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Warner Robins Air Logistics Center, Robins Air Force Base, Georgia shall:

1. Cease and desist from:

(a) Unilaterally implementing matters which have been bargained to impasse during collective bargaining negotiations with the American Federation of Government Employees, Local 987, AFL-CIO, or any other exclusive representative, and which have been submitted to the Federal Service Impasses Panel, including limitations on the use of official time by stewards for representational purposes, until the processes of the Federal Service Impasses Panel have been allowed to run their course.

(b) In any like or related manner interferring with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Notify the American Federation of Government Employees, Local 987, AFL-CIO, or any other exclusive representative, that management will not unilaterally implement matters which have been bargained to impasse during collective bargaining negotiations and which have been submitted to the Federal Service Impasses Panel, including limitations on the use of official time by stewards for representational purposes, until the processes of the Federal Service Impasses Panel have been allowed to run their course.

(b) Post at its facility at Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 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 General, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all places where notices of employees are customarily posted. The Commanding General shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 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. 40-7514(CA), insofar as it alleges a violation of Section 19(a)(2) of the Order, and the complaint in Case No. 40-7585(CA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
October 4, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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

EXECUTIVE ORDER 11491, AS AMENDED

LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE

We hereby notify our employees that:

WE WILL NOT unilaterally implement matters which have been bargained to impasse during collective bargaining negotiations with the American Federation of Government Employees, Local 987, AFL-CIO, or any other exclusive representative, and which have been submitted to the Federal Service Impasses Panel, including limitations on the use of official time by stewards for representational purposes, until the processes of the Federal Service Impasses Panel have been allowed to run their course.

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 American Federation of Government Employees, Local 987, AFL-CIO, or any other exclusive representative, that we will not unilaterally implement matters which have been bargained to impasse during collective bargaining negotiations and which have been submitted to the Federal Service Impasses Panel, including limitations on the use of official time by stewards for representational purposes, until the processes of the Federal Service Impasses Panel have been allowed to run their course.

_____
(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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: Room 300 - 1371 Peachtree Street, NE, Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
Warner Robins Air Logistics Center, Robins Air Force Base, Warner Robins Georgia Respondent	:	
and	:	Case Nos. 40-7514(CA) 40-7585(CA)
American Federation of Government Employees, Local 987, AFL-CIO Complainant	:	

Michael Deep, Esq., and
Captain Jerry Brasel
Warner Robins, Georgia
For the Respondent

Mark Roth and Lawrence E. Franks, Esqs.
Washington, D.C.
For the Complainant

Before: GORDON J. MYATT
Administrative Law Juge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Complaint filed in Case No. 40-7514(CA) by American Federation of Government Employees, Local 987, AFL-CIO (hereinafter called the Union), against Warner Robins Air Logistics Center, Robins Air Force Base (hereinafter called the Activity), and a subsequent complaint filed in Case No. 40-7585(CA), the Regional Administrator for Labor-Management Services Administration for the Atlanta Region issued Notices of Hearing on Complaint on October 21, and October 26, 1976, respectively. The cases were consolidated for purposes of hearing by an Order issued October 26, 1976.

The Complaint in Case No. 40-7514 alleged that the Activity violated Section 19(a)(1), (2) and (6) of Executive Order 11491, as amended. The Complaint in Case No. 40-7585 alleged that the Activity violated Section 19(a)(1) and (6) of the Order.

In Case No. 40-7514 it is alleged that the Activity unilaterally implemented its last offer on the amount of official time available to union stewards for representational purposes at a time when the same subject matter had been submitted by the parties to the Federal Services Impasses Panel and that forum had not had an opportunity to act on the impassed matter. The complainant in Case No. 40-7585 alleges that the Activity unilaterally implemented a record-keeping system in the Directorate of Distribution, without negotiating upon request, for the sole purpose of recording the use of official time by union stewards in the performance of their representational duties. It is asserted that the implementation was effected in spite of written notice by the Union that the subject matter was negotiable.

A hearing was held in Warner Robins, Georgia, on November 30 and December 1, 1976. All parties were represented by counsel and afforded full opportunity to be heard and to introduce relevant evidence and testimony on the issues involved. Briefs were submitted by counsel and have been duly considered.

Upon the entire record in this matter, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact 1/

A. Background Facts

The Activity has world-wide responsibility for activities essential to the military mission of the United States Air Force. The Activity has three basic missions: (1) world-wide logistics manager for assigned aircraft and commodities; (2) repair center for aircraft and five distinct technologies; (3) storage center at both of the wholesale and retail levels for Air Force spare parts and systems. The Activity is the exclusive technology

1/ The alleged violations are based on facts common to both complaints. Many of the essential facts have been jointly stipulated by the parties and are contained in the record as Joint Exhibit No. 1.

repair center for airborne electronics for the entire Air Force. This responsibility requires support for maintenance shop operations as well as for receiving, storing, issuing and transporting all assigned equipment and logistics for which it is responsible.

The Activity employs approximately 16,500 civilians as well as military personnel. The highest authority at the Logistics Center is the Commander -- Major General William R. Hayes. Organizationally the Activity is structured into a number of operational elements. The highest elements directly subordinate to the Commander are directorates. Each directorate is composed of subordinate elements designated, in descending order, as divisions, branches, sections, units, and line supervisors. Two of the largest directorates are the Directorate of Maintenance and the Directorate of Distribution. The former is concerned with aircraft maintenance responsibilities while the latter is responsible for the receipt, storage, and issuance of logistics on a world-wide basis. There are a number of huge complex structures located on the base, including maintenance hangers and warehousing facilities.

The Union has been the exclusive bargaining representative for the bargaining unit employees of the Activity since 1966. There have been a series of negotiated agreements in effect between the parties, but the 1973 agreement provides the starting point for consideration of the issues presented here. The Union structured itself organizationally to correspond with the organizational set-up of the Activity. The President of the Union is considered the counterpart to the Commander or his designee. Immediately subordinate to the union president is the executive vice president, who is also in charge of all of the stewards throughout the base. Each major directorate has a union vice president assigned to it as the counterpart of the director or the deputy director of that directorate. Each directorate also has a chief steward 2/ and divisional, branch, section, and unit stewards. In all, there are approximately 200 stewards and union officials servicing the employees of the various units.

2/ In some instances the vice president of a major directorate also functions as chief steward.

B. The 1973 Negotiated Agreement

In June 1973 the parties completed negotiations for and signed an agreement which was approved by a higher military authority, effective November 16, 1973. (Joint Exhibit No. 3). The agreement contained the following provision relating to union representation:

ARTICLE VIII

UNION REPRESENTATION

Section a: ...The Employer agrees to recognize a maximum of one steward to every 50 employees in the units. The Union agrees, in applying the provisions of this Section, to assure that each employee in the bargaining units has ready access to a Steward in his working area....

* * * * *

Section d: The primary responsibility of a steward is his assigned duty as a Government employee. A steward will be allowed a reasonable amount of time to carry out his steward duties commensurate with the provisions of this Agreement. The Union agrees that its officers and stewards will guard against the use of excessive time in performing duties considered appropriate by this Agreement.... (Emphasis supplied).

In June 1974, the parties executed Supplement I to the multi-unit agreement. However, this supplement did not touch upon the provisions relating to union representation. (Joint Exhibt No. 3).

C. The Problem on the Use of Official Time by Union Representatives

The record discloses that management and union representatives were involved in a long-standing dispute over what management considered to be excessive use of official time by union representatives in the performance of their representational duties. In 1973, the Deputy Director of the Directorate of Maintenance proposed to revise an operating instruction (MAOI 11-9) of that organization.

He sought to require issuance of administrative permits by supervisors to union representatives seeking to leave their duty stations for representational purposes. (Respondent Activity Exhibit No. 1). This was an effort to control the amount of official time used by union stewards in that directorate. The Union vigorously opposed this and indicated that a similar attempt to address the problem had been initiated by management in 1972. (Respondent Activity No. 2).

Testimony by management officials, ranging from first-line supervisors to directorate labor relations officers, 3/ indicate that the problem was a major concern throughout the entire Activity. The evidence shows that from 1973 through 1975, between 60 and 70 union stewards and representatives were away from their jobs and engaged in activities on behalf of the Union for periods ranging from 25% to 100% of their job time. Surveys conducted in the distribution and maintenance directorates indicate that supervisors were unable to control the use of official time by the union representatives because the negotiated agreement required a "reasonable time" for this purpose. There were no guidelines or specific instructions for the supervisors or the union representatives to follow in determining what amount of time was necessary in any given situation. There is undisputed testimony in the record that when supervisors sought to deny union stewards use of official time for an asserted representational purpose, the steward would then file a grievance against the supervisor based on a putative contract violation. Under the terms of the negotiated agreement, the agrieved steward was then entitled to representation by another union steward and a reasonable time to prepare the grievance for presentation. In addition the steward was entitled to a maximum of eight hours to prepare for a higher level appeal, if it were not satisfactorily resolved by the first-line supervisor. (Article VIII, Section d of the 1973 Agreeement). By adopting these tactics, union stewards, who were denied use of overtime by their supervisors, could effectively get the time not only to process their own purported grievance, but also to handle the matter for which they originally intended to leave

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3/ Each of the major directorates has a labor relations officer who provides guidance to the director or the deputy director of that directorate in labor-management problems and interpretations of the negotiated agreement. The directorate labor relations officers receive their guidance from the Labor Relations Officer of the Activity, who is the designee of the Commander in labor-management matters.

their duty station. Moreover, the filing of a contract grievance would cause another union representative to leave his or her job assignment to perform a representational function.

The problem of excessive use of official time by union representatives continued to plague management throughout the term of the agreement. The record shows that the use of official time by union representatives increased during 1974 and 1975. The official union view was that any amount of time required for representational matters was "reasonable" under the terms of the negotiated agreement. Another contributing factor in the representational demands on union stewards was the fact that the steward positions were under-staffed; even though there were approximatly 200 stewards assigned to the Activity. In some instances, a single steward would occupy steward positions for several organizatonal levels; e.g., a division steward would occupy a number of the steward positions within that division or a branch steward would serve as a branch, section, and/or unit steward within that given branch. This drastically increased the amount of time such a steward would be required to devote to representational matters.

In additon to the complaints of management that stewards were failing to perform their assigned government duties, management was confronted with a deterioration in the morale of the employees working in the units where the stewards were normally employed. The testimony indicates that because of the great amount of absences, the supervisors or other employees had to perform the job duties which were assigned to the stewards. According to the undisputed testimony of management officials, these employees resented having to carry this extra burden to enable the stewards to perform duties on behalf of the Union. Furthermore, the evidence indicates that the lengthy absences from the duty stations caused continuing friction between the supervisors and the stewards involved. In instances where the supervisors questioned the steward to determine the need for official time, the steward would refuse to divulge any information other than that it was a union matter. When this occurred, the supervisor was unable to make a judgment as to whether the use of the time was justified. If he refused the time, he was subjected to a contract grievance filed by the steward. The record discloses that as many as seven grievances were filed in an eight hour period against a single supervisor by the same

steward. As noted, these grievances would entitle the steward to be represented by another steward, and they would both be afforded time to prepare the grievances for presentation at the first level and additional time to prepare an appeal to a higher authority. 4/ Under the terms of the negotiated agreement these grievances could be pursued up to the level of the Commander. The record shows, however, that in most instances the grievances were not pressed beyond the directorate level, and the stewards gained sufficient time to engage in representational functions as well as time to pursue the contract grievance.

In an effort to control the amount of time employees spent on matters other than officially assigned duties, the Activity issued a regulation on March 12, 1976, designated "Employee Control Policy". Included in the types of absences authorized were: (a) consulting with the civilian personnel office, EEO advisors, or union representatives; (b) grievance or appeal hearings; and (c) stewards performing steward duty authorized by the labor agreement. This policy provided for three methods of notification regarding the whereabouts of employees. The first was an informal method whereby verbal permission would be obtained from a supervisor. The second provided for a "sign-out board" on which the employee would note the information regarding his whereabouts and obtain permission from the supervisor before leaving. On return the employee would have to check in with the supervisor and erase the entry on the sign-out board. The third procedure was the use of an "administrative permit". The employee would have to request permission and receive a permit authorizing his absence from the area. Upon return to his work station he would give the permit back to the supervisor who would retain it for 30 days for record purposes. 5/ While this policy provided for documentation of the absence of an employee from the work area, it had virtually no effect on the control on the amount of time spent on representational activities. Thus, stewards continued to insist upon leaving their areas to handle

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4/ See Respondent Activity Exhibit Nos. 8(a)-(g) for typical examples of this type of grievance.

5/ Joint Exhibit No. 29.

matters in their steward capacity, and would file contract grievances if such permission were denied. The record discloses that the volume of contract grievances steadily increased during 1974 and 1975 and further that the union filed numerous unfair labor practice charges against the Activity based upon the controversy over the use of official time by stewards.

In April 1975, a joint fact finding team composed of a management and a union representative investigated the amount of time spent by three individuals identified by management as the most flagrant violators of excessive use of official time time for union activities. The results of this survey were issued on May 5, 1975 (Respondent Activity Exhibit No. 10). The investigation indicated that during a six month period, one of the stewards was engaged in representational duties for periods randing from 60 percent of his work time to 84 percent. Another steward engaged in representational duties during a similar period from a range of 88 percent to 90 percent of his official work time. The third individual, during the same period, was on representational duties from a low of 41 percent to a high of 72 percent of his work time.

When the results of the investigation were made known to the Union, the union president rejected its accuracy on the ground that the representational duties included time spent on agency grievance procedures and other legitimate excusals, which could not be attributed to their union responsibilities. The Union rejected management's claim that the union representatives were using an unreasonable amount of time contrary to the contract requirements.

As a countermeasure to the rising volume of charges of contract violations and unfair labor practice charges filed by the Union, the Activity filed charges of contract violations against seven different stewards in three of the directorates. (Respondent Activity No. 11). As noted, the union charges of contract violations were rarely taken beyond the directorate level, but their adjudication involved considerable amounts of work time on the part of both management and the union stewards. The parties finally decided to engage in a trade-off whereby management withdrew its charges against the stewards and the Union in turn withdrew a number of unfair labor practice charges filed against the Activity.

D. The Efforts to Renegotiate the Basic Collective Bargaining Agreement

On October 1974, the parties began negotiations on Supplement II of the 1973 agreement. Among other things, management submitted drastic revisions to Article VIII -- the use of official time for representational purposes. Management proposed that 5 percent of the work time in a four week period for representational purposes would not be considered as interfering with federal employment. Between 5 and 10 percent would require attention of the union president to make certain that the union steward involved did not neglect work duties. More than 10 percent would not be permitted. The Union took the position that the only standard to be applied for use of official time was "reasonable time," as contained in the current agreement. The parties engaged in extensive negotiations on various proposals and counterproposals, but the use of official time was considered an impassed item on July 1975. Although the parties did sign off on a Supplement II in May 1975, they did not include the modification on the use of official time.

In September 1975, the parties served notice of intent to renegotiate the entire basic agreement. They also agreed that all impassed matters from the prior negotiations would be negotiated along with new proposals. Both management and the labor organization submitted proposals on the amount of official duty time to be allowed for representational activities. Management's proposals ranged from no official time to a maximum of four hours per steward per pay period. The four hours per pay period were to be non-cumulative and non-transferable. After lengthy negotiations on the use of official time and many other proposals and counterproposals, the parties agreed that several issues including the use of official time has reached impasse. In an attempt to resolve the dispute they called on the services of mediators from the Federal Mediation and Conciliation Service. The efforts of the mediators were unsuccessful, however, and the parties were deadlocked on several issues including the matter of the use of offical time. They agreed in a memorandum of understanding dated April 15, 1976, that they were hopelessly deadlocked and would cease negotiations in order to seek the services of the Federal Services Impasses Panel. (Joint Exhibit No. 4).

It should be noted that during the course of the negotiations which commenced in the fall of 1975, the parties mutually agreed to two extentions of the 1973 basic agreement and its supplements. The final extension terminated on April 16, 1976 -- the day after the parties agreed to submit the impassed items to the Panel.

In a memorandum of understanding dated April 21, 1976, the parties agreed to remove from the impassed items the Duration Article, and to negotiate that provision in order to arrive at a negotiated agreement. It was the intent of the understanding that if they could not agree on the Duration Article, it would also be submitted to the Impasses Panel along with the other items. However, the parties were able to agree on this provision and a new agreement was forwarded to higher authority of the Activity for review and approval. The negotiated agreement was approved without change and became effective as of May 24, 1976. The provision relating to the use of official time for representational purposes was not contained in the new agreement and remained at impasse.

Although the parties had a written understanding that all impassed items would be submitted to the Panel, the Activity informed the union president on April 30 that management could make the unilateral changes after having engaged in good faith negotiations which resulted in impasse, provided the Union was given notice and an opportunity to consult and confer regarding the impact of the changes on the unit employees. (Joint Exhibit No. 7). Management informed the Union that it proposed to unilaterally implement its last offer of four hours official time per pay period for each steward for representational duties. Management also stated that a "joint recordkeeping system between supervisors and employees will be established to insure accurate time-keeping and to prevent abuse of the system." 6/

6/ The other provision that management intended to unilaterally implement related to the hours of work of professional nurses. As this is not an issue in these consolidated cases, the matter will not be discussed herein.

In a letter dated May 7, 1976, the union president took issue with management's asserted right to unilaterally implement the last proposal on the use of official time. He declined to meet with management to consult over the implementaton. The Union stated that the parties had agreed to submit the impassed items to the Panel, and requested that management not implement its proposals until the Panel had an opportunity to act. (Joint Exhibit No. 8).

On May 12, 1976, the parties submitted their positions to the Impasses Panel. Their request for assistance was acknowledged by the Panel on May 18, 1976, and the parties were informed that a member of the Panel staff would be in touch with them "shortly". (Joint Exhibit No. 12).

On May 20, 1976, the Commander of the Activity informed the Union in writing that management intended to implement its last proposal regarding the use of official time. Management took the position that the Union had been offered an opportunity in advance to consult and confer regarding the impact of the implementation, "but declined to do so." (Joint Exhibit No. 14). On that same day, the Commander issued a directive to all subordinate elements advising them that management's last proposal on the use of official time for representational purposes was to become effective immediately. (Joint Exhibit No. 13). The directive stated that the implementation would be as follows:

> a. Up to four hours of official time per pay period may be granted to union stewards to perform authorized representational functions. Such time will not be cumulative from one pay period to another and cannot be transferred from one employee to another.
>
> b. A joint recordkeeping system between the supervisor and employees must be established to insure accurate accounting of official time used.
>
> c. Union stewards, including chief stewards, may request annual leave or leave without pay when the four hour maximum has been reached. Such request will be considered under existing criteria for granting annual leave or LWOP.

The directive also indicated that employees representing other employees under the agency grievance procedure would be authorized the time prescribed by that regulation.

On June 11, 1976 the Deputy Director of the Distribution Directorate sent a memo to Kendricks, Union Vice President for Distribution, informing him of the method by which that directorate planned to implement the Commander's policy on recordkeeping. (Joint Exhibit No. 20). Sometime prior to that date, the Labor Relations Officer of the directorate had several discussions with Kendricks on the subject of the recordkeeping proposal (these discussions were termed "briefings" by Kendricks, but were considered "consultation" by management). 7/ On June 28, the recordkeeping proposal for the Directorate of Distribution was officially put into effect by way of a memorandum. (Joint Exhibit No. 22). It was stated that a log book would be maintained by the supervisor and his counterpart steward. Each time a steward was required to leave his work area for representational duties, the absence would be entered into the log and initialed by both the steward and the supervisor. Supervisors were cautioned to insure that no more than four hours official time was used by a steward in one pay period. The memorandum noted that the procedure did not "obviate the requirements of the employee control policy instituted on March 12, 1976. This document was subsequently amended on July 2, 1976 to reflect a change requested by Kendricks. The change indicated that a single log book would be maintained by the immediate supervisor and the steward. (Joint Exhibit No. 23).

Although Kendricks made a recommendation regarding the recordkeeping procedures which was adopted by management, the Union took the official position that the entire subject matter of the recordkeeping was negotiable and should be applied activity-wide. Management disagreed and took the position that it could only be negotiated during the "open period" of the contract. Since this had expired and a new agreement was in effect, management was of the view that the Union only had the right to be "consulted" prior to the recordkeeping policy being implemented.

Although the impassed items were before the Federal Services Impasses Panel, the parties did not have a hearing. A representative from the Panel came to the Activity and met with the parties. After intensive negotiations under his supervison, the parties finally arrived at an agreement on the impassed items. Regarding the use of official time for representational duties, the parties agreed that a steward would be allowed up to a maximum of four hours of official

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7/ Joint Exhibit Nos. 19 and 21.

duty time per pay period for performance of representational duties, with certain exceptions from that four hour limitation. As a result of these efforts, the parties jointly withdrew their request for assistance from the Panel on November 18, 1976. (Joint Exhibit 27).

Contentions of the Parties

The Union, in a well written brief, contends that the parties had mutually agreed to submit the impassed items to the Federal Services Impasses Panel and did so. It asserts that the subsequent unilateral action by the Activity regarding the impassed provision on the use of official time -- two weeks after the submission to the Panel -- violated the requirements of the Executive Order as the Activity failed to allow the processes of the Panel to run its course. Concerning the implementation of the recordkeeping procedures in the Directorate of Distribution, the Union contends that the Commander's policy had base-wide application. Therefore, it was subject to negotiation at the command level before implementation in any form by subordinate directorates.

The Respondent Activity submitted a lengthy but well researched and thorough brief. Essentially, however, the Activity argues that the negotiated agreement and its extensions had expired, and the parties had bargained to impasse. Therefore, management was free to implement its proposal on the limitation of the use of official time; provided it did not exceed the scope of the offer made during negotiations, and provided further that the Union was given notification in advance to enable it to consult and confer on the implementation. The Activity asserts that the alleged excessive use of official time by the union representatives constituted a overriding exigency which gave it the right to act, even though the matter was before the Panel. Regarding the procedures on recordkeeping in the Directorate of Distribution, the Activity contends that the terms of the agreement make it a "closed" contract, i.e., the parties can only negotiate during the anniversary date of the agreement, and at all other times are only required to engage in "consultation". On this theory, the Activity contends that the only requirement on the matter of recordkeeping is that the union representatives be informed in advance and provided an opportunity to consult with management on the proposal. After such consultation, management is free to implement its proposal while giving due regard to the input from the Union.

Concluding Findings

The basic issue in Case No. 40-7514, in my judgment, is whether the Activity was privileged to unilaterally implement the limitation on the use of official time for representational purposes after lengthy negotiations on the subject to the point impasse, after having submitted the issue to the Federal Services Impasses Panel, but prior to allowing that forum to act on the subject matter. The Activity cites a plethora of cases in the private sector supporting the proposition that an employer may unilaterally implement proposals made during negotiations when the parties have bargained to a genuine impasse, and the union has been informed of the intention to carry out such implementation. While court and National Labor Relation Board cases in the private sector are not controlling, the Assistant Secretary has looked upon such decisions for guidance in similiar situations in the public sector. However, I am not persuaded that these cases have application here, nor do they provide meaningful guidance in the instant cases.

In none of the cited cases dealing with the private sector is there any indication that the parties agreed to invoke third-party assistance in settling their disputes. Rather, the parties engaged in good faith negotations to impasse and then resorted to self-help in the form of unilateral implementation, lockout or strike. This is the distinguishing feature which causes me to reject these cases as meaningful indicators in resolving the issues here.

In the instant case the parties mutually agreed, in a signed understanding, to submit impassed issues to the Federal Services Impasses Panel for appropriate action; and did in fact follow through with this procedure. Although there is nothing in Section 17 of the Executive Order which mandates that parties take their impassed disputes to the Panel, the Assistant Secretary has held that once the services of the Panel are requested, it effectuates "the purposes of the Order to require that the parties must, in the absence of an overriding exigency, maintain the status quo and permit the processes of the Panel to run its course before a unilateral change in term or conditions of employment can be effectuated." U.S. Army Corps of Engineers, Philadelphia District, A/SLMR No. 673. While the Activity attempts to distinguish the Corps of Engineers case, I find it to be completely apposite to the facts developed on the record here. Therefore, in the absence of a persuavise

showing that the Activity was confronted with an "overriding exigency ", the unilateral implementation of the limitation on the use of official time for representational purposes, while the matter was before the Panel, is a violation of the Executive Order. To hold otherwise means that the Executive Order offers an empty method of settling impassed disputes. Parties would be free to invoke the services of the Panel and then blithly engage in unilateral conduct before the Panel had an opportunity to act. Rather than stabilize labor relations, this would result in increased disharmony. In my opinion, this was not the intent or the purpose of the framers of the Order.

The only justification for the unilateral conduct by the Activity here, based on the Corps of Engineers case, would be that it was confronted with an overriding exigency which required immediate action. In my view, the activity has not established a case of such an emergency nature. There can be no doubt that the problem was one of long-standing and management's concern was genuine and legitimate. Indeed, sound management practices required, even mandated, that corrective action be taken. But there was nothing to suggest that the situation, which had existed at least since 1970, required immediate changes in personnel policies and practices. Department of Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401. In proposing defined limitations during the 1974 and 1975 negotiations, management was taking positive and permissible actions to correct the problem within the spirit and intent of the Executive Order. There has been no showing on this record of any major change in circumstances at the Activity which had not prevailed since the problem first arose. The only thing that can be cited is its continued existence over the period of years. Therefore, management, having put into motion the processes of the Impasses Panel, must be considered to have acted precipitously in failing to allow that forum an opportunity to carry out its functions under the Executive Order.

Accordingly, I find that the Activity has failed to establish by a preponderance of the evidence that the situation regarding the excessive use of official time was of such an overriding and emergency nature that it warranted unilateral action, while the very matter was before the Impasses Panel. I further find that the conduct of the

Activity in this regard violated the obligations imposed upon it by Section 19(a)(6) of the Executive Order. I also find and conclude that such conduct violated Section 19(a)(1) of the Executive Order as it interferred with, restrained, and coerced unit employees in their right to have their exclusive representative act for and represent their interest in matters concerning grievances, personnel policies and practices as assured by Section 10(e) of the Order. San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Kelly Air Force Base, Texas, A/SLMR No. 540. However, I do not find that this conduct violates Section 19(a)(2) of the Order. There is nothing here which suggests that the conduct served to encourage or discourage membership in the Union by discrimination in regard to hire, tenure, promotion, or other condition of employment. Accordingly, this allegation of the complaint must be dismissed.

My conclusions in this regard are not affected by the Activity's reliance on the fact that the negotiated agreement and its extensions had expired. It has been held that "only these rights and privileges which are based solely on the existence of a written agreement -- e.g., checkoff privileges --" terminate with the expiration of a negotiated agreement. Internal Revenue Services, Ogden Service Center, Internal Revenue Services, et al, A/SLMR No. 806. The Assistant Secretary in the Internal Revenue case held that "other rights and privileges accorded to exclusive representatives continue in effect until such time as they are modified or eliminated pursuant to negotiations or change after a good faith bargaining impasse has been reached." 8/ Although the parties had reached impasse on the issues here, they had obligated themselves to use the services of the Impasses Panel. Thus, they were not free to engage in unilateral self-help action until the Panel's processes had been allowed to run its course.

Turning to the alleged violations relating to the recordkeeping procedures implemented in the Directorate of Distribution (Case NO. 40-7585), I find that this conduct did not violate the provisions of the Executive Order. The record discloses that the chief union representative for that directorate was notified of the proposed procedures by directorate-level management prior to its implementation, Moreover his input and suggestions were sought. Although the

8/ Internal Revenue Services, Ogden Service Center, supra; U.S. Army Corps of Engineers, Philadelphia District, supra.

Union took the position that these discussions constituted a "briefing" and management considered them to be "consultation" under the newly effective negotiated agreement, the final recordkeeping procedures issued by management incorporated recommendations made by the union representative. While the official union position is that the recordkeeping procedures were appliable base-wide and required negotiation at the command level, it was only devised, discussed and implemented in the Directorate of Distribution.

Article III of the negotiated agreement sets forth instances in which the parties would engage in consultation and negotations. Section b of that Article provides:

> Any matter which affects the working conditions or personnel policies of the unit(s) which is within the discretion of the Employer and not included as a part of, or precluded by, the Agreement, and appropriate for consultation or negotiation, will not be changed by the Employer until the Union has been consulted. If the proposed change is in conflict with this Agreement, the Employer will give the Union adequate advance notice and the opportunity to negotiate.

Section e of that same Article contains the following langauage:

> The appropriate representative of the Employer shall consult with the appropriate Steward, Chief Steward, or other Union Official on proposed changes and practices, policies, procedures and working conditions within the discretion of the Employer which will affect employees in the bargaining units. It is agreed that both the Employer and the Union will consult at the appropriate decision-making level... Once consulted at that level, it shall be considered that the requirement to consult has been complied with....

Section 48 of the negotiated agreement defines certain terms used in the agreement, and the definition of consultation is as follows:

> (2) Consultation: The interchange of facts and opinions, verbal or written, to obtain the views of appropriate Union officials, prior to implementation of proposed personnel policies, practices and procedures relating to working conditions within the discretion of the Commander which are not specifically covered by the Labor Agreement. It is understood that after consultation and consideration of the views of the Union by the Employer, the concurrence of the Union is not necessary for implementation by the Employer, unless otherwise agreed in a particular article.

Without passing upon the question of whether the vice president of the Union and his management counterpart in the Directorate of Distribution had engaged in consultation within the meaning of the terms of the negotiated agreement, prior to the implementation of the recordkeeping procedures, it is evident that there is an arguable basis for management's position -- that consultation rather than negotiation was all that was required in this instance. At the very most, the issue between the parties on this aspect of the case involves differing and arguable interpretations of the negotiated agreement rather than an action which constitutes a clear unilateral breech of the agreement. 9/ I find, therefore, that the issue involving the recordkeeping procedures and their implementation in the Directorate of Distribution is essentially one of differing interpretations of the parties rights and obligations under the negotiated agreement and not a clear unilateral breech of that agreement. 10/ Accordingly,

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9/ Aerospace Guidance and Meterology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677; Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624; Federal Aviation Administration Muskegon Air Traffic Control Tower, A/SLMR No. 534.

10/ Aerospace Guidance and Meterology Center, Neward Air Force Station, Neward, Ohio, supra.

the allegations contained in Case No. 40-7585 relating to the implementation of the recordkeeping procedures in the Directorate of Distribution should be dismissed in their entirety.

Remedy

The Union urges as part of the appropriate relief that the parties be placed in status quo ante for the period commencing with the date of the unilateral imposition of the four hour limitation on use of official time until the agreement was reached through the services of the Impasses Panel. As noted herein, the parties finally resolved their differences with the assistance of the Panel, and executed an agreement relating to a limitation on the amount of official time for representational purposes. In view of this development, I find that a status quo ante remedy is not appropriate for the circumstances presented by this case. U.S. Army Corps of Engineers, Philadelphia District, supra. Moreover, there is no probative evidence in the record which would support an adjustment of any time lost by union stewards during this period.

Having found that the Respondent Activity has engaged in conduct which violates Section 19(a)(1) and (6), I shall recommend that the Assistant Secretary adopt the following Recommended 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 203.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby Orders that Warner Robins Air Logistics Center, Robins Air Force Base, Warner Robins, Georgia, shall:

1. Cease and desist from:

   (a) Unilaterally changing policies or regulations on matters which have been bargained to impasse during collective bargaining negotiations and which have been submitted to the Federal Services Impasses Panel, including limitations on the use of official time for representational purposes, until the processes of the Impasses Panel have been allowed to run their course.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their 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:

(a) Notify American Federation of Government Employees, Local 987, AFL-CIO, or any other exclusive representative, that management will not unilaterally implement matters which have been bargained to impasse during collective bargaining negotiations and which have been submitted to the Federal Services Impasses Panel, including limitations on the use of official time for representational purposes by union representatives, until the processes of the Impasses Panel have been allowed to run its course.

(b) Post at its facility at Warner Robins Air Logistic Center, Robins Air Force Base, Warner Robins, Georgia, 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, Warner Robins Air Logistic Center, Robins Air Force Base, Warner Robins, Georgia, and shall be posted and maintained by him for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices of employees are customarily posted. The Commanding Officer shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 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.

Gordon J. Myatt

GORDON J. MYATT
Administrative Law Judge

Dated: 4 MAY 1977
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 unilaterally implement matters which have been bargained to impasse during collective bargaining negotiations with American Federation of Government Employees, Local 987, AFL-CIO, or any other exclusive representative, and submitted to the Federal Services Impasses Panel, including limitations on the use of official time by union representatives for representational purposes, until the processes of the Impasses Panel have been allowed to run its course.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in rights assured by Executive Order 11491, as amended.

WE WILL notify the American Federation of Government Employees, Local 987, AFL-CIO, or any other exclusive representative, that we will not engage in the conduct stated above.

_____
(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 any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor Management Services Administration, United States Department of Labor, whose address is: Room 300 - 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

October 4, 1977

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

COMMUNITY SERVICES ADMINISTRATION
A/SLMR No. 913

This case involved an unfair labor practice complaint filed by the National Council of CSA Locals, AFGE, AFL-CIO (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(6) of the Order by unilaterally issuing reduction-in-force (RIF) regulations prior to final agreement with the Complainant.

The Complainant had initialed the agreed upon regulations, which its membership then declined to ratify pursuant to the Complainant's constitution. The Administrative Law Judge concluded that the Respondent was obligated to bargain, if necessary, to impasse concerning the contents of its proposed RIF regulations. He found that no impasse had been reached, but that only a tentative agreement had been reached subject to membership ratification. He concluded that the Complainant, under the circumstances herein, had a right to insist on ratification, and that it also had the right to request a resumption of bargaining when membership ratification failed. The Administrative Law Judge also found that no overriding exigency existed which would justify the unilateral implementation of the regulations. Accordingly, he concluded that the Respondent violated Section 19(a)(6) of the Order by issuing its staff instruction prior to reaching agreement or impasse.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

COMMUNITY SERVICES ADMINISTRATION

Respondent

and Case No. 22-7295(CA)

NATIONAL COUNCIL OF CSA LOCALS,
AFGE, AFL-CIO

Complainant

DECISION AND ORDER

On May 23, 1977, Administrative Law Judge Edwin S. Bernstein issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief, and the Complainant filed an answering brief with respect to the Respondent'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 Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief and the Complainant's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Community Services Administration shall:

1. Cease and desist from:

Taking further reduction-in-force actions pursuant to the procedures set forth in Community Services Administration Staff Instruction 351-1.

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

(a) Rescind Community Services Administration Staff Instruction 351-1 and, upon request, meet and confer with the National Council of CSA Locals, AFGE, AFL-CIO, regarding the institution of reduction-in-force procedures.

(b) Post at all of 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 Agency's 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 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
October 4, 1977

Francis X. Burkhardt, 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 take further reduction-in-force actions pursuant to the procedures set forth in Community Services Administration Staff Instruction 351-1.

WE WILL rescind Community Services Administration Staff Instruction 351-1 and, upon request, meet and confer with the National Council of CSA Locals, AFGE, AFL-CIO, regarding the institution of reduction-in-force procedures.

_____
(Agency)

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, Labor-Management Services Administration, United States Department of Labor whose address is 3535 Market Street, Room 14120, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
COMMUNITY SERVICES ADMINISTRATION Respondent	:	
v.	:	Case No. 22-7295 (CA)
NATIONAL COUNCIL OF CSA LOCALS, AFGE, AFL-CIO Complainant	:	

Rogers Davis, Esquire
Labor-Management Relations Specialist
Personnel and Manpower Division
Community Services Administration
1200 - 19th Street, N.W.
Washington, D.C. 20506

For the Respondent

Phillip R. Kete, President
National Council of CSA Locals
AFGE, AFL-CIO
1200 - 19th Street, N.W.
Washington, D.C. 20506

For the Complainant

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding was initiated upon the filing of a complaint by National Council of CSA Locals, AFGE, AFL-CIO ("the Union") against Community Services Administration ("the Agency") on June 16, 1976.

The complaint alleges that the Agency violated

Sections 19(a)(5) and (6) of Executive Order 11491, as amended ("the Executive Order") by unilaterally issuing reduction in force ("RIF") regulations prior to final agreement by the Union. 1/ The Regional Administrator for the Philadelphia Region issued a Notice of Hearing on October 28, 1976 with respect to alleged violations of Section 19(a)(6) of the Executive Order.

A hearing was held before me in Washington, D.C. on January 11, 1977. Both parties were present and were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to adduce relevant evidence. Briefs were filed by both parties.

Upon 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

There is no dispute about the facts. The Agency has approximately 1000 employees in its headquarters and 10 regional offices. The Union, which represents the Agency's employees has 11 locals - one at each office, administered by its national council.

As of October 13, 1975, the Agency was divested of its legal services functions as a result of legislation, and a reduction in force became necessary. The Agency then had no regulation governing reductions in force.

On December 14, 1975, Mr. Phillip R. Kete, the Union's president wrote to Mr. Alphonse Rodriguez, the Agency's Director of Administration, requesting negotiations between the Agency and Union on reduction in force procedures. The letter stated:

> "... we suggest that sufficient time be allowed in any timetable you may be developing for reorganizing or reducing in force to complete your obligation to

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1/ By request of October 20, 1976 approved by the Assistant Regional Administrator on October 26, 1976, the Union withdrew its allegation of violation of Section 19(a)(5).

us."

In letters to Mr. Rodriguez on January 9 and 13, 1976, Mr. Kete renewed his request that negotiations begin.

The Agency sent a proposed staff instruction on the subject to the Union on January 27, 1976. The Union rejected this by letter of February 4, 1976. On March 8, 1976 the Agency submitted another proposed staff instruction and on March 26, 1976 the Union sent a counter-proposal to management.

The parties held negotiating meetings on at least five days between March 31 and April 16, 1976. During all sessions, the Agency's Director of Personnel, Mr. Robert W. Crittenden was its chief negotiator and Mr. Kete was the Union's chief negotiator.

At the first negotiating session, Mr. Kete stated that any agreement reached in the negotiations would be subject to ratification by the Union's members and that the Union could not enter into any agreement unless it was so ratified. Mr. Crittenden answered that the Agency "could not recognize a ratification process". The parties then began negotiations and the issue of Union's right to obtain ratification was not discussed again.

Negotiations were constructive. The negotiators reached agreement on all provisions by April 16, 1976. On that date, a clean draft was initialled by the chief negotiators. A "Memorandum of Understanding" indicating agreement was initialled by the chief negotiators but they did not sign at the memorandum's signature blocks. At the time, Mr. Crittenden asked Mr. Kete when the Union would sign the memorandum. Mr. Kete replied that he would sign it as soon as it was ratified by the membership.

Mr. Crittenden testified that he did not sign the memorandum on April 16, 1976 because he needed to brief the Agency's director, Mr. Samuel Martinez, on the agreement before signing. Mr. Crittenden briefed Mr. Martinez about the agreement late in the first week of May. On April 16, after the negotiators had completed initialling, Mr. Alphonse Rodriguez, Mr. Crittenden's direct supervisor, requested some minor changes. The Union agreed to these changes and the agreement was so modified.

By Tuesday, May 11, 1976, the Agency was ready to issue

the proposed regulation and indicated this to the Union.

On April 16, 1976, the same day that the memorandum was initialled, Mr. Kete sent copies of the proposed regulation to the other national council officers and to the president of each local, asking that it be submitted to the local memberships for a vote on ratification. Mr. Kete asked the Agency if he could use the Agency's TWX Machine for this purpose. When the Agency refused permission, he used regular mail.

The Union's constitution provides that ratification shall be accomplished by approval of at least a majority of its locals having a majority of the Union's total membership. By May 5, 1976, 5 locals voted against ratification, 3 ratified, and 3 others indicated that if voted upon ratification would fail. The locals that opposed ratification circulated letters explaining their views. On May 6, 1976, Mr. Kete sent a three page, single-spaced memorandum to all locals setting forth arguments and a request that they reconsider and ratify the proposed regulation.

On May 7, 1976, Mr. Kete wrote to Mr. Martinez warning against any unilateral issuance of a reduction in force regulation. The letter stated:

> "I understand that personnel director Robert Crittenden intends to issue a staff instruction establishing policies for carrying out reductions in force, despite the fact that negotiations are in progress. You are aware no doubt, that such action would be an unfair labor practice and we would be forced to respond accordingly."

On May 11, 1976, Mr. Crittenden wrote to Mr. Kete stating that the reduction in force regulation would be published and made effective that day. Also on May 11, Mr. Crittenden replied to Mr. Kete's May 7 letter and Mr. Kete wrote to Mr. Martinez protesting the issuance of the regulation. On May 12, 1976, Mr. Kete wrote to Mr. Crittenden stating that the Union's membership rejected the proposed regulation and tentative agreement and requesting the resumption of negotiations.

The Agency issued its reduction in force regulation, CSA Staff Instruction 351-1, on May 14, 1976. The Union

filed its complaint in this proceeding on June 16, 1976.

By letter to the parties of October 28, 1976, the Regional Administrator directed attention to the following issues:

> "1. Is the Union entitled, under the Order, to obtain membership ratification of an agreement concerning RIF regulations prior to the Activity's implementation of the agreement?
>
> "2. Did the Activity violate the Order by promulgating the RIF regulations prior to final agreement by the Union?

The Agency contended that it was urgent that the regulation be issued when it was because of concern for violation of Civil Service Commission regulations concerning illegal details. My findings with regard to the relevant facts, similarly undisputed, follow.

Pending enactment of a reduction in force regulation the Agency had its affected employees on an 120 day detail. That detail was extended for another 120 days which expired on June 8, 1976. Under Civil Service Commission regulations the Agency was required to complete its reduction in force by June 8, 1976. The reduction in force pursuant to the regulation issued on May 14, 1976 was not completed by June 8, 1976. On May 14, 1976, it was apparent to the Agency that a reduction in force pursuant to a regulation issued on that date could not have been completed by June 8, 1976. Mr. Crittenden stated that even though the Agency knew this, it felt that it should at least issue a regulation by June 8, 1976 to show that the Agency was "moving with all immediate speed".

The Agency admitted that during the years of 1973 through 1976 there were a number of other instances in which it was not able to comply with the Civil Service Commission regulations regarding details and there were quite a few "illegal details" by the Agency."

Mr. Kete stated that his conclusion the agreement should be ratified before being executed and finally agreed to was based on Article IX, Section 2 of the Union's constitution and the emotional nature of the subject of the

regulation. 2/

Conclusions of Law

Section 11(a) of the Executive Order provides that "An Agency and a labor organization that has been accorded exclusive recognition ... shall ... confer ... with respect to matters affecting working conditions ..." In United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289, the Assistant Secretary held that while the decision to effectuate a RIF action is a matter about which there is no obligation to meet and confer, there is an obligation under the Executive Order to meet and confer about the method and procedures of carrying out the RIF action before carrying it out and that the activity's issuance of RIF notices without providing the Union with an opportunity to meet and confer on the subject violated Section 19(a)(6) of the Executive Order. This holding has been consistently adhered to: Iowa State Agricultural Stabilization and Conservation Service Office, Department of Agriculture, A/SLMR No. 453; Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 679.

By issuing CSA Staff Instruction on May 14, 1976, the Agency violated Section 19(a)(6) of the Executive Order in that it failed to provide a sufficient opportunity for the Union to confer on the RIF regulation.

The Union was entitled to obtain ratification of the proposed RIF regulation before agreeing to it. The agreement regarding the regulation was a national contract and therefore ratification by the Union membership was required by Article IX, Section 2 of the Union's constitution.

2/ Article IX Section 2 reads:

> "Ratification of any local negotiated contracts or agreements shall be by a majority of the Local membership. Ratification of a National contract shall be by a minimum of both 50 percent of the Locals and 50 percent of the Union members. All members of a local are considered to have ratified the contract once that Local has so approved at a regular or special meeting".

In its dealings with the Agency, the Union at all times carefully preserved its right to obtain membership ratification. The document initialled on April 16 was not a binding agreement. It was a tentative agreement subject to Union ratification and subject to the approval by the Agency's director.

I do not agree with the Agency's contention that an impasse was reached. There was a tentative agreement, an attempt to obtain ratification, and a request to return to the bargaining table when ratification failed. In no way does this constitute an impasse.

The Agency stressed its need to act quickly. Throughout the parties' dealings the Union acted expeditiously; it was not the cause of any delays. It was the Union that urged commencing negotiations as early as December 1975. Despite the Agency's concern about time, it took approximately 3 weeks for its director to approve the proposed regulation. The reduction in force could not have been completed by the required June 8, 1976 date by the issuance of the regulation on May 14. Mr. Crittenden testified that, failing completion of the RIF by June 8, the regulation should have been issued by June 8. By that standard, the Agency could have delayed issuance of the regulation for another three weeks.

Finally, in view of the Agency's frequent resort to extended details contrary to Civil Service Regulations, the argument that it issued the regulation on May 14 because of its desire to avoid illegal details is unpersuasive, especially since the RIF could not be completed by June 8 and illegal details would be required in any event.

Thus, instead of issuing the RIF regulation, the Agency should have returned to the bargaining table when it learned that the Union's membership had failed to ratify the proposed agreement.

In the Union's post-hearing brief it urges, "The only logical remedy is that CSA Staff Instruction 351-1 be declared null and void and any personnel actions taken pursuant to it be rescinded. To not order this remedy would be to condone the violation and make a bargaining obligation under the Executive Order a nullity". Although this argument is persuasive, the Federal Labor Relations Council has recently held in Department of the Interior, Bureau of

Reclamation, Yuma Projects Office, Yuma, Arizona that, "an unfair labor practice complaint may not be used as an alternate method for obtaining redress for the employees who properly have access to the appeals procedure". 3/ The Council further held that the Assistant Secretary could not direct reestablishment of competitive areas, reevaluation of layoffs that had been made, or reinstatement with back pay of any employee incorrectly laid off.

Recommendation

Having found that Respondent has engaged in conduct prohibited by Section 19(a)(6) of Executive Order 11491, as amended, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes and policies of the Executive Order.

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended and Section 203.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Community Services Administration shall:

1. Cease and desist from:

(a) Further reduction in force actions pursuant to CSA Staff Instruction 351-1.

(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 policies of the Executive Order:

(a) Rescind CSA Staff Instruction 351-1.

3/ FLRC No. 74A-52, reviewing A/SLMR No. 401. See A/SLMR No. 808 for decision on remand. Also, see Colorado Air National Guard, Buckley Air National Guard Base, Aurora, Colorado, A/SLMR No. 758 which the Assistant Secretary found distinguishable.

(b) Upon request meet, confer and negotiate with National Council of CSA Locals, AFGE, AFL-CIO regarding new reduction-in-force procedures.

(c) Post at all of 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 Agency's 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.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

EDWIN S. BERNSTEIN
Administrative Law Judge

Dated: May 23, 1977
Washington, D.C.

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 rescind CSA Staff Instruction 351-1 and not take any further reduction-in-force actions pursuant to that instruction.

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 National Council of CSA Locals, AFGE, AFL-CIO, meet, confer and negotiate regarding new reduction-in-force procedures.

_____
Agency

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, Labor-Management Services Administration, United States Department of Labor whose address is 3535 Market Street, Room 14120, Philadelphia, Pennsylvania 19104.

October 4, 1977

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

DEPARTMENT OF THE NAVY,
NAVY TORPEDO STATION,
KEYPORT, WASHINGTON
A/SLMR No. 914

This case involved representation petitions filed by the International Association of Machinists and Aerospace Workers, Local 282, AFL-CIO, (IAM) and by the International Federation of Professional and Technical Engineers, Local 12, AFL-CIO, (IFPTE). The IAM sought an election in a unit consisting of all nonprofessional General Schedule (GS) employees of the Activity working at its Keyport and Bangor sites. The IFPTE sought an election in a unit consisting of, in effect, all GS professional employees and all nonprofessional technical employees of the Activity working at its Keyport and Bangor sites. The Activity took the position that the unit sought by the IAM was appropriate and that the unit sought by the IFPTE, insofar as it would include among its nonprofessional component only technical employees, was inappropriate, as such employees do not have a community of interest separate and distinct from other nonprofessional GS employees of the Activity. The Activity also indicated it would not oppose a separate unit consisting of all professional employees.

Under all of the circumstances, the Assistant Secretary concluded that the unit petitioned for by the IAM was appropriate under Section 10(b) of the Order as the claimed employees share a clear and identifiable community of interest. He found that all of the Activity's nonprofessional GS employees, including the technical employees sought by the IFPTE in its petitioned for unit, have essentially the same working conditions, experience, job contacts, occasionally share common supervision, and are covered by the same labor relations policies, personnel policies and procedures. Additionally, he found that the unit petitioned for by the IAM would promote effective dealings and efficiency of agency operations. In this regard, he noted that the Civilian Personnel Department services all of the nonprofessional employees, including administering all of the Activity's personnel programs and policies, and that the inclusion of all unrepresented nonprofessional GS employees in one unit would prevent fragmentation of units at the Activity as such unit is, in effect, a residual unit of all unrepresented nonprofessional GS employees of the Activity.

With respect to the IFPTE's petitioned for unit of all GS professional employees and nonprofessional technical employees located at the Activity's Keyport and Bangor sites, the Assistant Secretary found that such unit

was inappropriate for the purpose of exclusive recognition. He noted that the claimed GS nonprofessional technical employees encompass only a part of the Activity's nonprofessional GS employees and that such employees do not share a clear and identifiable community of interest separate from other nonprofessional and nontechnical GS employees at the Activity inasmuch as they have essentially the same working conditions, are covered by the same personnel policies and procedures, and, occasionally, share common supervision.

However, the Assistant Secretary found that a separate unit of all professional employees, which was encompassed within the IFPTE's petitioned for unit, would be appropriate for the purpose of exclusive recognition under the Order. He noted that a unit of professional employees would include all of the professional employees at the Activity's Keyport and Bangor sites who share a clear and identifiable community of interest. He also found that such a comprehensive unit of all professional employees would promote effective dealings and efficiency of agency operations and would tend to reduce the fragmentation of units at the Activity.

Accordingly, the Assistant Secretary directed that elections be conducted in the units found appropriate.

A/SLMR No. 914

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
NAVY TORPEDO STATION,
KEYPORT, WASHINGTON

Activity

and Case No. 71-4093(RO)

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, LOCAL 282, AFL-CIO

Petitioner

DEPARTMENT OF THE NAVY,
NAVY TORPEDO STATION,
KEYPORT, WASHINGTON

Activity

and Case No. 71-4155(RO)

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, LOCAL 12, 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 Daniel P. Krause. 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 submitted by the International Association of Machinists and Aerospace Workers, Local 282, AFL-CIO, hereinafter called IAM, the Assistant Secretary finds:

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

2. In Case No. 71-4093(RO), the IAM seeks an election in a unit consisting of all General Schedule (GS) employees of the Activity working at its Keyport and Bangor sites, excluding professional employees,

employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, firemen, guards, and supervisors as defined in Executive Order 11491, as amended.

In Case No. 71-4155(RO), the International Federation of Professional and Technical Employees, Local 12, AFL-CIO, hereinafter called IFPTE, seeks an election in a unit consisting of, in effect, all GS professional employees and all nonprofessional technical employees of the Activity working at its Keyport and Bangor sites, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, firemen, guards, and supervisors as defined by the Order. Thus, the unit petitioned for by the IFPTE would include some of the nonprofessional GS employees petitioned for by the IAM.

The Activity takes the position that the unit sought by the IAM is appropriate for the purpose of exclusive recognition and that the proposed IFPTE unit, insofar as it would include among its nonprofessional component only technical employees, is inappropriate, as such employees do not have a community of interest separate and distinct from other nonprofessional GS employees of the Activity. The Activity indicated that it would not oppose a separate unit consisting of all professional employees. The IFPTE takes the position that its petitioned for unit is appropriate in that units of technical employees are currently recognized in the Federal sector. On the other hand, the IAM contends that the IFPTE's petitioned for unit is inappropriate inasmuch as it does not, in fact, encompass all of the nonprofessional technicians of the Activity. 1/

The Activity's mission is to provide material and technical support for assigned weapons systems, weapons or components; to proof, test and evaluate underwater weapons and components; to exercise design cognizance of underwater acoustic ranges and range equipment; and to perform additional tasks as directed by the Commander of the Naval Sea Command. It is comprised of some nine support departments and some eight production departments and attachments. The nine support departments consist of: Administration, Comptroller, Data Processing, Safety, Resources and Planning, Civilian Personnel, Industrial Support, Security, and Supply. The eight production departments and attachments consist of: Weapons, Weapons Quality Engineering Center, Quality Assurance, Proof and Test Evaluation, Indian Island/Bangor Detachment, Research and Engineering, Technical Operations, and NAVTORPSTA Detachment, Hawaii. 2/

1/ The parties stipulated that there were other job classifications at the Activity having the title of technician which were not included in the list of those positions considered to be "technical" by the IFPTE.

2/ The parties stipulated as there are no GS employees located at the Activity's Indian Island location and as the Activity's Hawaii Detachment is such a great distance from Keyport, the employees at these locations should be excluded from either of the petitioned for GS units.

The record reveals that there are approximately 628 nonsupervisory, nonprofessional GS employees and approximately 259 nonsupervisory, professional GS employees at the Activity's Keyport and Bangor sites. Of the 628 nonsupervisory GS employees petitioned for by the IAM, the IFPTE contends that approximately 269, in some 17 different job classifications, are technical employees. There are no employees in the petitioned for units covered by negotiated agreements or represented by an exclusively recognized labor organization. 3/

The IFPTE's petitioned for unit of technical and professional employees work throughout the various departments and divisions of the Activity to coordinate efforts in performing the functions necessary in accomplishing the Activity's mission. The record indicates that all of the Activity's GS employees interact with each other within their own branches and divisions as well as interacting with other GS employees in other branches and divisions in order to coordinate the work flows essential in accomplishing the Activity's projects.

Many of the Activity's technicians, including those not designated as "technical" employees by the IFPTE (see footnote one, above), work in the same areas and have the same working conditions as all of the other Activity's GS employees throughout the Activity and, in many instances, are supervised by the same supervisors. For example, computer technicians work closely with mathematicians, computer specialists and programmers, and systems analysts in other Activity divisions and branches; the industrial engineer technician works closely with management analysts and project and program engineers; the equipment specialist works closely with the GS supply employees and program analyst and coordinates work with a load coordination analyst; and the quality assurance specialist works with GS employees such as the auditors, equipment operators, clerks and computer specialist.

All of the Activity's GS employees are covered by the same personnel policies and placement plan, incentive programs and disciplinary actions. The record reveals also that all of the Activity's personnel programs and policies, including labor relations policies, are centrally administered by its Civilian Personnel Department.

3/ The record reveals that the following employees are included in units of exclusive recognition at the Activity, Keyport: the Bremerton Metal Trades Council represents all nonsupervisory trades and crafts (Wage Grade employees) except those in the Ordnance and Public Works Departments; the IAM represents all nonsupervisory trades and crafts in the Ordnance and Public Works Departments; Local 48, American Federation of Government Employees, AFL-CIO, represents all nonsupervisory firefighters and guards in the Security Department; and Local 1630, American Federation of Government Employees, AFL-CIO, represents all nonsupervisory employees in the NAVTORPSTA Detachment, Hawthorne, Nevada.

Under all of the circumstances herein, I find that the unit petitioned for by the IAM in Case No. 71-4093(RO) is appropriate for the purpose of exclusive recognition under Section 10(b) of the Order as the claimed employees share a clear and identifiable community of interest. Thus, as noted above, the evidence establishes that the Activity's nonprofessional GS employees, including the technical employees claimed by the IFPTE, have essentially the same working conditions, experience, job contacts, occasionally share common supervision, and are covered by the same labor relations policies, personnel policies and procedures. Additionally, I find that such a unit will promote effective dealings and efficiency of agency operations. With regard to effective dealings, the evidence establishes that the Civilian Personnel Department services all of the nonprofessional employees, including administering all of the Activity's personnel programs and policies. With respect to efficiency of agency operations, I find that the inclusion of all unrepresented nonprofessional GS employees in one unit will prevent the fragmentation of units at the Activity as such unit is, in effect, a residual unit of all unrepresented, nonprofessional GS employees of the Activity. Accordingly, I find that the unit petitioned for by the IAM in Case No. 71-4093(RO) is appropriate for the purpose of exclusive recognition.

Furthermore, I find that the IFPTE's petitioned for combined unit in Case No. 71-4155(RO) of all GS professional employees and nonprofessional technical employees at the Activity's Keyport and Bangor sites is inappropriate for the purpose of exclusive recognition. In this regard, the record reveals that the claimed GS nonprofessional technical employees encompass only a part of the Activity's nonprofessional GS employees and that such employees do not share a clear and identifiable community of interest separate from other nonprofessional and nontechnical GS employees at the Activity inasmuch as they all essentially have the same working conditions, are covered by the same personnel policies and procedures, and, occasionally, share common supervision.

However, I find that a separate unit of all professional employees, which is encompassed within the IFPTE's petitioned for unit, would be appropriate for exclusive recognition under the Order. In this regard, the record reveals that a unit of professional employees would include all of the professional employees at the Activity's Keyport and Bangor sites who share a clear and identifiable community of interest. Furthermore, such a comprehensive unit of all professional employees will promote effective dealings and efficiency of agency operations and will tend to reduce the fragmentation of units at the Activity.

Under all of the above circumstances, I find that the following described units are appropriate for the purpose of exclusive recognition within the meaning of Section 10(b) of Executive Order 11491, as amended:

Unit A: All nonprofessional General Schedule employees of the Navy Torpedo Station, Keyport, working at the Keyport and Bangor sites, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, professional employees, management officials, firemen, guards, and supervisors as defined in Executive Order 11491, as amended.

Unit B: All professional employees of the Navy Torpedo Station, Keyport, working at the Keyport and Bangor sites, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, firemen, guards, and supervisors as defined in Executive Order 11491, as amended. 4/

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted among employees in the units 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 described 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 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 Unit A shall vote whether they wish to be represented for the purpose of exclusive recognition by the International Association of Machinists and Aerospace Workers, Local 282, AFL-CIO; by the International Federation of Professional and Technical Engineers,

4/ The record is unclear as to whether the IFPTE's showing of interest is adequate in the professional unit found appropriate in Case No. 71-4155(RO). Accordingly, before proceeding to an election in the subject case, the appropriate Area Administrator is directed to reevaluate whether or not the IFPTE has a 30 percent showing of interest among the Activity's professional employees. If it is determined that the IFPTE's showing is insufficient, then the petition in Case No. 71-4155(RO) should be dismissed.

Local 12, AFL-CIO; or by neither labor organization. 5/ Those eligible to vote in Unit B shall vote whether or not they wish to be represented for the purpose of exclusive recognition by the International Federation of Professional and Technical Engineers, Local 12, AFL-CIO.

Because the above Direction of Election with respect to Unit B is in a unit different than that which was sought by the IFPTE, I shall permit IFPTE to withdraw its petition if it does not desire to proceed to an election in the unit found appropriate upon notice to the appropriate Area Administrator within 10 days of the issuance of this decision. If the IFPTE desires to proceed to an election, because the unit found appropriate is substantially different than that 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 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 among the employees in the unit found appropriate.

Dated, Washington, D. C.
October 4, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

5/ The record is unclear as to whether the showing of interest of the IFPTE is adequate to treat the IFPTE as an intervenor in the nonprofessional unit found appropriate in Case No. 71-4093(RO). Accordingly, before proceeding to an election in the subject case, the appropriate Area Administrator is directed to evaluate whether or not the IFPTE has a 10 percent showing of interest among the nonprofessional employees so as to afford it intervenor status in the election in Case No. 71-4093(RO). If it is determined that the IFPTE's showing of interest is insufficient, it should not be placed on the ballot in said election.

October 4, 1977

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

U.S. AGRICULTURAL RESEARCH SERVICE,
GEORGIA - SOUTH CAROLINA AREA
A/SLMR No. 915

This case arose as a result of the representation petition filed by the National Federation of Federal Employees, Local 1924 (NFFE). The NFFE sought a unit of all of the Activity's nonprofessional employees, excluding employees in existing bargaining units in which either agreement or certification bars exist, as well as the standard exclusions. The Activity took the position that the sought unit is inappropriate for the purpose of exclusive recognition, and that the only appropriate unit would be an Area Office-wide unit.

The Assistant Secretary found that the unit petitioned for by the NFFE was appropriate for the purpose of exclusive recognition. In this regard, he noted that the sought unit is, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity, and that the employees in such unit have similar job classifications, skills, and duties, are subject to common personnel policies and practices, and enjoy common overall supervision and essentially uniform working conditions. Further, noting the delegation of labor relations authority to the Activity Director, the Assistant Secretary found that the sought unit would promote effective dealings and efficiency of agency operations, and such unit would prevent further fragmentation of the Activity's nonprofessional employees. Accordingly, the Assistant Secretary directed an election to be conducted among employees in the unit found appropriate.

A/SLMR No. 915

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. AGRICULTURAL RESEARCH SERVICE,
GEORGIA - SOUTH CAROLINA AREA

Activity

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1924

Petitioner

and Case No. 40-07505(RO)

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

Party in Interest 1/

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 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 the case, including briefs filed by the Activity and the National Federation of Federal Employees, Local 1924, hereinafter called NFFE, the Assistant Secretary finds:

1. The NFFE claims to represent certain employees of the Activity.

2. In its petition, the NFFE seeks an election in a unit consisting of all employees in the Georgia-South Carolina Area of the Agricultural Research Service, U.S. Department of Agriculture, excluding employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, professional employees, confidential employees, supervisors and employees in units under agreement and certification bars. The Activity takes the position that the petitioned for unit is not appropriate for the purpose of exclusive recognition under the Order. It contends that only an area-wide unit is appropriate and that the petitioned for unit, which is a residual unit, would serve to continue the fragmentation of the Activity which now exists.

1/ The American Federation of Government Employees, AFL-CIO, Local 987, hereinafter called AFGE, was permitted to appear at the hearing as a party in interest in view of the Activity's contention that only an area-wide unit would be appropriate and such a unit would include a facility for which the AFGE holds exclusive recognition.

The mission of the Agricultural Research Service (ARS), which was established in 1953 as a division of the Department of Agriculture, is to conduct basic, applied, and developmental research concerning animal and plant production, the use and improvement of soil, water and air, and the marketing, use, and effects of agricultural products. The ARS' operations are conducted at numerous field locations in the United States, Puerto Rico, the Virgin Islands, and in several foreign countries. Central offices for the Administrator of the ARS and his staff are maintained in the Washington, D.C., metropolitan area. These offices provide overall leadership and direction to the programs and activities assigned to the ARS. Field activities are conducted on a geographical basis through four Regional Offices, 20 Area Offices and seven major Research Centers.

The Activity herein is one of nine Area Offices in the Southern Region, whose headquarters is in New Orleans, Louisiana. Headquartered in Tifton, Georgia, the Activity is headed by an Area Director, whose staff consists of an Assistant Area Director, an Area Administrative Officer, and two secretaries. The Area Director exercises general supervision over the work and operation of over 30 different lines of research carried out at eight different locations. 2/ The Activity is further subdivided into laboratories headed by a Laboratory Director or Chief, and research units headed by a Research Leader. Laboratories exist only at those locations where there is a need for technical leadership and coordination of the efforts of several research units. The basic organizational component of the Activity is the research unit, and the Research Leader reports directly to the Area Director except when the research unit is under a Laboratory Director or Chief. The Research Leader is the immediate supervisor of employees in the unit and, where applicable, the Laboratory Director or Chief is the second level supervisor.

At the time of the hearing in this matter, four exclusively represented units existed within the Activity. In July 1970, NFFE Local 1758 was certified as the exclusive representative of a unit of all nonprofessional employees of the Stored-Products Insect Research and Development Laboratory, located in Savannah, Georgia. There is a negotiated agreement covering this unit which expired in July 1977. On January 20, 1976, AFGE Local 987 was certified as the exclusive representative of a unit of all nonprofessional employees of the Southeastern Fruit and Tree Nut Laboratory, Byron, Georgia, with the standard exclusions. In January 1970, NFFE Local 1764 was certified as the exclusive representative of the nonprofessional and professional employees of the Plant Introduction Station, Bamboo Farm, Savannah, Georgia. In a letter to the Hearing Officer, NFFE Local 1764 disclaimed interest in further representing these latter employees, and, at the hearing herein, the NFFE representative present stated that NFFE Local 1764 is, in fact, defunct. In July 1970, NFFE Local 1755 was certified as the exclusive representative of

2/ Charleston, Florence, and Clemson, South Carolina; and Byron, Savannah, Tifton, Experiment, and Dawson, Georgia.

all nonprofessional Wage Grade employees of the Crops Research Division, Vegetable Breeding Laboratory, Charleston, South Carolina. At the hearing, a NFFE national representative, acting on behalf of NFFE Local 1755, agreed to include this unit in the petitioned for unit. The claimed unit includes, therefore, all nonprofessional employees of the Activity, except the nonprofessional employees in exclusively recognized units assigned to the Southeastern Fruit and Tree Nut Laboratory, Byron, Georgia, and the Stored-Products Insect Research and Development Laboratory, Savannah, Georgia.

In asserting its position with regard to the appropriateness of the claimed unit herein, the Activity argued that the existence of less than area-wide units should not be considered in reaching a determination in the instant matter. In this regard, the Activity pointed out that all of the units existing at the time the instant petition was filed were created prior to a 1972 reorganization which created the present organizational structure of the ARS and the Activity. With regard to the Byron, Georgia, unit for which the AFGE was certified in 1976, the Activity noted that this unit also existed prior to the reorganization, and that the 1976 certification resulted as a consequence of a successful challenge by the AFGE in the existing unit.

Essentially all employees of the Activity enjoy common personnel policies and practices administered by the Regional Personnel Office. In this regard, the evidence establishes that the competitive area for merit promotions GS-7 through GS-11 is regionwide; the competitive area for reductions-in-force involving research technicians GS-7 and above is area-wide, while that for other positions GS-7 and above is regionwide; the authority to establish or revise employees' tours of duty is vested in the Regional Deputy Administrator, but this authority can be delegated to the Area Director; the authority to approve irregular or unscheduled overtime is held by the Area Director; the Area Director is the lowest level for the approval of incentive awards; and the Area Director has the authority to approve travel, training, all formal details of employees lasting 30 days or more and all changes in postiion descriptions. While labor relations matters are handled by the Regional Personnel Office, the Area Director has been delegated final authority with regard to such matters. The record reveals also that the employees in the sought unit are classified either as technicians or as clericals, and, despite their geographic dispersion, perform their duties (technical and/or clerical) under generally similar conditions.

Based on the foregoing circumstances, I find that the area-wide unit sought is appropriate for the purpose of exclusive recognition. Thus, there was no evidence that the existing units have been rendered inappropriate by a reorganization. The employees in the sought unit include all of the remaining unrepresented, nonprofessional employees of the Activity and, therefore, constitute a residual unit of the Activity's nonprofessional employees. Further, all employees in the claimed unit enjoy common overall supervision, generally similar working conditions, have similar classifications, skills and duties, and are subject to

common personnel policies and practices. Moreover, noting the delegation of authority to the Area Director in labor relations matters, and the fact that the claimed unit constitutes a comprehensive residual grouping of the Activity's nonprofessional employees which will prevent further fragmentation, I find that such unit will promote effective dealings and efficiency of agency operations.

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 employees of the Georgia-South Carolina Area, Agricultural Research Service, U.S. Department of Agriculture, excluding nonprofessional employees of the Stored-Products Insect Research and Development Laboratory, Savannah, Georgia, and the Southeastern Fruit and Tree Nut Laboratory, Byron, Georgia, all professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity and supervisors as defined by 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 employees who did not work during that period because they were out ill or on vacation or on furlough, including those in the military services 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 or not they desire to be represented for the purpose of exclusive recognition by the National Federation of Federal Employees, Local 1924. 3/

Dated, Washington, D.C.
October 4, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

3/ As the unit represented by the AFGE is not included in the unit for which an election has been directed herein, and as there was no other basis warranting the AFGE's intervention in this matter, I shall not place the AFGE on the ballot.

October 5, 1977

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

GENERAL SERVICES ADMINISTRATION,
REGION 2
A/SLMR No. 916

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees (AFL-CIO), District 2, Council of General Services Administration Locals (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally changing certain working conditions without meeting and conferring regarding the "change and/or procedures." The alleged change in working conditions involved the portion of time during work hours when employees of the Federal Archives and Records Center, Bayonne, New Jersey, were to furnish over-the-counter services to persons requesting access to records.

The Administrative Law Judge recommended that the complaint be dismissed. He found that the Respondent had changed the service hours to the public, but it had no obligation to negotiate with the Complainant regarding the decision, noting that the employees' hours of work were not affected. However, he noted that the effectuation of the decision did change working conditions for some employees. While concluding that the Respondent would be required to negotiate concerning the impact of such change, if requested, the Administrative Law Judge noted that after the change was made, the Complainant only requested that it be rescinded.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 916

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 2

Respondent

and Case No. 30-7224(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES (AFL-CIO), DISTRICT 2,
COUNCIL OF GENERAL SERVICES
ADMINISTRATION LOCALS

Complainant

DECISION AND ORDER

On June 6, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-7224(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 5, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
GENERAL SERVICES ADMINISTRATION, REGION 2 Respondent	:	
and	:	Case No. 30-7224(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL-CIO), DISTRICT 2, COUNCIL OF GENERAL SERVICES ADMINISTRATION LOCALS Complainant	:	

Gene Carbone, President
Council of G.S.A. Locals
26 Federal Plaza
New York, New York 10007
For the Complainant

Joseph A. Livingston, Esq.
Chief, Employee Relations Branch
General Services Administration
26 Federal Plaza
New York, New York 10007
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11419 as amended. It was initiated by a complaint dated July 8, 1976 and filed July 13, 1976 alleging a violation of Sections 19(a)(1) and (6) of the Executive Order. The violation was alleged to consist of a Facility of the Respondent, the Federal Archives and Records Center in Bayonne, New Jersey, by memorandum of May 20, 1976, changing the hours it would furnish over-the-counter

service to persons requesting access to records until 4:30 P.M. instead of the previous expiration time of 4:00 P.M., without conferring with the Complainant concerning the impact of such change. The Respondent filed a response to the complaint dated August 27, 1976 in which it denied that the memorandum of May 20 changed the over-the-counter hours of service but simply constituted a reaffirmation and reminder of the previously existing hours of such service.

On January 11, 1977 the Regional Administrator issued a Notice of Hearing to be held on January 27, 1977 in Bayonne, New Jersey. Hearings were held on January 27 and 28 in Bayonne. The Complainant was represented by the President of the Council of General Services Administration Locals, District 2 and the Respondent was represented by the Chief of its Employee Relations Branch. Both sides produced witnesses who were examined and cross-examined and both sides offered exhibits which were received in evidence. Both sides made closing arguments and the Respondent filed a timely brief on March 21, 1977.

FACTS

The Federal Archives and Records Center in Bayonne, New Jersey, is a Facility of the Respondent. It is one of sixteen records centers in the United States and one of ten federal archives. It stores and services federal records that are created in the States of New York and New Jersey. Its records are produced for study in the reading room by representatives of governmental agencies, researchers, students, and other members of the public. American Federation of Government Employees (AFGE) Local 3248, a component of the Complainant, represents a unit of the Facility's employees including those who service "patrons" who come to obtain and examine records.

Prior to locating in Bayonne the Facility was located in New York City. It started moving to Bayonne in January of 1974. It started furnishing service to customers in Bayonne in September 1974 and the move was completed early in 1975.

In New York City the official working hours were from 8:30 A.M. to 5:00 P.M. A sign in the lobby of the building in which the Facility was located advised the public that reference services were furnished in Room 302 from 9:00 A.M. to 4:00 P.M. That sign was put up by the Public Buildings Service of G.S.A. over the objection of the Director of the

Facility. There was no such sign in the Center itself and services were actually furnished during the entire working hours.

The hours of duty in Bayonne were initially 8:15 A.M. to 4:45 P.M. The location of the Facility in Bayonne, one of the buildings in the Military Ocean Terminal, is not readily accessible by public transportation. At the request of the employees, to facilitate their transportation problems, the hours of duty were changed to 8:00 A.M. to 4:30 P.M. in October 1975 with the approval of the Regional Administrator. An issue of the Federal Register in November 1974 announced that the business hours of the Facility were 8:00 A.M. to 4:30 P.M. Monday through Friday, and 41 C.F.R. § 105-61.5101-7, under the heading "Location of Records and Hours of Use", states that the hours at the Facility are 8:00 A.M. to 4:30 P.M. Monday through Friday.

At some undeterminable time before May 20, 1976 some unascertainable person placed a sign in the room where patrons came to obtain over-the-counter service which stated that reference requests would not be serviced after 4:00 P.M. Such statement was largely academic because service business fell off sharply beginning about 3:00 P.M. and it was rarely that service was asked for after 4:00 P.M. and when it was asked for it was generally given. However, some of the employees who sometimes furnished over-the-counter service or responded to telephonic requests sometimes responded to requests for such service after 4:00 P.M. by telling the customer or caller to come back or call back the next day. Requests for over-the-counter service were made in writing on a printed form. When a request was made late in the day, or when it was made for a volume of material that appeared likely to take a long time to examine, a rubber stamp was placed on the request advising the patron that "the reference room closes at 4:00 P.M."

There was a sharp conflict in the testimony over how long the sign at the service counter stating that reference requests would not be serviced after 4:00 P.M. had been there. The testimony ranged from the sign having been there since service began at Bayonne to the testimony of the Director of the Facility, Thomas F. Greitz, that it could not have been there much before the week before May 20, 1976 when he first noticed it.

Greitz testified that he had been the Director since before the move to Bayonne; that it had always been his policy that service was to be furnished during all business hours; that the space in front of the service counter had been his

office until December 1975 because of construction work in what was to be his office; that he would have seen such sign had it been there then and would have removed it (as he later did), and even after he moved into his regular office, which was near the service counter, he would have noticed it because he moved around a lot and was "nosey" about what was going on; that had he seen such sign he would have replaced it with a sign stating that service terminated at 4:30; and that some time during the week before May 20 he did see the 4:00 sign. He testified that he never authorized the cessation of service at 4:00 P.M. but that he authorized the use of the rubber stamp stating that the reference room closed at 4:00 P.M. as a "nudge" to encourage patrons to leave by 4:30 P.M.

Some time during the week preceding May 20, 1976 Greitz received a telephone call from one of his superiors in Washington complaining that he had called the Records Center at 4:20 P.M. and was told to call back the next day. Greitz' attention was called also to three other incidents that occurred the same week, in two of which a caller had arrived at the Records Center slightly before 4:00 P.M. and the other had arrived slightly after 4:00 P.M. and all three were told to come back the next day. Greitz testified that it was then that he discovered the 4:00 sign and replaced it with a sign of the same size and shape and bearing the same message except that it said that reference requests would not be serviced after 4:30 P.M. instead of 4:00 P.M. I conclude from all the testimony that someone in management authorized the 4:00 P.M. sign and had it placed at the counter at least some months before May 20 and that Greitz replaced it with the 4:30 sign because of the incidents of the week before May 20. I find also that management knew that some employees sometimes did not accept requests for service after 4:00 P.M. and permitted such conduct. With these exceptions I find the facts in accordance with Greitz' testimony.

On May 20, 1976 Greitz addressed a memorandum to five individuals two of whom regularly worked at the service counter two of whom were supervisors of employees who sometimes worked at the service counter, and the fifth was the President of Local 3248 who seldom worked at the service counter. The memorandum stated that there appeared to be some confusion concerning the official hours of duty; that the official hours of duty and hours of service were 8:00 A.M. to 4:30 P.M. that no one was to be turned away if he came before 4:30 P.M. or told to call the next day if he called before 4:30 P.M.; that if asked for service before 4:30 P.M. the service must

be completed; that if it appeared that overtime might be involved it should be called to the attention of the Branch Chief who would determine if overtime was necessary and would obtain authorization of overtime from the Director; that only the Director had authority to determine that service requested before 4:30 P.M. should, because of the lateness of the time of the request, be given the next day; and it concluded with the suggestion that if any employees could not meet such requirements because of personal or transportation problems they should seek employment elsewhere.

A week later, on May 27, 1976, the President of Local 3248, Leroy Hampton, delivered a letter to the Director stating that the Director's May 20 memorandum implemented a change in policy affecting working conditions without conferring with the union concerning the change. It asserted that this was a violation of Executive Order 11491 and requested a meeting to try to solve the issue. Greitz advised Hampton that he would meet with the Union that afternoon. The Local President and Vice President met with Greitz that afternoon. Hampton asked that the memorandum of May 20 be rescinded. Greitz responded that he could not and would not rescind that memorandum and the Union representatives left.

The Facility had buzzers sounded at various times during the working day such as start of official hours, start and end of break periods, and the like. A schedule of sounding the buzzer issued on January 8, 1976 called for a buzzer at 4:20 P.M. to signal the start of wash up and change of clothing period 1/ and a schedule issued on November 17, 1976 (after the complaint in this case was filed) called for the buzzer for that purpose to be sounded at the same time, 4:20 P.M. 2/

One supervisor and several part-time employees regularly worked until 5:00 P.M. There is no evidence that since May 20, 1976 any employee lost his wash-up time because of the announced requirement that over-the-counter service was to be furnished by members of the unit until 4:30 P.M. or that any member of the unit worked overtime for that reason, and I find that no such incident occurred.

DISCUSSION AND CONCLUSION

It has been determined that the 8:00 A.M. to 4:00 P.M. sign for service over the counter was in the service room for some months before May 20, 1976, that management knew it, and that management knew that some employees sometimes told patrons asking for service over the counter or telephonically

1/ Exh. C-3.
2/ Exh. R-8.

to come back or call back the next day if the service was asked for after 4:00 P.M. and permitted such conduct. The memorandum of May 20, 1976, prohibiting a refusal of service if the request was made before 4:30 P.M., thus did effectuate a change in working conditions for some employees in the unit. Since the official working hours were from 8:00 A.M. to 4:30 P.M., the Respondent was not under obligation to negotiate concerning whether such change should be made.

It was, however, under obligation to bargain, if requested, concerning the impact of such change. It did not negotiate before issuing the memorandum and replacing the 8:00 A.M. - 4:00 P.M. sign with the 8:00 A.M. - 4:30 P.M. sign. After May 20 it was not requested to negotiate concerning the impact of the change; it was simply requested to rescind the change and refused to do so.

However, in view of the pattern of patronage at the Facility, the possibility of adverse impact was quite slight. Patronage fell off sharply after 3:00 P.M. and rarely was service asked for after 4:00 P.M. The only possibly adverse impact from the change suggested by anyone was that an employee might lose his wash-up time or might be required to work overtime. The likelihood of that happening was further lessened by the presence of a supervisor and several part-time employees who worked until 5:00 P.M., and in fact it never occurred.

In these circumstances, if we assume that the Facility in abstract principle should have allowed some time, between the announcement of the new policy and its implementation, for discussion of possibly adverse impact, the possibility was too remote and theoretical (and never occurred) for the failure to do so to constitute an unfair labor practice under the Executive Order.

RECOMMENDED ORDER

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: June 6, 1977
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 AMENED

OVERSEAS PRIVATE INVESTMENT CORPORATION
A/SLMR No. 917

This case involved a petition for clarification of unit filed by the American Federation of Government Employees, Local 1534, AFL-CIO (AFGE) seeking clarification of the status of some 14 individuals in the exclusively recognized bargaining unit. The Activity contended that two of the employees were confidential employees and that the remaining employees at issue were supervisors within the meaning of Section 2(c) of the Order.

The Assistant Secretary found that the two employees asserted to be confidential were, in fact, not confidential employees. In addition, he made findings with respect to the supervisory status of the remainder of the employees whose status the AFGE sought to clarify, and he clarified the unit accordingly.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OVERSEAS PRIVATE INVESTMENT
CORPORATION

Activity

and Case No. 22-7532(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1534, AFL-CIO

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 Ralph R. Smith. 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:

The Petitioner, American Federation of Government Employees, Local 1534, AFL-CIO, herein called AFGE, was certified on September 22, 1971, as the exclusive representative of a unit of all professional and non-professional employees of the Overseas Private Investment Corporation, herein called OPIC or Activity. In this proceeding, the AFGE seeks to clarify the status of the following 14 employees who the Activity contends should be excluded from the unit: Carolyn Boddie, Administrative Aid, Steno, GS-301-6; Jose Vasquez, Chauffeur, WG-5703-5; Mary Lloyd, Information Systems Assistant, GS-301-7; Michael Cooper, Financial Analyst, GS-1160-14; Henry Wolfe, Computer Specialist, GS-334-12; Ella Hawkins, Insurance Applications Officer, GS-301-10; Hilda Schudder, Administrative Officer, GS-341-12; Henry Ritter, Accountant (General), GS-510-12; and Attorney-Advisors, GS-905-13/14, Rufus Brown, Allen Keesee, Anthony Marra, Lorin Weinsenfeld, Marcia Wiss and Jay Stevens.

The AFGE contends that Boddie and Vasquez are not confidential employees as argued by the Activity and that Lloyd, Cooper, Wolfe, Hawkins, Scudder and Ritter are not supervisors within the meaning of Section 2(c) of the Order. Further, it asserts that the six Attorney-Advisors

involved herein are not supervisors and/or employees engaged in Federal Personnel work in other than a purely clerical capacity. 1/

The mission of the OPIC is to promote and facilitate the flow of private investment capital in the United States to friendly developing nations. The OPIC offers United States investors assistance in finding overseas investment opportunities, insurance to protect their investments, and loans and loan guarantees to help finance their projects. In addition to encouraging United States investors to make investments in developing nations, the OPIC plays an important role in U.S. foreign policy by stimulating economic and social progress in approximately 90 less developed countries. Organizationally the OPIC is divided into the following departments: Insurance, Financing, Treasurer, Corporate Planning, Public Affairs, General Counsel and the Office of the President.

With respect to the particular employees whose status is in dispute herein, I make the following findings and conclusions:

Carolyn Boddie, Administrative Aid, Steno, GS-301-6 and Jose Vasquez, Chauffeur, WG-5703-5

Carolyn Boddie works as the number three or "back up" secretary in the Office of the President of the OPIC where her work is primarily clerical in nature. Boddie handles incoming and outgoing mail, types everyday correspondence and, on occasion, routinely assists other secretaries in the President's Office. The evidence establishes that in connection with her job functions Boddie has never seen or typed proposals concerning any negotiated agreement with the AFGE, materials concerning employee grievances and promotions, adverse actions, or labor-management memoranda. While Boddie has attended senior management

1/ At the hearing, the parties stipulated that certain individuals covered by the petition, and separately listed in the attached Appendix, are confidential or supervisory employees, or management officials and, therefore, were excluded from the unit. There is no record evidence that the stipulations with respect to the employees listed in the Appendix were improper. It should be noted that such stipulations, in the context of a unit clarification petition, are viewed as motions to amend the petition to delete and, in effect, withdraw the petition as to the stipulated employees. Under these circumstances, I grant the motions to amend and, therefore, find it unnecessary to clarify the status of those stipulated employees listed in the Appendix. Cf. New Jersey Department of Defense, A/SLMR No. 121, and U.S. Department of Transportation, St. Lawrence Seaway Development Corporation, A/SLMR No. 839.

meetings on three occasions and may have occasional access to personnel or statistical records, the record reveals that her attendance at the meetings was for general orientation purposes only and that she does not act in a confidential capacity to a person who formulates and effectuates management policy in the field of labor relations.

With respect to Jose Vasquez, the evidence shows that he performs chauffeur duties for the President of the OPIC, its executive staff, and visiting foreign dignitaries, and serves beverages and lunch at senior staff meetings and receptions. In this capacity, he attends the above-named meetings for short periods of time to perform catering duties and does not act in a confidential capacity to a person who formulates and effectuates management policy in the field of labor relations.

Based on the foregoing circumstances, I find that Boddie and Vasquez are not confidential employees who should be excluded from the exclusively recognized unit. Thus, in my view, while these employees have attended senior level staff meetings, such meetings did not directly concern labor relations matters, and their attendance was not part of their designated duties. 2/ Accordingly, I shall include Carolyn Boddie, Administrative Aid, Steno, GS-301-6, and Jose Vasquez, Chauffeur, WG-5703-5, in the unit.

Mary Lloyd, Information Systems Assistant, GS-301-7

Mary Lloyd works under the general supervision of the Assistant to the Treasurer of the OPIC and has principal responsibility for word processing operations at the Activity. Most of the time, Lloyd works alongside one full-time and one half-time clerical assistant. All employees in the word processing unit, including Lloyd, perform computerized typing. Because of the volume and the routine nature of the keypunch typing used in word processing operations, Lloyd and her fellow employees perform their assignments on a first come, first serve basis and regularly check each other's work for accuracy.

Although Lloyd has authority to schedule overtime, the record reveals that the employees involved in word processing operations, by mutual agreement, have worked out procedures which best facilitate their own work, especially with respect to overtime. In this regard, overtime in the word processing unit is scheduled on a voluntary rotating basis, and Lloyd has frequently worked overtime in rotation, in addition to substituting for either of the clerical assistants who cannot work on weekends.

2/ With respect to Boddie's access to personnel or statistical records, it has been held previously that mere access to such records does not warrant exclusion as a confidential employee. Virginia National Guard Headquarters, 4th Battalion, 111th Artillery, A/SLMR No. 69.

While Lloyd is responsible for all day-to-day production work on word processing machinery and must be able to meet rigid deadlines, priorities and standards of work are set by her supervisor. The record reflects that Lloyd does not have the authority to hire, transfer or promote employees. Nor has Lloyd suspended, laid off, recalled, discharged, rewarded, disciplined employees or adjusted their grievances, or effectively recommended such action.

Based on the foregoing, as the record reveals that Lloyd does not exercise any supervisory authority requiring the use of independent judgement, or have the authority to effectively recommend such action, I find that she is not a supervisor within the meaning of Section 2(c) of the Order, and that she should be included in the unit.

Michael Cooper, Financial Analyst, GS-1160-14

Michael Cooper is one of three approving officers at the Activity who dispurse corporation funds and is directly answerable to the Deputy Treasurer of the OPIC. Cooper is also responsible for financial evaluations regarding the position of OPIC borrowers and works closely with the Deputy Treasurer in reviewing market rates, maturity dates, amounts of investments and corporation fees and revenues. The evidence shows that in his capacity as an approving officer for the OPIC, Cooper works with one half-time assistant who functions primarily as a cashier, receiving the majority of her work from the mailroom at the Activity and performing her cashier functions without Cooper's supervision.

The record reveals that although Cooper was instrumental in designing standardized forms which the half-time assistant uses in her work, he does not direct or assign work to the cashier and is seldom called upon to answer work related questions. The evidence further indicates that Cooper has not suspended, laid off, recalled, discharged, or disciplined employees, or adjusted their grievances, and does not have the authority to hire, transfer or promote employees. Nor does the evidence demonstrate that his recommendations with respect to personnel actions are effective or relied on. In this connection, while the cashier received a promotion, it was unrelated to work performed for Cooper and he did not approve the promotion. Cooper's own supervisor interviews potential candidates for cashier vacancies and merely asks his opinion on applicants while reserving approval authority for himself. Moreover, such evaluations as Cooper makes concerning his half-time assistant are made jointly with others and routine leave approval is made jointly with others.

Based on the foregoing circumstances, I find that Michael Cooper Financial Analyst, GS-1160-14, is not a supervisor within the meaning of Section 2(c) of the Order and should be included in the unit as he does not exercise supervisory authority requiring the use of independent judgement and does not effectively recommend such actions.

Henry Wolfe, Computer Specialist, GS-334-12

Henry Wolfe is employed as a Computer Specialist at the Activity under the direct supervision of the Assistant to the Treasurer of the OPIC. Wolfe's work is primarily concerned with the operation and maintainance of non-financial computer based systems at the Activity. His present work requires knowledge of IBM 360/370 systems and necessitates an understanding of information systems analysis. In addition to his computer specialist duties, Wolfe has been assigned responsibility for the operation and supervision of the OPIC's Central File and Record Storage facility.

The record reveals that Wolfe works with one programs record clerk whose job is routine in nature and includes logging and distributing files throughout the OPIC. Wolfe does not regularly review the work of the programs record clerk or make work assignments. The day-to-day duties of the clerk are unrelated to Wolfe's major responsibilty for non-financial computer operations. The record demonstrates that Wolfe does not hire, fire, transfer, suspend, lay off, recall, promote, discharge, reward, discipline or adjust employee grievances, or effective recommend such action. Although Wolfe has authorized leave and overtime for the programs record clerk, his granting of leave has been largely pro forma and for short periods of time only. With respect to the authority to grant overtime, the record reveals that Wolfe initiated overtime requests on three occasions and such requests were passed on for approval to higher authorities. Moreover, the overtime received by the programs record clerk appears to have been for the benefit of individ other than Wolfe, who have requested the clerk's assistance at such varie tasks as cleaning and xeroxing. 3/

In my view, the record shows that Wolfe does not exercise supervisor authority within the meaing of Section 2(c) of the Order that requires the use of independent judgement, or have the authority to effectively recommend any such action. Therefore, I shall include him within the unit.

Ella Hawkins, Insurance Applications Officer, GS-301-10

Ella Hawkins is the Insurance Applications Officer for the Insurance Department of the OPIC. She directs and controls operations relating to initial applications for investment insurance coverage. Her duties include counseling prospective investors in the processing of insurance

3/ Prior to his present position, and pursuant to a reorganization at th OPIC made effective March 1976, Wolfe was reclassified from a Compute Systems Administrator, GS-330-14, to a Computer Specialist, GS-334-12 In his former capacity, Wolfe supervised directly or through subordinates approximately nine employees and the parties' agreed at the hearing that in his role as a Computer Systems Administrator he was a supervisor within the meaning of the Order.

and loan applications, and responding to telegrams, letters, telephonic and personal inquiries from investors, Congress, governmental agencies and foreign governments. Additionally, Hawkins has authority to examine and screen applications sent to the OPIC for coverage feasibility and to determine needed data and facts for potential corporation projects.

To assist Hawkins in the performance of her duties, Hawkins has been assigned an Applications Clerk (Typing), GS-301-6, who performs administrative and clerical duties and works under a system designed to expedite the handling of approximately 750 active OPIC files. The clerk performs her duties under the direction of Hawkins who is responsible for the correctness of her work. The evidence indicates that Hawkins has been instrumental in the transfer of two individuals to the position of Applications Clerk. In both instances, Hawkins initiated moves to effect the transfer of the individuals she recommended to her immediate supervisor for the position of Applications Clerk, and testimony shows that nominees for the position must be cleared and approved by Hawkins. Also, the evidence shows that Hawkins has the independent authority to certify step increases and has done so for the current Applications Clerk, and that she regularly supplies on-the-job training to new employees and has counseled Application Clerks on their use or abuse of sick leave.

Because Hawkins initiates and effectively recommends employee transfers and has independent authority to grant step increases and has done so, I find that she is a supervisor within the meaning of Section 2(c) of the Order and should be excluded from the unit.

Hilda Scudder, Administrative Officer, GS-341-12

Hilda Scudder serves as Administrative Officer with responsibility for providing management support services for approximately 130 OPIC personnel. Her responsibilities include space and property management, building maintenance, administration of parking spaces and physical security. She serves also as the focal point at the OPIC for the receipt, control and distribution of documents used in conjunction with insurance and investment projects, and provides advice to the OPIC staff concerning security classification procedures.

Additionally, Scudder has overall responsibility for the effectiveness of operations in the receptionist area of the Activity. Working for Scudder in this capacity is a receptionist who arranges security briefings for new employees, issues building keys, gives information to visitors and callers, and sees that proper security is maintained in the receptionist area.

The record demonstrates that Scudder has initiated and effectively recommended a meritorious performance award for the present OPIC receptionist. There is no evidence that her recommendation was independently reviewed or evaluated. Further, Scudder has effectuated a within grade increase for the same individual.

In addition to her responsibility for overseeing the work of the receptionist, the evidence establishes that Scudder independently and without review has admonished and counseled receptionists regarding personal phone calls, the appearance of the OPIC lobby, security procedures, plans for escorting visiting dignitaries, timetables and logging mail, loitering and action to take in the event of civil disturbances, and, on occasion, has given receptionists clerical assignments to complete.

Because, among other things, Scudder has effectively recommended performance awards and has effectuated within grade increases, I conclude that she is a supervisor within the meaning of Section 2(c) of the Order and, therefore, should be excluded from the unit.

Henry Ritter, Accountant (General), GS-510-12

Henry Ritter is an accountant in the Office of the Treasurer of the OPIC. He is directly responsible for the day-to-day operation of insurance activities performed in the Insurance Operations Unit of the Treasurer's Office. Ritter oversees all accounting matters and certain clerical personnel within the unit and maintains a working relationship with private industry in order to expedite the transfer of political risk insurance to the private sector. He further coordinates all data processing reports related to insurance operations. Assisting Ritter in the above-noted responsibilities, and more specifically in computer operations, are two part-time clerical employees who spend a majority of their time coding insurance applications.

The record reveals that when Ritter's supervisor, who has overall authority for the Insurance Operations Unit, is absent, he fills in and has done so for periods of up to ten weeks, and that Ritter was primarily responsible for transferring an employee into the Unit. The record reveals further that Ritter has provided substantial technical training to clerks performing computerized typing during their first four months on the job and that he effectively recommended a promotion for one of his clerical assistants.

Inasmuch as Ritter can effectively recommend promotions for employees under his direction and the transfer of employees, I find that he is a supervisor within the meaning of the Order and, therefore, he should be excluded from the unit.

Rufus Brown, Allen Keesee, Anthony Marra, Lorin Weinsenfeld, Marcia Wiss, Jay Stevens, Attorney-Advisors, GS-905-13/14

Attorney-Advisors Brown, Keesee, Marra, Weinsenfeld, Wiss and Stevens all work for the General Counsel of the OPIC. The record demonstrates that these attorney-advisors regularly interview and hire their own secretarial help. In this regard, the record reveals that after the positions are approved by the General Counsel the individual attorneys interview candidates and then inform the personnel office of their selection. Also, attorney-advisors can transfer secretarial employees and have, upon occasion, effectively recommended changes in the duty status of their own secretaries. Record testimony indicates that the subject attorney-advisors have the authority to recommend disciplinary action regarding their own secretarial help and have initiated such actions. They have the discretion to decide when overtime work is needed, and have frequently approved overtime for their own secretaries without prior approval from the General Counsel. The record shows further that attorney-advisors give special performance awards to their secretaries and that they approve annual and sick leave.

Inasmuch as the attorney-advisors herein effectively hire their own secretaries, can transfer and change the duty status of employees under their direction, independently decide when overtime work is needed and approve its use, and are primarily responsible in the granting of special performance awards for their secretaries, I conclude that they are supervisors within the meaning of Section 2(c) of the Order. Accordingly, I shall exclude them from the unit. 4/

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, in which exclusive recognition was granted on September 22, 1971, to the American Federation of Government Employees, Local 1534, AFL-CIO, be, and it hereby is, clarified by including in said unit the individuals set forth in Group I below, and by excluding from said unit the individuals set forth in Group II below.

GROUP I

Carolyn Boddie, Administrative Aid, Steno, GS-301-6

4/ In view of the disposition herein, I find it unnecessary to decide whether the attorney-advisors are employees engaged in Federal personnel work in other than a purely clerical capacity.

Jose Vasquez, Chauffeur, WG-5703-5
Mary Lloyd, Information Systems Assistant, GS-301-7
Michael Cooper, Financial Analyst, GS-1160-14
Henry Wolfe, Computer Specialist, GS-334-12

GROUP II

Ella Hawkins, Insurance Applications Officer, GS-301-10
Hilda Scudder, Administrative Officer, GS-341-12
Henry Ritter, Accountant (General), GS-510-12
Rufus Brown, Attorney-Advisor, GS-905-13/14
Allen Keesee, Attorney-Advisor, GS-905-13/14
Anthony Marra, Attorney-Advisor, GS-905-13/14
Lorin Weinsenfeld, Attorney-Advisor, GS-905-13/14
Marcia Wiss, Attorney-Advisor, GS-905-13/14
Jay Stevens, Attorney-Advisor, GS-905-13/14

Dated, Washington, D.C.
October 5, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

The parties agreed that the following individuals were either confidential or supervisory employees, or management officials and should be excluded from the exclusively recognized unit:

Kathleen Smith, Librarian, GS-1410-11
Helen VanCleff, Secretary (Steno), GS-318-9
Jackie Whitaker, Personnel Assistant (Typing), GS-203-7
William Lemmer, Attorney-Advisor, GS-905-13/14
Steve Franklin, Attorney-Advisor, GS-905-13/14
Raymond Conklin, Attorney-Advisor, GS-905-13/14
Robert Svensk, Private Program Officer, (Excepted Service)
Brenda Hardy, Clerk-Typist, GS-322-4

October 5, 1977

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,
MEBA, AFL-CIO, LOCAL 301,
AURORA, ILLINOIS
A/SLMR No. 918

This case involved an unfair labor practice complaint filed by an individual against the Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, Local 301. Essentially the Complainant alleged that the Respondent violated Section 19(b)(1) of the Order by refusing to allow the Complainant and other employees of the Activity involved who were not members of the Respondent to participate in a poll on a proposal to change certain employees' work schedules.

The Administrative Law Judge concluded that the Respondent had not violated section 19(b)(1) of the Order when it conducted the poll. In this regard, the Administrative Law Judge noted that Section 10(e) guarantees to all unit employees the right to be fairly represented by an exclusive representative. He found that where, as here, the action of a labor organization is not shown to be arbitrary, discriminatory or in bad faith, it has broad latitude in fulfilling its representational obligations. Therefore, he recommended that the complaint be dismissed.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 918

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

PROFESSIONAL AIR TRAFFIC
CONTROLLERS ORGANIZATION,
MEBA, AFL-CIO, LOCAL 301,
AURORA, ILLINOIS

Respondent

and Case No. 50-15406(CO)

RONALD E. WIEST

Complainant

DECISION AND ORDER

On June 29, 1977, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision 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 with respect to the Administrative Law Judge's Recommended Decision.

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 Recommended Decision, and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-15406(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
October 5, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W
Washington, D.C. 20036

In the Matter of

LOCAL 301, PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, MEBA, AFL-CIO (PATCO), AURORA, ILLINOIS
Respondent

and

RONALD E. WIEST
Complainant

Case No. 50-15406(

WILLIAM B. PEER, ESQ.
Suite 1002, 1101 17th Street, N.W.
Washington, D.C. 20036
For the Respondent

RONALD E. WIEST
Rural Route 3, Box 732E
Aurora, Illinois 60504
Pro Se

Before: SALVATORE J. ARRIGO
Administrative Law Judge

RECOMMENDED DECISION

Preliminary Statement

This proceeding arises under the provisions of Executive Order 11491, as amended (hereafter referred to as the Order). Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereafter referred to as the Assistant Secretary), a Notice of Hearing on Complaint issued on February 17, 1977 with reference to an alleged violation of Section 19(b)(1) of the Order. The complaint, filed by Ronald E. Wiest, an individual, alleged that the above captioned Respondent violated the Order when it refused to allow Mr. Wiest and other non-Union employees of the

Federal Aviation Agency, Aurora, Illinois (hereafter referred to as the Facility) to participate in a vote on a proposal to change certain employees' work schedules.

At the hearing held on March 31, 1977 the parties were afforded full opportunity to adduce evidence and call, examine and cross-examine witnesses. Both parties argued orally at which time counsel for Respondent cited various cases in support of his position. The parties waived the right to file briefs.

Upon the entire record in this matter and from my evaluation of the evidence, I make the following:

Findings of Fact

The facts are not in dispute. At all material times since October 1972 Local 301, Professional Air Traffic Controllers Organization has been the exclusive collective bargaining representative of various employees at the Facility including data system specialists. Prior to January 1977 the Facility employed approximately 23 data system specialists of which 16 were employed on a regular 8 a.m. to 4:30 p.m. shift in administrative tasks such as programming and testing. The remaining seven data system specialists worked operating computers in support of air traffic controllers. Since air traffic control was a 24 hour operation, data system support was required to be provided on a 24 hour basis. To meet this need the seven support or "operation" data system specialists worked on one of three eight hour shifts and rotated those shifts. Because of their work schedules these seven operation data system specialists earned additional compensation since premium pay was received for work on Sundays, holidays and work between the hours of 6 p.m. and 6 a.m.

Beginning around early October 1976 the Union representative servicing the data system specialists informally "checked" at coffee breaks and the like with various specialists regarding their feelings as to the operations work being performed completely by seven of the 23 specialists. Not all specialists are members of the Union and the representative's "checking", was done without regard to the employees' Union membership. On October 27, 1976 the Union representative polled specialists who were Union members as to whether they wished to continue with the current work schedules or whether

they desired to have all specialists rotate into the operations work. The Complainant, an operations specialist, requested and was refused an opportunity to vote on the issue specifically because of his lack of Union membership. Indeed, Respondent acknowledges that all 5 non-Union employees were denied the privilege of voting on the matter precisely because of their lack of Union membership.

The vote tally was nine to seven in favor of all specialists rotating into operations work. The Union thereupon submitted to management a proposal to change shift hours of all specialists but management refused to agree to the proposal. Subsequently, the Union used the vehicle of a grievance on the inequality of opportunity to earn premium pay to again put the question before management and resolution of the grievance resulted in the desired change in work schedules. The change occurred on January 16, 1977 and affected Union members and non-members alike without discrimination based on Union membership. 1/ The new schedule was still in effect at the time of the hearing herein.

Discussion and Conclusions

Essentially at issue herein is whether the Union, in excluding non-members when taking the poll, breached its duty 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." Complainant alleges that the Union's exclusion of non-members while polling members on a matter concerning working conditions was clearly discriminatory and therefore violative of the Order. The Union basically contends that voting on proposals to be negotiated with management, or a ratification vote taken after agreement has been reached between Union and management negotiators, is an internal Union affair which does not require affording non-members a voice in the matter.

While Section 10(e) of the Order recites a union's obligation or duty to fairly represent non-union and union employees alike, the parameters of that obligation have not yet been explicitly defined under existing case law. However, the proposition that a union, by virtue of its exclusive representative status, has a duty to fairly represent all employees in a collective bargaining unit regardless of union membership has been long held in numerous court cases which have arisen in the private sector. One of the earliest cases on this

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1/ Complainant testified that he would fail to earn approximately $2000 a year by not remaining soley on operations work.

subject was Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192 (1944), a suit to enjoin enforcement of agreements which discriminated against black railroad firemen in favor of white firemen. In that case, wherein black employees were excluded from union membership by the union's constitution and ritual, the Supreme Court held that under the Railway Labor Act a collective bargaining representative had the duty to exercise the power conferred upon it in a manner which would not discriminate unfairly against any of the group the union proported to represent. The Supreme Court reached a similar holding within regard to a union's duty of fair representation under the National Labor Relations Act in Wallace Corporation v. NLRB, 323 U.S. 255 (1944). The Supreme Court subsequently held that to establish a breach of duty of fair representation enforceable by the courts or the National Labor Relations Board it must be shown that the Union's action was arbitrary, discriminatory or in bad faith. 2/

Precisely how a union fulfills its duty of fair representation in situations involving non-members has been aptly described as "troublesome" by the National Labor Relations Board, 3/ especially since a union's right to exercise discretion over its internal affairs has also been widely recognized. In the Borg Warner case 4/ the Board held, with Supreme Court approval, that an employer violated the National Labor Relations Act by insisting, to the point of impasse, upon the inclusion of a clause in its contract with the union which would require that a strike ballot be taken by all union and non-union employees on the employer's last contract offer and the union would be bound thereby. In its decision the Board stated:

> "It appears self-evident that a representative system necessarily involves trusting the agent with discretion not subject to review by those it represents as to each exercise thereof, particularly at the instance of an outside party. It is the pattern traditionally followed in the labor movement in this country and the concept embodied in the Act. As the

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2/ Vaca v. Sipes, 386 U.S. 171, 190 (1967).

3/ Hughes Tool Company, 104 NLRB 318 (1953).

4/ NLRB v. Wooster Division of Borg Warner, 113 NLRB 1288 (1953), 236 F.2d 898 (6th Cir. 1956), 356 U.S. 342 (1958).

> Supreme Court stated, the Act, 'has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.' Under the practice of collective bargaining as thus developed, it is customary to leave the decision as to demands to be made upon the employer, the sanction to be resorted to in support of the demands, and the content of the contract ultimately entered into, up to the majority representative leaving to internal procedures of the union the extent to which these may be ratified by the membership of the union or employees generally. The legislative history of the Act as it was originally enacted makes it abundantly clear that Congress was fully aware of all the implications arising out of writing the majority rule principle into the Act, including the fact that those in the minority were not to have an effective voice in the collective-bargaining negotiations. Indeed, this view of the intendment of the Act is clearly supported by the Supreme Court's opinion in the Brooks case where it is stated that 'in placing a non-consenting minority under the bargaining responsibility of an agency selected by a majority of the workers, Congress has discarded the common law doctrine of agency'." (Footnotes omitted.)

A union's right under the National Labor Relations Act to control its internal affairs has similarly been recognized in numerous other cases. Thus, employers were found to have violated the requirements of that Act to negotiate with a union in good faith by insisting that a contract be ratified by a secret vote of employees 5/ and insisting upon a contract clause which required all unit employees, including non-union employees, be given the right to receive notice of union meetings and vote at such meetings and that no decision be

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5/ NLRB v. Darlington Veneer Co., 236 F.2d 85 (4th Cir. 1956).

made by the union on matters within the scope of collective bargaining except upon majority vote of all employees who voted at the meeting. 6/ Further, in North Coast Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al., 197 NLRB 905 (1972), the Board held that it was a legitimate exercise of union authority to disregard a contract ratification vote in which non-members participated and adhere to the results of a second vote in which non-members were excluded. In rejecting a Trail Examiner's conclusion that the union could not validly disqualify non-union employees from participating in an essential ratification vote, the Board stated:

> "We have long held that the method of voting on contract ratification is within the discretion of a labor organization. Here, dissatisfaction with the first vote arose within the Union itself when an employee questioned the propriety of the vote to all employees and Macknezie therefore called for the members' only vote. The Respondents had the choice, they chose to permit only members to vote on the issue of contract ratification and the results are binding on the Respondents...." (Footnotes omitted.)

The courts in considering employees' rights vis a vis the exclusive representative under the Railway Labor Act have reached the same conclusions. McMullins v. Kansas, Oklahoma Gulf Railway Co., 229 F.2d 50 (10th Cir. 1956), cert. denied 351 U.S. 918, was such a case. McMullins was an action for an injunction to prevent enforcement of an agreement between the certified bargaining agent and the employer which provided for compulsory retirement of locomotive engineers upon reaching the age of seventy. No formal notice of the proposed provision was given individually to the plaintiffs or to a second union, some of whose members were covered by the agreement. The provision was unanimiously approved at a regular meeting of the certified representative and the agreement was signed. Plaintiffs, inter alia, contended that the contract was invalid because of failure to provide notice to the second union or the affected individuals who brought the suit. The court sustained a lower court's judgment against the plaintiffs finding: "The

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6/ NLRB v. Corsicana Cotton Mills, 178 F.2d 344 (5th Cir. 1949).

bargaining agent is the representative of the craft and is not required to consult with the individual members or to give them notice of comtemplated contractual actions within the scope of its authority...." A similar holding was reached in Fogg v. Randolph, 244 F.Supp. 885 (S.D.N.Y. 1962)

I recognize that the matter at issue herein is not concerned with the rights of union members vis a vis the union as an organization. However, it is interesting to note that under the Labor-Management Reporting and Disclosure Act rights of union members are quite circumscribed in contract negotiation and ratification matters. 7/ Thus, in Confederated Independent Union, Local No. 1 v. Rockwell-Standard Company et al., 465 F.2d 1137 (3rd Cir. 1972) the court held that the LMRDA "does not require that a collective bargaining agreement be submitted to a local union or the union membership for authorization, negotiation or ratification, in the absence of an express requirement in the agreement, or in the constitution, bylaws or rules and regulations of the union." 8/ The court further stated that the statute "does not require submission of proposed agreements or any segments thereof to the membership; nor grant members the right to vote on negotiating, executing or approving contracts."

Section 19(b)(1) of the Order mandates that a labor organization shall not interfere with, restrain or coerce an employee in the exercise of his rights assured by the Order. One of an employee's rights under the Order is, as provided in Section 10(e), to have the exclusive bargaining agent represent his interest in matters concerning working conditions without discrimination for reasons of labor organization membership. Thus, under the Order a union has

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7/ The Rules and Regulations of the Assistant Secretary governing labor-management relations in the Federal service in Part 204.1, Standards of Conduct, provides: "In applying the standards contained in this subpart the Assistant Secretary will be guided by the interpretation and policies followed by the Department of Labor in applying the provisions of the LMRDA and, where no such interpretation exists, he will be guided, as appropriate, by decisions of the courts."

8/ Citing Cleveland Orchestra Committee et al. v. Cleveland Federation of Musicians, Local No. 4, et al. 303 F.2d 229 (6th Cir. 1962).

the duty to fairly represent all members of the collective bargaining unit and discrimination against non-members breaches that duty. 9/ It can be argued therefore that excluding non-members when taking a poll as to what proposals a union will submit to management concerning working hours "discriminates", in the broad sense of the word, against non-members since union members have an input as to what may become a working condition and non-members do not. However, in the private sector such "discrimination" is not viewed in isolation. Rather, as seen from the above, a union's actions are weighed against the widely recognized right of a union to maintain control over its own internal affairs. This right includes affording a union broad latitude in fulfilling its representational obligations in negotiating and administering agreements on behalf of all unit employees in a manner it deems appropriate under the circumstances, so long as the union action is not shown to be arbitrary, discriminatory or in bad faith. Even though non-union unit employees may well have a substantial interest in how a particular union policy which directly or indirectly affects working conditions is shaped, that interest standing alone does not guarantee a non-member's participation in determining union policy. 10/ Thus, it does not appear that in the private sector labor laws have been so interpreted to give non-members the right, absent agreement by the union, to determine what the union's contract proposals will be, participate in contract ratification votes, or participate in strike votes.

Indeed, an argument might also be made that non-members even have a substantial interest in who will be the union officers since those officers deal with management on matters concerning all unit employees' working conditions. Nevertheless, I know of no case where a voice in these determinations has been given to a non-member.

9/ Cf. Veterans Administration Hospital, St. Louis, Missouri and American Federation of Government Employees, AFL-CIO, Local 1715, A/SLMR No. 838 (May 11, 1977).

10/ However, see what is obviously dictum in Steele v. Louisville and Nashville R.R. Co., supra, wherein the court stated: "wherever necessary ... (to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially and in good faith,) ... the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action."

In the case herein the employee polling occurred in order to ascertain sentiment for a more equitable sharing of premium pay among all data systems specialists. The Union did not engage in the poll with a hostile motive towards non-members. The ultimate change in shifts worked to the benefit and detriment of various unit employees alike, without regard to Union membership. While the Union has a duty of fair representation under the Order, in my view union's in the Federal service should be afforded latitude similar to that given private sector unions while fulfilling their representational obligations. Accordingly, since the actions taken by Respondent herein were neither discriminatorily motivated nor discriminatory in effect and there is no showing of bad faith on the part of Respondent, I conclude that the Union's conduct herein did not violate the Order.

RECOMMENDATION

In view of the foregoing I recommend that the Complaint herein be dismissed.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: JUN 9 1977
Washington, D.C.

October 6, 1977

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 THE ARMY,
U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY
A/SLMR No. 919

On July 26, 1976, the Assistant Secretary issued his Decision and Order in A/SLMR No. 679, in which he found that the Respondent had violated Section 19(a)(1) and (6) of the Order by changing competitive areas for reduction-in-force (RIF) purposes without first meeting and conferring regarding its decision with the Complainant, the exclusive representative of two units of employees in the affected Headquarters and Installation Support Activity (HISA) competitive area.

On July 12, 1977, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 76A-101 remanding the case to the Assistant Secretary for action consistent with its decision. The Council determined that an agency owes no obligation to negotiate with the exclusive representative(s) of employees who remain in the competitive area regarding the decision to remove other employees. However, the Council determined that an agency must notify the labor organization(s) representing employees who are to remain in the competitive area of the decision to remove other employees and, upon request, negotiate concerning the impact of such removal on those remaining employees.

Applying the rationale of the Council to the facts of the instant case, the Assistant Secretary found that the Respondent violated Section 19(a)(1) and (6) of the Order based on its failure to notify the Complainant of the decision to remove employees not represented by the Complainant from the competitive area and to afford the Complainant an opportunity, upon request, to negotiate concerning the impact of such removal on any remaining employees in the bargaining units represented by the Complainant. Accordingly, the Assistant Secretary required the Respondent to cease and desist from the conduct found violative of the Order and to take certain affirmative actions.

A/SLMR No. 919

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE ARMY,
U.S. ARMY ELECTRONICS COMMAND,
FORT MONMOUTH, NEW JERSEY

Respondent

and

Case No. 32-3666(CA)
A/SLMR No. 679
FLRC No. 76A-101

LOCAL 476, NATIONAL FEDERATION
OF FEDERAL EMPLOYEES

Complainant

SUPPLEMENTAL DECISION AND ORDER

On January 30, 1976, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices. In essence, the complaint in the instant case alleged that the Respondent violated Section 19(a)(1) and (6) of the Executive Order by changing competitive areas for reduction-in-force (RIF) purposes without first meeting and conferring with the Complainant, the exclusive representative of two units of employees in the affected Headquarters and Installation Support Activity (HISA) competitive area.

On July 26, 1976, in A/SLMR No. 679, the Assistant Secretary found that the Respondent was obligated to afford the Complainant the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the decision to alter the HISA competitive area and that its failure to do so was violative of Section 19(a)(1) and (6) of the Order. While noting that the decision to effectuate a RIF action is a matter upon which there is no obligation under the Order to meet and confer, the Assistant Secretary found that such reservation of decision making and action authority does not bar negotiations, to the extent consonant with law and regulations, concerning the procedures involved and the impact of the decision on the employees adversely affected. In this connection, the Assistant Secretary found that the establishment of competitive areas for the purpose of a RIF is itself a procedure utilized in the effectuation of a RIF decision.

On July 12, 1977, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 76A-101 remanding the case to

the Assistant Secretary for action consistent with its decision. The Council noted that the Assistant Secretary's finding of a violation of Section 19(a)(1) and (6) was based on the Respondent's failure to give the Complainant an opportunity to negotiate concerning the decision to remove from the competitive area employees not represented by the Complainant but instead represented by a different labor organization. In the Council's view, an agency proposing to remove a group of exclusively represented employees from one competitive area to another could not make such a change in the personnel policies and practices and matters affecting working conditions of those employees without providing to the labor organization(s) representating those employees adequate notice and an opportunity to request negotiations about the proposed change. However, in the Council's judgment, an agency owes no obligation to negotiate with the exclusive representative(s) of employees who remain in the competitive area regarding the decision to remove other employees. Rather, the agency must notify the labor organization(s) representing employees who are to remain in the competitive area of the decision to remove other employees and, upon request, negotiate concerning the impact of such removal on those remaining employees.

Upon consideration of the entire record in this matter, including the brief filed by the Respondent subsequent to the Council's decision, and applying the rationale of the Council to the facts of the instant case, I concur with the Administrative Law Judge's finding in his Recommended Decision and Order that the Respondent violated Section 19(a)(1) and (6) of the Order based on its failure to notify the Complainant of the decision to remove employees not represented by the Complainant from the competitive area and to afford the Complainant the opportunity to negotiate, upon request, concerning the impact of such removal on any employees remaining in the bargaining units represented by the Complainant.

As the Respondent did not have an obligation to meet and confer with the Complainant regarding the decision to remove employees not represented by the Complainant from the competitive area, I do not find that a remedial order is warranted which would require that the Respondent's action be rescinded. Rather, I will require that the Respondent cease and desist from engaging in the future in the conduct found violative of the Order and require that it notify the Complainant and afford the latter an opportunity to bargain concerning the impact of the Respondent's decision on those remaining employees represented by the Complainant.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Army Electronics Command, Fort Monmouth, New Jersey, shall:

1. Cease and desist from:

(a) Changing the composition of the HISA competitive area -- also denoted as Competitive Area No. 4 -- without notifying Local 476, National Federation of Federal Employees, the exclusive representative of two units of employees remaining in the HISA competitive area, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact which the modification of the competitive area will have on the employees it represents.

(b) In any like or related manner, interfering with, restraining, or coercing 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 policies of Executive Order 11491, as amended:

(a) Notify Local 476, National Federation of Federal Employees, of any intended changes in the composition of the HISA competitive area and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the impact any such changes will have on the employees in units exclusively represented by Local 476 remaining in the HISA competitive area.

(b) Post at its facility at the U.S. Army Electronics Command, Fort Monmouth, 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 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.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
October 6, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

APPENDIX

NOTICE TO ALL EMPLOYEES

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 change the composition of the HISA competitive area -- also denoted as Competitive Area No. 4 -- without notifying Local 476, National Federation of Federal Employees, the exclusive representative of two units of employees in the HISA competitive area, and affording such representative the opportunity to meet and confer, to the extent consonant with law and regulations, on the impact the modification of the competitive area will have on the employees it represents.

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 Local 476, National Federation of Federal Employees, of any intended changes in the composition of the HISA competitive area and, upon request, meet and confer in good faith, to the extent consonant with law and regulations, on the impact any such changes will have on the employees in units exclusively represented by Local 476 remaining in the HISA competitive area.

_____
(Agency)

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 Regional Administrator 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.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Department of the Army,
U.S. Army Electronics Command,
Fort Monmouth, New Jersey

and

Local 476, National Federation
of Federal Employees

A/SLMR No. 679
FLRC No. 76A-101

DECISION ON APPEAL FROM
ASSISTANT SECRETARY'S DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary based upon a complaint filed by Local 476, National Federation of Federal Employees (NFFE Local 476). The Assistant Secretary found, in the circumstances of the case, that the Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey (ECOM) had violated section 19(a)(1) and (6) of the Order.[1/] The violation occurred when ECOM failed to afford NFFE Local 476, the exclusive representative of certain employees who were in a competitive area for reduction-in-force (RIF) purposes, the opportunity to meet and confer on the removal of certain other employees (not represented by NFFE Local 476) from that competitive area.

The factual background of this case, as found by the Assistant Secretary, is essentially uncontroverted and is as follows: ECOM is a subordinate command of the U.S. Army Materiel Command (AMC),[2/] a major command of the

1/ Section 19(a) of the Order provides in pertinent part:

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.

2/ The name of the Army Materiel Command has since been changed to the Army Materiel Development and Readiness Command (DARCOM).

Department of the Army headquartered in Washington, D.C. ECOM consists of a number of organizational elements, each of which constitutes a competitive area for RIF purposes for its civilian employees. The Headquarters and Installation Support Activity (HISA) is one such organizational element and is denominated in ECOM's table of organization as Competitive Area No. 4. Prior to June 7, 1974, there were 13 separate organizational subelements included in the HISA competitive area. NFFE Local 476 was the exclusive representative of the employees in two of the organizational subelements included in the HISA competitive area.3/ Each constituted a separate bargaining unit and each was covered by a collective bargaining agreement between ECOM and NFFE Local 476.4/

During the latter part of July and the first part of August 1972, AMC entered into an agreement entitled the Master Civilian Personnel Servicing Agreement, to become effective September 1, 1972, with the U.S. Army Strategic Communications Command (STRATCOM),5/ a major command of the Department of the Army headquartered in Ft. Huachuca, Arizona. Under that agreement, AMC would provide, upon request, civilian personnel services to STRATCOM for the latter's activities at the base level.6/ On August 8, 1973, the Commanding General of ECOM entered into a supplement to the Master Civilian Personnel Servicing Agreement with STRATCOM at Ft. Monmouth to provide civilian personnel service to the latter's activities located there.7/

3/ The two organizational subelements represented by NFFE Local 476 in two separate bargaining units were the Guard Force employees of the Internal Security Division and the employees of the Pictorial and Audio-Visual Branch of the Administrative Services Division.

4/ Employees in the Stations Supply and Stock Control Division, Equipment Management Division, Facilities Engineer Division, and Communications Electronics Division, all organizational subelements within the HISA competitive area, were principally represented by the American Federation of Government Employees, with the exception of a bargaining unit of employees in the Facilities Engineer Division who were represented by the International Association of Firefighters.

5/ The name of the Strategic Communications Command has since been changed to the U.S. Army Communications Command (USACC).

6/ The Master Civilian Personnel Servicing Agreement contained the following provision:

> Employees of the Service[d] Activity [STRATCOM] will be in a separate competitive area from employees of the servicing activity [AMC] unless a variation is justified and approved in advance by HQ, USASTRATCOM and HQ, USAMC and the variation is specified in individual supplements to this agreement.

7/ The supplemental agreement contained the following provision relating to reduction-in-force:

(Continued)

On June 7, 1974, the Commanding General of ECOM issued a command letter modifying the competitive areas for RIF purposes at ECOM by, among other things, removing from the HISA competitive area the Communications Command Agency (the STRATCOM activity at Ft. Monmouth)8/ and placing it in a separate competitive area designated Competitive Area No. 11.9/ The STRATCOM employees who were removed from the HISA competitive area and made a separate competitive area were represented by a different labor organization and not by NFFE Local 476. This modification was effectuated by ECOM without giving notice to or negotiating with any of the labor organizations (including NFFE Local 476) representing the employees in the various organizational subelements within the HISA competitive area. NFFE Local 476 thereafter filed an unfair labor practice complaint alleging, in substance, that ECOM violated section 19(a)(1) and (6) of the Order when it changed competitive areas for RIF purposes without first "consulting and conferring" with NFFE Local 476 as the exclusive representative of certain employees assigned to the affected competitive area.

The Assistant Secretary concluded, in pertinent part, that ECOM was obligated to afford NFFE Local 476, the exclusive representative of certain employees who remained in the HISA competitive area, the opportunity to meet and confer, to the extent consonant with law and regulations, concerning the decision to alter the HISA competitive area, and that its failure to do so was violative of section 19(a)(1) and (6) of the Order. The Assistant Secretary, finding a status quo ante remedy necessary under the circumstances, ordered ECOM to rescind its command

(Continued)

> For Reduction-in-Force purposes, Serviced Activity Employees located at Ft. Monmouth, New Jersey and Philadelphia, Pennsylvania will be considered under the same competitive area as the Headquarters and Installation Support Activity (ECOM) through 24 March 1974. Effective 25 March 1974, Serviced Activity employees will be considered under a separate competitive area, to be established, apart from other activities serviced by the Servicing Activity.

8/ The civilian employees in the Communications Command Agency (STRATCOM) operate the telephone system for ECOM. Their functions and job skills differ from those of the employees in the guard and audio-visual units exclusively represented by NFFE Local 476 within the HISA competitive area.

9/ This modification was brought about by a consolidation of the various elements of ECOM, the elimination of the Philadelphia office competitive areas, and organization designation changes which had occurred subsequent to the establishment of the existing competitive areas.

letter of June 7, 1974, modifying the HISA competitive area; to notify NFFE Local 476 of any intended changes in the composition of the HISA competitive area; and, upon request, to negotiate in good faith with NFFE Local 476, to the extent consonant with law and regulations, on the decision to effectuate such changes.

The Department of the Army (the agency), in conjunction with the Department of Defense, appealed the Assistant Secretary's decision and order to the Council. The Council accepted the agency's petition for review, concluding that a major policy issue is present, namely: whether the Assistant Secretary's finding of an obligation to meet and confer (negotiate) in the circumstances of this case is consistent with the purposes of the Order. The Council also granted the agency's request for a stay, having determined that the request met the criteria set forth in section 2411.47(e)(2) of its rules. Neither party filed a brief on the merits.

Opinion

The major policy issue for Council decision is whether the finding of an obligation to meet and confer (negotiate) in the circumstances of this case is consistent with the purposes of the Order. That is, the question presented is whether the Assistant Secretary's finding that ECOM was obligated to provide NFFE Local 476 the opportunity to negotiate, to the extent consistent with law and regulations, concerning the decision to remove certain employees (who were not represented by NFFE Local 476 and who, for that matter, were represented by a different labor organization) from the competitive area, is consistent with the purposes of the Order. For the reasons stated below, we conclude that the finding of such an obligation to negotiate in the circumstances of this case is inconsistent with the purposes of the Order.

Agency management is obligated to negotiate with a labor organization accorded exclusive recognition with respect to personnel policies and practices and matters affecting working conditions of employees in the bargaining unit.10/ Moreover, the Order requires, as a part of the

10/ It is undisputed that, in the circumstances of the case, the establishment of competitive areas for RIF purposes and the modifications of those competitive areas, such as the removal of employees as involved in this case, are negotiable. See in this regard Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401, FLRC No. 74A-52 (Sept. 17, 1976), Report No. 112. In discussing the obligation of an agency pending the resolution of representational issues which arise due to a reorganization, the Council ruled that "[w]here the agency, as a direct result of the reorganization and consistent with the necessary functioning of the agency, must make changes

(Continued)

obligation to negotiate, adequate notice and an opportunity to negotiate prior to changing "established personnel policies and practices and matters affecting working conditions during the term of an existing agreement, unless the issues thus raised are controlled by current contractual commitments, or a clear and unmistakable waiver is present."11/ Thus, an agency proposing to remove a group of exclusively represented employees from one competitive area to another could not make such a change in the personnel policies and practices and matters affecting working conditions of those employees without providing to the labor organization representing those employees adequate notice and an opportunity to request negotiations about the proposed change.

While an agency's obligation to the labor organization representing employees who are proposed to be removed from a competitive area is clear, the issue in the instant case concerns the nature of the obligation owed the labor organization which represents employees who remain in the competitive area after it is decided to remove other employees from that competitive area. In this circumstance, since these employees remain in the competitive area, there is no obligation to negotiate with their exclusive representative(s) on the decision to remove other employees. Instead, there is an obligation to negotiate concerning the impact of that decision on the employees who remain in that competitive area. More particularly, the agency must notify the labor organization(s) representing employees who are to remain in the competitive area of the decision to remove other employees and, upon request, negotiate concerning the impact of such removal on those remaining employees.12/

(Continued)

in otherwise negotiable personnel policies and practices and matters affecting working conditions, . . . the agency must notify the incumbent union or unions of those proposed changes, and, upon request, negotiate on those matters covered by section 11(a) of the Order." [Emphasis added.] Applying such principle to the fact situation before it (which involved a unilateral change in competitive areas for RIF purposes), the Council held that "it is clear that if [the exclusive representative of the employees who were unilaterally removed from the established competitive area] was not informed of the agency's proposed change in competitive areas, or if [the exclusive representative] was so informed but the agency, upon request, refused to bargain thereon with [the exclusive representative], the agency must be deemed to have violated its obligation to negotiate under the Order."

11/ Labor-Management Relations in the Federal Service (1975), at 41.

12/ Cf. Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, supra n. 9, at 12 of Council decision; Seattle Center Controller's Union and Federal Aviation Administration, 1 FLRC 349 [FLRC No. 71A-57 (May 9, 1973), Report No. 37.]

In this manner, the foregoing obligations reflect a careful balance among the respective interests of the agency which seeks to effectuate a change in an established competitive area, the different groups of employees within the competitive area who may be affected in varying degrees by such change (e.g., those employees who are removed as well as those who remain) and the labor organizations which represent them. Moreover, such obligations circumvent the practical difficulties which would arise if an agency were required, in these circumstances, to negotiate separately and independently with each labor organization exclusively representing employees within an established competitive area concerning the decision to effectuate a modification thereof, such as the removal of a group of employees represented by one such labor organization. That is, in such circumstances, the potential for negotiating inconsistent or conflicting agreements with different labor organizations on the one hand, or for reaching a series of impasses in negotiations with them on the other, is thus avoided.13/

In the instant case, the Assistant Secretary's finding of a violation of section 19(a)(1) and (6) was based on ECOM's failure to give NFFE Local 476 an opportunity to negotiate concerning the decision to remove from the competitive area employees not represented by NFFE Local 476 but instead represented by a different labor organization. As discussed above, the activity was under no obligation to afford NFFE Local 476 an opportunity to negotiate about the decision to so alter the competitive area. Accordingly, the finding of a violation of section 19(a)(1) and (6) based on such failure is inconsistent with the purposes of the Order and must be set aside.14/ However, a finding of a violation of section 19 (a)(1) and (6) and the according of an appropriate remedy, based on a

13/ In the Report and Recommendation of the Council on the amendment of Executive Order 11491, as amended, the Council noted that reorganization-related questions "can involve myriad combinations of variable factors," and therefore recommended that "each reorganization-related problem should be dealt with on a case-by-case basis within the particular factual context in which it has arisen." Consistent with this policy, the Council's decision in the instant case, which involves a reorganization-related problem, is limited to the particular circumstances of the case. Labor-Management Relations in the Federal Service (1975), at 50.

14/ In view of the Council's decision that the activity was under no obligation to afford NFFE Local 476 an opportunity to negotiate about the decision to remove certain employees not represented by NFFE Local 476 from the competitive area, but to negotiate, upon request, concerning the impact of such removal on any remaining employees in the bargaining units represented by NFFE Local 476, we find it unnecessary to pass upon the agency's contention that, at the time the competitive area was modified, a higher level agency regulation served as a bar to negotiations on the decision to effectuate the change.

failure to notify NFFE Local 476 of the decision to remove employees not represented by NFFE Local 476 from the competitive area and to afford NFFE Local 476 an opportunity, upon request, to negotiate concerning the impact of such removal on any remaining employees in the bargaining units represented by NFFE Local 476, would be consistent with the purposes of the Order.

Conclusion

Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for action consistent with our decision herein.

By the Council.

Harold D. Kessler
Acting Executive Director

Issued: July 12, 1977

October 6, 1977

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,
AIR TRAFFIC CONTROL TOWER,
GREATER PITTSBURGH AIRPORT,
PITTSBURGH, PENNSYLVANIA
A/SLMR No. 920

This case involved an unfair labor practice complaint filed by an individual alleging that the Federal Aviation Administration, Air Traffic Control Tower, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, (Respondent) violated Section 19(a)(1) of the Order when an official of the Respondent questioned the Complainant concerning an informal grievance he had filed and indicated what consequences would ensue if the Complainant pursued the grievance.

The Complainant was advised in April 1976, that his work schedule was to be changed to enable him to take an instructor training course. Thereafter, the Complainant filed an informal grievance on the basis that the schedule change had not been made in accordance with a provision of the negotiated agreement in effect between the Respondent and the Professional Air Traffic Controllers Organization. Following the expiration of the formal grievance filing date and noting that no formal grievance had been filed, the Respondent met with the Complainant. During their meeting, the Respondent questioned the Complainant's motive for filing the informal grievance, indicated that it would be forced to take a strict interpretation of the particular provision of the negotiated agreement if the Complainant pursued the grievance, and asked what the reaction of the Complainant's co-workers would be if they learned that the Complainant's actions were responsible for the strict interpretation of the agreement.

The Administrative Law Judge found that the Respondent's conduct was violative of Section 19(a)(1) of the Order. In this regard, he noted that the Respondent's statements had the effect of interfering with, restraining, and coercing the Complainant in the exercise of rights assured by the Order, including the right to invoke the negotiated grievance machinery.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the Respondent cease and desist from the conduct found violative and that it take certain affirmative actions.

A/SLMR No. 920

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

FEDERAL AVIATION ADMINISTRATION,
AIR TRAFFIC CONTROL TOWER,
GREATER PITTSBURGH AIRPORT,
PITTSBURGH, PENNSYLVANIA

Respondent

and Case No. 21-05391(CA)

KENNETH N. PATTON

Complainant

DECISION AND ORDER

On June 17, 1977, Administrative Law Judge Louis Scalzo 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 cease and desist therefrom and 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, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

In agreement with the Administrative Law Judge, I find that, under the particular circumstances herein, the statement made by an official of the Respondent to the Complainant following the latter's filing of an informal grievance had the effect of interfering with, restraining, or coercing the Complainant in the exercise of his rights assured by the Order, and that, therefore, the Respondent's conduct in this regard constituted a violation of Section 19(a)(1) of the Order. 1/

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Federal Aviation Administration, Air Traffic Control Tower, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, shall:

1/ See Department of Defense, Arkansas National Guard, A/SLMR No. 53, and Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582.

1. Cease and desist from:

(a) Interrogating employees who invoke the negotiated grievance machinery concerning their motivation for filing grievances and indicating what actions will be taken if such grievances are pursued.

(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 policies of Executive Order 11491, as amended:

(a) Post at its facility at the Federal Aviation Administration, Air Traffic Control Tower, 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 Chief of the Air Traffic Control Tower 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 shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
October 6, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 interrogate employees who invoke the negotiated grievance machinery concerning their motivation for filing grievances and indicate what actions will be taken if such grievances are pursued.

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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 3535 Market Street, Room 14120, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
	:	
FEDERAL AVIATION ADMINISTRATION AIR TRAFFIC CONTROL TOWER GREATER PITTSBURGH AIRPORT PITTSBURGH, PENNSYLVANIA	:	
Respondent	:	Case No. 21-05391 (CA)
and	:	
KENNETH N. PATTON	:	
Complainant	:	

Scott Kallman, Esquire
Joseph C. Winkler, Esquire
Federal Aviation Administration
Labor Relations Branch
Federal Building, J.F.K. International Airport
Jamaica, New York 11430

For the Respondent

George W. Kerr, Esquire
Regional Vice President
Professional Air Traffic Controllers
Organization
4250 Veterans Highway
Holbrook, New York 11741

For the Complainant

Before: LOUIS SCALZO
Administrative Law Judge

REPORT AND RECOMMENDATION

Statement of the Case

This case arises under Executive Order 11491 as amended (hereinafter referred to as "the Order"). It was initiated by the filing of an unfair labor practice complaint on October 18, 1976, by Kenneth N. Patton, a qualified air traffic controller employed by the Respondent at the Greater Pittsburgh Airport. The Complainant alleges that the Respondent violated Section 19(a)(1) of the Order, as a result of certain statements made to the Complainant on May 14, 1976 by James J. Hanten, Chief Controller, Greater Pittsburgh Airport. It was charged that the Complainant was told that a grievance which had been filed by the Complainant was precipitated by disappointment over non-selection for a supervisory position. It was further alleged that if the Complainant decided to pursue the grievance, the Respondent would discontinue an established practice of posting watch schedules ten or more weeks in advance, and would post such watch schedules only twenty to twenty-one days in advance. The Complainant contends that Mr. Hanten's statements restrained and coerced the Complainant with respect to the exercise of rights provided to the Complainant by the Executive Order, particularly the right to file grievances under the provisions of the agreement governing labor relations between the Federal Aviation Administration (FAA) and the Professional Air Traffic Controllers Organization (PATCO).

Findings of Fact

The record reflects that the Complainant was informed on April 29, 1976, by Joseph G. Kucala, his supervisor, that the Complainant's previously posted work schedule or tour of duty would be changed, and that he would be required to attend an instructor training course designed to develop his capability as an air traffic controller instructor. The training assignment was posted as a change to the watch schedule in the middle to latter part of April 1976. The class was scheduled to begin in late May 1976. The change meant that the Complainant would have to work a day previously scheduled as a day off, and that his hours of work would be altered.

When informed of the watch schedule change, the Complainant informed Mr. Kucala that the change was violative of Article 33, Section 2 of the collective bargaining agreement executed by FAA and PATCO. 1/ The Complainant did not receive an immediate response to his informal grievance, and he requested Mr. Kucala to review the collective bargaining agreement. Mr. Kucala said that he would do so.

Although the basic watch schedule was posted a year in advance, it was a regular practice for the Respondent to post the assignment of work schedules to specific individuals at least ten weeks in advance. This practice was permitted by local conditions at the facility and was specifically authorized by Section 2 of Article 33. The Complainant

---

1/ This agreement was in affect at all times considered pertinent in this case. Article 33, Section 2 provides:

> Assignments to the watch schedule shall be posted at least fourteen (14) days in advance, or for a longer period where local conditions permit. The Employer recognizes that changes of individual assignments to the watch schedule are undesirable; therefore, the Employer agrees to make every reasonable effort to avoid such changes. When it is necessary to change an employee's posted shift assignment, the Employer shall use the following alternatives to the extent feasible prior to making the change:
>
> (a) overtime;
> (b) personnel on detail assignments;
> (c) personnel on permanent assignments that are required to maintain currency;
> (d) line supervisors or staff;
> (e) rescheduling of training.
>
> In the event the above alternatives are found not to be feasible the employee's posted shift assignment can be changed.

contended that the change in his assigned tour of duty for training purposes should not have been effected without first exhausting the reasonable alternatives reflected in Section 2 of Article 33. Specifically, he felt that the training could have been rescheduled so as to avoid changing his tour of duty.

As a result of the Complainant's objection, Mr. Kucala considered alternatives to watch schedule changes reflected in the collective bargaining agreement and concluded that these alternatives were not feasible. Mr. Kucala decided to insist on compliance. This decision was made following a May 3, 1976 conversation between Mr. Kucala and Mr. Hanten. They discussed the Complainant's grievance, and Mr. Hanten advised Mr. Kucala that the training had to be completed within a prescribed period, and that the scheduled class was the last to be given prior to the expiration of the period. Upon being apprised of Mr. Kucala's decision to insist on the change made, Mr. Hanten made a notation of the date for the purpose of calculating a ten-day period in which the Complainan would have to pursue the grievance formally to the next level following the anticipated first stage rejection of the grievance. 2/

Subsequently, on the same day Mr. Kucala met with the Complainant and Mr. Edwin M. Wintermyer, Vice President of the Local, and the Complainant's representative, regarding the grievance. After discussing the grievance with Mr. Kucala they were advised that the change in the Complainant's tour of duty would stand. The Complainant in turn apprised Mr. Kucala that a formal grievance would be filed.

2/ Article 7, Section 3 of the collective bargaining agreement provides for the filing of a formal grievance with the Facility Chief within ten calendar days following receipt of an answer from a supervisor. Section 7 of Article 7 provides for extensions of time in which to proceed with a grievance.

The Complainant then began to give consideration to his grievance, particularly from the standpoint of whether proceeding further would be advantageous to union members at the facility. Since the ten-day period in which to file a formal grievance expired on May 13, 1976, or ten days following Mr. Kucala's rejection, and since the Complainant did not pursue the matter further during this period of time, the right to process the grievance to the next level expired on May 13, 1976. 3/

On May 14, 1976, the day following the expiration of the ten-day period, Mr. Hanten asked Mr. Kucala about the disposition of the grievance and Mr. Kucala advised that he had heard nothing further and that he considered it abandoned. A discusssion then ensued about the Complainant, during which Mr. Kucala advised Mr. Hanten that the Complainant had acted out of character when he filed a grievance in response to a watch schedule change. They discussed a supervisory position which the Complainant had unsuccessfully sought just prior to the schedule change, and an observed change in the Complainant's attitude as reflected by the filing of the grievance. 4/ Mr. Kucala noted that the Complainant was still a strong candidate for promotional consideration. He inquired whether Mr. Hanten could do anything to motivate the Complainant to seek a supervisory position. Based upon Mr. Kucala's statements and Mr. Hanten's own reported concern about the Complainant's morale, it was agreed that Mr. Hanten would give the Complainant a "pep talk."

3/ There is no indication that an objection based on untimeliness was ever raised by the Respondent. Moreover, it will be seen from the evidence outlined that Mr. Hanten discussed the merits of the grievance with the Complainant on May 14, 1976 and attempted to dissuade him from filing a formal grievance.

4/ A team supervisor position for which the Complainant had been considered was filled by another employee in April of 1976.

Mr. Kucala telephoned the Complainant and made arrangements for the Complainant to see Mr. Hanten later that same day. He advised the Complainant that the discussion was purely personal in nature and that it would not pertain to Union business. It was established that the Complainant was then temporarily acting as the Union's Facility Representative as the officers of the Union were away attending a Union convention. The Complainant informed Mr. Kucala that if the meeting with Mr. Hanten related to Union business, the Complainant would not be prepared to meet with Mr. Hanten on such short notice.

Mr. Hanten did meet with the Complainant early in the afternoon on May 14, 1976. 5/ Mr. Hanten first advised that the conversation was personal and that he had not called him in as a Union representative. He inquired whether or not his non-selection for a supervisory position was the reason for his general attitude and depression. He also inquired of Mr. Patton whether his reason for filing a grievance was based upon unhappiness about not obtaining a promotion. The Complainant responded in the negative to those inquiries from Mr. Hanten. Mr. Hanten also initiated a discussion concerning the interpretation to be given Article 33. It was admitted that he did this because he considered it important to ascertain the position of employees at the installation on this issue. In this regard he admitted that he felt inclined to discuss or explain management's position concerning the construction to be given to Article 33 of the collective bargaining agreement. Mr. Hanten advised the Complainant that if he filed his grievance, Mr. Hanten would respond by strictly construing Article 33, Section 2 of the collective bargaining agreement, that he would abandon the local practice of scheduling watch assignments at least ten weeks in advance, and that he would instead, make such

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5/ It should be noted that the Complainant recalls that the meeting occured on or about May 12, 1976.

assignments no more than fourteen to twenty-one days in advance. Mr. Hanten also asked what the Complainant's fellow Union members would think of Complainant when it became known that Complainant bore responsibility for the unfavorable change in scheduling practice described by Mr. Hanten. Mr. Hanten freely admitted making the inquiries and statements outlined. Although it appeared that the ten-day period in which to file a formal grievance expired on May 13, 1976, or ten days after Mr. KuCala's rejection, the record clearly indicates that this period of limitation was not interposed by the Respondent. Moreover, the evidence indicates a real concern that the Complainant's grievance would be pursued further or that a similar grievance would be filed by the Complainant or others in the future.

At a June 17, 1976 meeting convened by Mr. Hanten to improve labor management relations, Mr. Hanten acknowledged the previously outlined elements of his May 14, 1976 conversation with the Complainant. 6/

Evidence adduced at the hearing clearly reflected that the Complainant as well as other Union members construed inquiries and statements made to the Complainant by Mr. Hanten on May 14, 1976, as indicating that one's promotion potential would be enhanced by refraining from initiating or filing grievances designed to develop a liberal interpretation of Section 2 of Article 33 of the collective bargaining agreement.

Discussion and Conclusions

The language of Section 19(a)(1) of the Order is designed to prevent employers from interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them. Section 1(a) of the Order provides:

6/ The meeting was attended by Mr. Hanten; Mr. Robert Rothdeutsch, Assistant Chief Controller; Mr. Darrell L. Knopfel, President of the Local; Edwin M. Wintermeyer, Vice President of the Local; and David G. Benson, and Carl E. Vaughn, leaders at the facility.

> Section 1. Policy. (a) 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. 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.

The doctrine has become well entrenched in the private sector, that, absent some legitimate purpose, an employer must not interrogate his employees regarding their union activities.

In such instances, interrogation constitutes interference with the rights of employees to feel free in joining and assisting labor organizations. The Assistant Secretary has, in Vandenberg Air Force Base, 4329 Aerospace Support Group, A/SLMR No. 383, concluded that in the federal sector a supervisor's interrogation of employees with respect to their union activities may be violative of Section 19(a)(1) of the Order. See also Office of Economic Opportunity, Region V, Chicago, Illinois, A/SLMR No. 477; Internal Revenue Service, Wilmington, Delaware District, A/SLMR No. 516; Federal Energy Administration, Region IV Atlanta, Georgia, A/SLMR No. 541; Department of the Army, United States Army Transportation Center and Fort Eustis, Virginia, A/SLMR No. 681 (dictum); and Department of the Navy, Mare Island Naval Shipyard, A/SLMR No. 775

It is clear that the right to engage in union activities, would be seriously jeopardized if employees are interrogated about their motives for filing and initiating grievances, particularly if such questions are posed within the context of an employee career development interview.

The authorities cited are analogous to the factual situation presented in this case. Here it was clearly established through the testimony of Mr. Hanten that Mr. Hanten's questions were designed to impose his point of view regarding the interpretation to be given Article 33. The imposition of Mr. Hanten's point of view during (what was supposed to be) a career development interview, made Mr. Hanten's questions and comments particularly coercive.

The Complainant was assured by Mr. Kucala that Union business would not be discussed during the interview, and that the subject would be personal. Mr. Hanten testified that the sole purpose of the interview was to encourage the Complainant to bid on promotional opportunities as he was a valued employee. Nevertheless, despite these claimed altruistic motives. the record reflects a strong pattern of interest in the grievance initiated by the Complainant, and continued interest in the Union position regarding the issue posed in the Complainant's grievance. This interest was first expressed by Mr. Hanten and pursued by him during the interview. Furthermore, Mr. Hanten indicated by his statements that he wished to discern the Complainant's attitudes and then persuade him to adopt the position of management. It must be concluded that questioning and comments based upon such interest, in the atmosphere described, operated to interfere with, restrain, and coerce the Complainant in the exercise of rights provided by Section 1(a), as well as other provisions of the Order providing federal employees the right to pursue grievance procedures in collective bargaining agreements.

Recommendation

Having found that the Respondent has engaged in certain conduct which is violative 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.

Recommended order

Pursuant to Section 6(b) of Executive Order 11491 and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor Management Relations hereby orders that the Federal Aviation Administration, Air Traffic Control Tower, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania, shall:

1. Cease and desist from:

(a) Utilizing personal career development interviews for the purpose of interrogating and questioning employees concerning their motives for initiating grievances, and for the purpose of attempting to discourage employees from initiating and filing 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 Executive Order 11491, as amended:

(a) Post at its facility at the Federal Aviation Administration Air Traffic Control Tower, 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 an appropriate management official and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Said official shall take reasonable steps to insure that said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within twenty days from the date of this Order, as to what steps have been taken to comply herewith.

Louis Scalzo

LOUIS SCALZO
Administrative Law Judge

Dated: June 17, 1977
Washington, DC

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 utilize personal career development interviews for the purpose of interrogating and questioning employees concerning their motives for initiating grievances, nor will we attempt to discourage employees from initiating and filing 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 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: 3535 Market Street, Room 14120, Philadelphia, Pennsylvania 19104.

October 12, 1977

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

COMMUNITY SERVICES ADMINISTRATION
A/SLMR No. 921

On November 10, 1976, the Assistant Secretary issued his Decision on Grievability in A/SLMR No. 749, in which he found, among other things, that the dispute in question was not grievable as the position involved in the dispute was a "policy" position within the meaning of Amendment 11 of the parties' negotiated agreement and was, therefore, excluded from the coverage of the negotiated agreement.

On August 17, 1977, the Federal Labor Relations Council (Council) issued its Decision on Appeal setting aside the Assistant Secretary's decision and remanding the case to him for reconsideration and decision consistent with the principles enumerated therein.

The Council noted, in this connection, in clarification of its decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, FLRC No. 74A-19, that the language of its decision should not be construed to mean that the Assistant Secretary may interpret the substantive provisions of an agreement in resolving a grievability question as an arbitrator would in deciding the merits of a grievance. Rather, it was intended that he decide such a question, when the question was referred to him, just as an arbitrator would where the parties' bilaterally agree to refer such threshold issue to the arbitrator.

Therefore, the Council concluded that since the dispute was over whether the position in question was a "policy" position within the meaning of the parties' negotiated agreement and as the parties' negotiated grievance procedure encompassed grievances over the interpretation and application of the agreement, the dispute was over a matter within the scope of the negotiated grievance procedure which should have been referred to an arbitrator.

Based on the rationale contained in the Council's decision, the Assistant Secretary modified his finding in A/SLMR No. 749 and found the grievance was on a matter subject to the parties' negotiated grievance procedure.

A/SLMR No. 921

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

COMMUNITY SERVICES ADMINISTRATION

Activity-Applicant

and

Case No. 22-5870(AP)
A/SLMR No. 749
FLRC No. 76A-149

NATIONAL COUNCIL OF CSA LOCALS,
AFGE, AFL-CIO

Labor Organization

SUPPLEMENTAL DECISION ON GRIEVABILITY

On February 20, 1976, Administrative Law Judge Samuel A. Chaitovitz issued his Recommended Decision on Grievability finding that the grievance involved was on a matter subject to the grievance procedure set forth in the parties' negotiated agreement. In reaching this conclusion, the Administrative Law Judge, among other things, rejected the Activity's contention that the dispute was not grievable as the position involved in the subject grievance, Employee Development Specialist, was excluded from the coverage of Amendment 11 of the parties' negotiated agreement as a "policy" position. 1/

On November 10, 1976, in A/SLMR No. 749, the Assistant Secretary found, among other things, that the position was involved in the formulation of Agency-wide training policy and, therefore, was specifically excluded from the coverage of Amendment 11 of the parties' negotiated agreement. Accordingly, the Assistant Secretary concluded that the subject grievance was not grievable under the negotiated grievance procedure.

On August 17, 1977, the Federal Labor Relations Council (Council) issued its Decision on Appeal in FLRC No. 76A-149 remanding the case to the Assistant Secretary for reconsideration and decision consistent with its decision. In remanding the case to the Assistant Secretary, the Council clarified the principles enumerated in its decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, FLRC No. 74A-19. The Council held that:

1/ Amendment 11 of the parties' negotiated agreement states, in pertinent part:

> The Parties agree that all vacancies will be posted, and that all vacancies in the competitive service above the entry level will be filled with in-house candidates, where possible, with the exception of policy and supervisory positions or when there is an emergency which precludes use of the Merit Promotion system . . . .

> /its/ statement in Crane that the Assistant Secretary must decide whether or not a dispute is subject to the negotiated grievance procedure, "just as an arbitrator would if the question were referred to him," while perhaps ambiguous, was not intended and should not be construed to mean that the Assistant Secretary may interpret substantive provisions of an agreement in resolving a grievability or arbitrability question as an arbitrator would in deciding the merits of a grievance. Instead, the Council's statement was intended to indicate that the Assistant Secretary must decide a question of grievability or arbitrability under a negotiated grievance procedure when such question is referred to him, just as an arbitrator would be required to decide the question of grievability or arbitrability where the parties bilaterally agree to refer such threshold issue to the arbitrator pursuant to Section 13(d) of the Order.

In applying these principles to the instant case, the Council found the Assistant Secretary's determination to be inconsistent with its intended interpretation and application of Section 13(d) of the Order. Thus, the Council concluded that since the parties were in dispute over whether the position in question was a "policy" position within the meaning of Amendment 11 of the negotiated agreement, and as the parties' negotiated grievance procedure encompassed grievances over the interpretation and application of the agreement, the grievance was on a matter within the scope of the negotiated grievance procedure and should have been referred to an arbitrator.

Based upon the Council's Decision on Appeal, and the rationale contained therein, I shall modify the finding in A/SLMR No. 749 consonant therewith.

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 22-5870(AP) is on a matter subject to the parties' negotiated grievance procedure.

ORDER

Pursuant to Section 6(a)(5) of Executive Order 11491, as amended, and Section 205.12(a) of the Regulations, it is hereby ordered that the Community Services Administration shall notify the Assistant Secretary of Labor for Labor-Management Relations in writing within 30 days from the date of this order as to what steps have been taken to comply with the above finding.

Dated, Washington, D.C.
October 12, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Community Services Administration

and

National Council of CSA Locals,
AFGE, AFL-CIO

A/SLMR No. 749
FLRC No. 76A-149

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary holding that a grievance was not on a matter subject to the parties' negotiated grievance procedure. The grievance, which was filed by the National Council of CSA Locals, AFGE, AFL-CIO (AFGE), alleged that the Community Services Administration (agency) failed to abide by its collective bargaining agreement with AFGE in filling a vacant position which was outside the collective bargaining unit. The agency took the position that the matter was not grievable under the negotiated grievance procedure and filed an Application for Decision on Grievability or Arbitrability.

The pertinent factual background of this case, as found by the Assistant Secretary, is as follows: AFGE represents a nationwide unit composed of all of the agency's non-supervisory General Schedule and Wage Grade employees, including professionals. Employees engaged in personnel work are excluded from the unit. In January 1975, the agency issued a Merit Promotion Announcement for the position of Employee Development Specialist in the Personnel Office of the agency. There were six applicants for the position. A certificate was sent to the selecting official containing the names of two "in-house" applicants, one of whom was in the bargaining unit, and two applicants from outside the agency. An outside applicant was selected for the position. AFGE then filed a grievance under the parties' negotiated grievance procedure,[1] contending that the agency did not adhere to Amendment 11 of the agreement in filling the vacancy. As set

[1] According to the Assistant Secretary's decision, Article 16 of the agreement provides for a grievance procedure to resolve grievances over the "interpretation or application of this Agreement." Section 11 of Article 16 provides that if the union or the agency alleges nonadherence, improper interpretation, or failure to implement a provision of the agreement, the complaining party shall submit the complaint to the other party. This section further provides for meetings, and if the matter is not resolved, either party may refer the matter to arbitration.

forth in the Assistant Secretary's decision, Amendment 11 of the printed agreement states, in pertinent part:

> The Parties agree that all vacancies will be posted, and that all vacancies in the competitive service above the entry level will be filled with in-house candidates, where possible, with the exception of policy and supervisory positions or when there is an emergency which precludes use of the Merit Promotion system . . . .[2] [Footnote added.]

AFGE alleged that the position was neither policymaking nor supervisory and must therefore be filled, pursuant to Amendment 11, with an in-house candidate. The agency's response was a final written rejection of the grievance which set forth its reasons for such rejection[3] and which notified AFGE of its intent to file an application with the Assistant Secretary as to whether the matter in dispute may properly be grieved under the parties' negotiated agreement. Shortly thereafter, the agency filed its Application for Decision on Grievability or Arbitrability with the Assistant Secretary.

The Assistant Secretary first resolved the issue raised by the agency's contention that the Order precludes a negotiated agreement from covering procedures for the filling of any vacancies outside the bargaining unit, and that, since the position involved herein was outside the unit, a dispute over the filling of that position was not grievable. The Assistant Secretary rejected this contention, concluding that while agencies are not obligated to bargain over proposals concerning the procedures for filling positions outside the bargaining unit, they may, at their option, bargain over such proposals. In support of this conclusion, he cited

[2] During the preliminary stages of the grievance procedure, and before the Assistant Secretary, AFGE sought the application of a different version of Amendment 11 which it claimed had been "agreed to by the parties at negotiations . . . ." The Assistant Secretary found that the language appearing in the printed agreement was binding upon the parties for the purposes of the instant grievability dispute, since the evidence failed to establish "beyond reasonable controversy" that such language was not consistent with the actual agreement or intention of the parties. The Assistant Secretary's finding in this regard is not at issue herein.

[3] The agency contended, in this regard, that the position in question was not in the bargaining unit, and, therefore, it had followed agency regulations and the FPM in filling the position; that under another article of the agreement, non-agency applicants could be considered where there were not three highly qualified in-house applicants; and, that since the position was outside the unit and because the agency could not apply different considerations to in-unit applicants and out-of-unit applicants, it would apply its own uniform standards, not those set forth in the agreement.

Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (Mar. 3, 1976), Report No. 100. The Assistant Secretary went on to hold that "[i]n the instant case clearly the [agency] chose to bargain and reached an agreement with respect to a proposal which encompassed the filling of 'all vacancies in the competitive service above the entry level'" and "[t]herefore, unless the position in question is otherwise specifically precluded from coverage under Amendment 11, a question concerning the procedures for filling such position would be grievable despite the fact that the position was outside the bargaining unit." Finally, the Assistant Secretary found that since Amendment 11 excludes from coverage those positions defined as "policy" positions, and since the record established that the Employee Development Specialist position in question is involved in the formulation of agency-wide training policy, the position is specifically excluded from coverage under Amendment 11 as a "policy" position. Accordingly, the Assistant Secretary concluded that "the instant grievance over whether Amendment 11 was followed in filling the position in question is not grievable under the negotiated grievance procedure."

AFGE appealed the Assistant Secretary's decision to the Council. The Council accepted AFGE's petition for review, concluding that a major policy issue was raised as to the intended interpretation and application of section 13(d) of the Order (as previously considered by the Council in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63) under the circumstances of the present case. AFGE and the agency filed briefs with the Council as provided in section 2411.16 of the Council's rules (5 CFR 2411.16).

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary in this case raised a major policy issue as to the intended interpretation and application of section 13(d) of the Order (as previously considered by the Council in Crane, supra) under the circumstances of the present case. That is, the issue presented in this case concerns the extent of the Assistant Secretary's responsibility under section 13(d) of the Order (as considered by the Council in Crane) in deciding questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, when such questions are referred to him for decision.

In Crane, a probationary employee grieved his termination under the provisions of a negotiated grievance procedure, claiming that such termination violated a provision of the agreement relating to "acceptable level of competence." The activity denied that the termination was grievable under the agreement, and the union then filed an application with the Assistant Secretary for a decision on grievability. Although a question was raised by the agency before the Assistant Secretary as to whether or not the grievance was on a matter for which a statutory appeal procedure exists,

the Assistant Secretary made no finding in that regard. Furthermore, the Assistant Secretary made no determination as to whether the grievance therein was on a matter subject to the negotiated grievance procedure, but, instead, ruled that this question "should be resolved through the negotiated grievance procedure." On appeal, the Council concluded that: (1) where an issue is presented concerning the applicability of a statutory appeal procedure, the Assistant Secretary must decide that question; (2) where a dispute is referred to him as to whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide such grievability dispute; and (3) in resolving the dispute referred to in (2), above, the Assistant Secretary must consider the relevant agreement provisions (including those provisions which describe the scope and coverage of the negotiated grievance procedure and any substantive provisions of the agreement which are being grieved) in light of related provisions of statute, the Order, and regulations, more particularly where special meaning is attached to words used in the relevant agreement provisions by such statute, regulation, or the Order and there is no indication that any other than the special meaning was intended by the parties. Accordingly, the Council set aside the Assistant Secretary's decision and remanded the case to him for reconsideration consistent with the foregoing principles.

The question before the Council is whether the Council's intended interpretation of section 13(d) of the Order as previously enunciated by the Council in Crane required the determination as to grievability made by the Assistant Secretary in the present case. For the reasons stated below, the Council is of the opinion that section 13(d) of the Order does not require the Assistant Secretary to interpret and apply such provision of the agreement, in the circumstances in the instant case, and, indeed, such action is inconsistent with section 13(d).

In the present case, a dispute was referred to the Assistant Secretary as to whether the agency's alleged failure to abide by its collective bargaining agreement with AFGE in filling a vacant position outside the collective bargaining unit was grievable under the negotiated grievance procedure contained in the agreement. Unlike Crane, no allegations were made herein that a statutory appeal procedure existed which would preclude the use of the negotiated grievance procedure. Furthermore, while the Assistant Secretary did make the required determination herein as to whether the grievance was on a matter subject to the negotiated grievance procedure,[4/] he then proceeded to interpret and apply Amendment 11 of the

4/ In this regard, unlike Crane, there was also no allegation herein that the relevant agreement provisions contained words to which special meaning was attached by statute, regulation, or the Order. As the Council indicated in Crane, at some length, this was especially significant in that case since the negotiated provision which was alleged to have been violated dealt with a matter——"acceptable level of competence"——which was established specifically in statute and dealt with extensively in Civil Service Commission regulations and the Federal Personnel Manual.

parties' agreement concluding that the position of Employee Development Specialist was a "policy" position and therefore was excluded from coverage of that provision. On the basis of his interpretation and application of Amendment 11, the Assistant Secretary concluded that the grievance over whether Amendment 11 was followed in filling the position in question was not grievable under the negotiated grievance procedure.

In Crane, the Council stated, insofar as relevant herein, that in any dispute referred to the Assistant Secretary as to whether a grievance is on a matter subject to a negotiated grievance procedure:

> [T]he Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13 and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. [Council decision at 4.]

This language in the Council's decision in Crane describes the Assistant Secretary's responsibilities under the Order in deciding whether a grievance is on a matter subject to a negotiated grievance procedure. In deciding whether a dispute is or is not subject to a particular negotiated grievance procedure, it is the responsibility of the Assistant Secretary to consider those "provisions which describe the scope and coverage of the negotiated grievance procedure," i.e., the general scope of such procedure as well as any specific exclusions contained therein. That is, he must decide, just as an arbitrator would decide at the outset in the Federal sector (or as an arbitrator or the Federal courts would in the private sector) whether the grievance involves a dispute which the parties intended to be resolved through their negotiated grievance procedure. The Assistant Secretary's consideration of "substantive provisions of the agreement being grieved" would be for the limited purpose of determining whether the grievance involves a claim which on its face is covered by the contract, i.e., involves a matter which arguably concerns the meaning or application of the substantive provision(s) being grieved and which the parties intended to be resolved under the negotiated grievance procedure.[5/] The Council's statement in Crane that the Assistant Secretary must decide whether or not a dispute is subject to the negotiated grievance procedure, "just as an arbitrator would if the question were referred to him," while perhaps ambiguous, was not intended and should not be construed to mean that the

5/ In making this determination in circumstances such as those presented in Crane, i.e., where the substantive provision contains terms to which a special meaning is attached by statute, regulation or the Order, the Assistant Secretary must consider those legal provisions in resolving the grievability or arbitrability dispute. See n. 4, supra.

Assistant Secretary may interpret the substantive provisions of an agreement in resolving a grievability or arbitrability question as an arbitrator would in deciding the merits of a grievance. Instead, the Council's statement was intended to indicate that the Assistant Secretary must decide a question of grievability or arbitrability under a negotiated grievance procedure when such question is referred to him, just as an arbitrator would be required to decide the question of grievability or arbitrability where the parties bilaterally agree to refer such threshold issue to the arbitrator pursuant to section 13(d) of the Order.[6/]

In applying these principles to the instant case, we find that the Assistant Secretary's determination that the grievance in this case was not subject to the negotiated grievance procedure is inconsistent with the

6/ The Council notes that the Assistant Secretary has previously recognized the foregoing distinction between the merits of a grievance and the grievability or arbitrability of a grievance under a negotiated agreement. See U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, Assistant Secretary Case No. 30-6026(GA), FLRC No. 76A-23 (July 8, 1976), Report No. 108. This description of the Assistant Secretary's responsibilities under section 13(d) is also in accord with the role of Federal courts in a suit under § 301 of the Labor-Management Relations Act (29 U.S.C. 185) to compel specific performance of an arbitration agreement. In such suits, judicial inquiry is narrowly restricted to the issues of whether the collective bargaining agreement between the parties contains an arbitration provision and to whether the labor dispute in question falls within its scope. Thus, in John Wiley and Sons v. Livingston, 376 U.S. 543 (1964), the Court stated:

> "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties." Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962). Accord, e.g., United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960).

As the Court likewise said in United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 568 (1960):

> . . . It [the function of the court] is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . . The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

See also UAW v. General Electric Co., 474 F.2d 1172 (6th Cir. 1973) and Haig Berberian, Inc., v. Warehousemen, 535 F.2d 496 (9th Cir. 1976).

Council's intended interpretation and application of section 13(d) of the Order, as previously enunciated by the Council in Crane. In the present case, as the Assistant Secretary recognized, the parties were in a dispute as to whether the position of Employee Development Specialist was a "policy" position within the meaning of Amendment 11 of the negotiated agreement. The parties' negotiated grievance procedure encompassed grievances over the "interpretation or application of this Agreement." Since the question of whether the position of Employee Development Specialist was a "policy" position involved the interpretation and application of the agreement, the grievance was on a matter within the scope of the negotiated grievance procedure and, therefore, should have been referred to an arbitrator. The Assistant Secretary, by interpreting the substantive provisions of the agreement and deciding that the position of Employee Development Specialist was a "policy" position within the meaning of Amendment 11, in effect resolved the merits of the dispute, rather than considering Amendment 11 for the limited purpose of determining whether the grievance involved the interpretation or application of that substantive provision and thus, whether the grievance fell within the scope of the parties' negotiated grievance procedure.

Conclusion

For the foregoing reasons, and pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision in the instant case and remand the case to him for reconsideration and decision consistent with the principles enumerated above.

By the Council.

Harold D. Kessler
Acting Executive Director

Issued: August 17, 1977

October 12, 1977

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
DEPENDENTS SCHOOLS, EUROPE
A/SLMR No. 922

This case involved an unfair labor practice complaint filed by Peter J. Migliaccio (Complainant) alleging, among other things, that the Respondent violated Section 19(a)(1) of the Order by interfering with the right of the Complainant to represent an employee and by discriminating against the Complainant because of his union affiliation. The Respondent took the position that the Order does not grant an individual the right to be the personal representative of an employee and, further, that the Complainant was not prevented from acting as the personal representative of the employee in the discussion which was held. The Complainant, on the other hand, maintained that because of his affiliation with a union other than the certified exclusive representative of the employee, the Respondent prevented him from acting effectively as the personal representative of the employee.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) of the Order. In this regard, he noted that Section 7(d)(1) of the Order merely states those instances where employees may choose a personal representative other than their exclusive representative and does not confer any right upon employees to have a personal representative which is enforceable under Section 19 of the Order. Thus, in his view, as the Complainant had no right enforceable under the Order to represent the employee as her personal representative, the Respondent did not violate the Order by initially refusing to treat the Complainant as the employee's personal representative when the latter appeared at a meeting to confer with Respondent's Principal over a dispute between management and the employee.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 922

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS, EUROPE 1/

Respondent

and

Case No. 22-6675(CA)

PETER J. MIGLIACCIO

Complainant

DECISION AND ORDER

On June 17, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-6675(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
October 12, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ The name of the Respondent appears as amended at the hearing.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS, EUROPE, 1/
Respondent

and

PETER J. MIGLIACCIO
Complainant

Case No. 22-6675(CA)

MARTIN B. FRANTZ
Labor-Management Employee Relations Specialist
Directorate,
Department of Defense Dependents Schools, Europe
APO New York 09164
For the Respondent

PETER J. MIGLIACCIO
NSA, Box 31
FPO New York 09521

and

ERNEST J. LEHMANN
Verona Elementary School
APO New York 09453
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on August 11, 1976 by the Regional Administrator for Labor-Management Services Administration of the U.S. Department

1/ The name of the employer appears as corrected at the hearing.

of Labor, Philadelphia Region, a hearing was held in the above entitled case on November 9, 1976 at Sembach, Germany.

This proceeding was initiated under Executive Order 11491, as amended, (herein called the Order) by the filing of a complaint on February 10, 1976 by Peter J. Migliaccio, (herein called Complainant) against Department of Defense Dependents Schools, Europe, (herein called Respondent). It was alleged that Respondent violated Section 19(a)(1) and (2) of the Order on or about November 14, 1976, 2/ by interfering with the right of Complainant to represent an employee, and by discriminating against Complainant because of his union affiliation. 3/ On March 5, 1976 Respondent filed a response to the complaint. It contended that no action was taken by management to interfere with Complainant's right to represent an employee personally; that any action taken by management had nothing to do with Complainant's union affiliation. Respondent denied the commission of any unfair labor practices.

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. Hereafter, Complainant filed a brief which has been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduce at the hearing, I make the following findings, conclusion and recommendations:

Findings of Fact

1. As part of its American School system, Respondent maintains an elementary and junior high school at Sembach, Germany. At all times material herein the Overseas Educational Association (OEA) was the collective bargaining representative of the teachers at the Sembach school.

2. On November 12, 1975, 4/ Trudi Cornish, a teacher at Sembach school, was removed from her class by Timothy J.

2/ The complaint was amended at the hearing to change the year to 1975.

3/ The 19(a)(2) allegation was not included in the Notice of Hearing as a litigable issue.

4/ All dates hereinafter mentioned are 1975 unless otherwise specified.

Kelley, principal at said school. Cornish was placed on AWOL for a day because she allegedly refused to permit her pupils, who were outside the building, to reenter the classroom or discuss the matter. 5/

3. On November 13 Complainant and Dr. Heidemarie Shurtleff, teacher, accompanied Cornish to superintendent Prince's office at the Sembach school. Since Prince was absent, they spoke to Marvin D. Kurtz, Elementary Coordinator for District III, who acted for Prince, as well as Mrs. Irene Richards. Complainant explained that Cornish had not been allowed to continue her teaching duties because she left some children outside for disciplinary reasons, and that Kelley brought in a substitute teacher. He stated that Kelley should be told to allow Cornish to return to the classroom and teach her group. Migliaccio mentioned he was there as Cornish's personal, not union, representative. Kurtz replied the problem was not within his jurisdiction, but he agreed to contact Kelley and advise him that Complainant and Cornish would visit the principal on the following day.

4. On November 14 Complainant and Cornish were at school en route to Kelley's office. The latter saw them and stated to Cornish he wanted to speak to her. Complainant attempted to introduce himself and Kelley said he knew Migliaccio was an OFT union official and that Migliaccio had no business being there. Complainant replied he was not there as a union representative or on union business. When Kelley stated he wanted to confer with Cornish, Migliaccio commented she has a right to representation, that he was her personal representative, and that she would talk only in his presence.

Complainant, Cornish and Kelley then went into the principal's office to discuss Cornish's problem. Kelley said it was an unfortunate incident since he knew Cornish was a very good teacher. He remarked that the matter seems settled inasmuch as she did come and discuss it. Complainant stated that while Cornish's problem was settled, he would take further action re discrimination against him.

5/ Cornish testified she had been suspended, and that she had been barred from teaching by Kelley on November 13. Kelley maintained that Cornish was not suspended but was requested to attend school on November 13 and see him before school started. In view of my ultimate conclusions herein, I do not find it necessary to determine whether Cornish was suspended and prevented from teaching on the aforementioned date.

5. At the close of the aforesaid meeting with the principal, Cornish returned to her classroom and resumed her duties as a teacher at the Sembach school.

Conclusions

It is contended by Complainant that Respondent violated Section 19(a)(1) of the Order by interfering with his right to effectively represent Trudi Cornish on November 14, 1975 in her dispute, as a teacher, with the Sembach school, Migliaccio argues that since an employee is entitled to a personal representative under Section 7(d)(1) of the Order, any interference with that right must necessarily result in a violation of the rights of said representative. In support of such argument Complainant cites Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, A/SLMR No. 705.

While there is little dispute as to the facts herein, Complainant's argument is predicated on a misconception as to the rights and obligations flowing from the Order. It is provided in Section 7(d)(1) of the Order that exclusive recognition of a labor organization does not prevent an employee from selecting his own representative in a grievance or appellate action, except when presenting a grievance under a negotiated procedure as provided in Section 13. However, contrary to Complainant's contention, Section 7(d)(1) does not confer any right upon employees, organizations or associations which are enforceable under Section 19 of the Order. It merely declares those instances where employees may choose a representative other than their exclusive representative in grievance or appellate action. Internal Revenue Services, Chicago District, A/SLMR No. 279; U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278. Thus, Section 7(d)(1) is inapposite herein, and it will not serve as a basis for the alleged infringement of Complainant's rights, under 19 of the Order, as Trudi Cornish's personal representative.

Neither does the cited case, Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, supra, offer much solace to the position taken by Complainant herein. That case dealt with the right of a union under Section 10 (e) of the Order to be represented at a formal discussion between management and a unit employee. Under that particular section employees have a protected right to assistance or representation by the exclusive representative when they are

summoned to formal discussions concerning grievances and working conditions affecting unit employees. See U.S. Army Training Center, Engineer and Fort Leonard Wood, A/SLMR No. 787.

The Assistant Secretary has dealt with the particular issue involved herein in the case of 380th Combat Support Group, Plattsburgh Air Force Base, Plattsburgh, N.Y. A/SLMR No. 493. The Complainant therein sought to have a personal representative present during a discussion on her supervisory appraisal with Complainant's supervisor. The request was denied. It was held that since the designee was not a representative of the exclusive bargaining agent, no right existed under Section 10(e) of the Order to have such designee present at the discussion. Moreover, no right was conferred upon the individual employee under Section 7(d)(1), which is enforceable under Section 19, to have a personal representative appear on her behalf.

It would follow, based on the foregoing cases, that Complainant herein has no right to represent Trudi Cornish, as her personal representative, which is enforceable under Section 19 of the Order. Accordingly, I conclude that Respondent did not violate Section 19(a)(1) thereof by its conduct in initially refusing to talk to Complainant on November 14 when the latter appeared at the Sembach school to confer with the principal, Timothy Kelley, re the dispute between management and Trudi Cornish. 6/

RECOMMENDATION

Upon the basis of the foregoing findings and conclusions, I recommend that the complaint herein be dismissed in its entirety.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: 17 JUN 1977
Washington, D.C.

6/ In view of my conclusion that no enforceable right under the Order is conferred upon Complainant herein, I find it unnecessary to determine whether Respondent did, in fact, confer with Migliaccio on November 14, 1975 and discuss Trudi Cornish's problem with him as her representative.

October 12, 1977

UNITED STATES DEPARMENT 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 CONTRACT
ADMINISTRATION SERVICES
REGION, LOS ANGELES
A/SLMR No. 923

This consolidated proceeding involved two unfair labor practice complaints filed by Mark Dana Tremayne (Complainant). The first complaint alleged that the Respondent violated Section 19(a)(1) of the Order when it denied the Complainant representation by his exclusive representative at a meeting called by the Respondent at which he was entitled to such representation. The second complaint alleged that the Respondent violated Section 19(a)(1) of the Order by promising the Complainant a promotion if he dropped a grievance.

The Administrative Law Judge recommended that both complaints be dismissed. With regard to the first complaint, the Administrative Law Judge found that, under the circumstances, the Complainant had a right to have his exclusive representative present at the meeting. However, he found the violative conduct to be de minimis and cured by a subsequent meeting held within a short period of time at which the exclusive representative was present. With regard to the second complaint, the Administrative Law Judge found that no promise was made to the Complainant.

Noting particularly the absence of exceptions in either case, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaints be dismissed in their entirety.

A/SLMR No. 923

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE SUPPLY AGENCY,
DEFENSE CONTRACT
ADMINISTRATION SERVICES
REGION, LOS ANGELES

Respondent

and

Case Nos. 72-5931(CA) and
72-5932(CA)

MARK DANA TREMAYNE

Complainant

DECISION AND ORDER

On July 22, 1977, Administrative Law Judge Gordon J. Myatt issued his Recommended Decision and Order in the above-entitled proceeding. In Case No. 72-5931(CA), he found that the Respondent had engaged in certain unfair labor practices, but recommended that the complaint be dismissed in that case because the conduct found violative of the Order was de minimis and cured by subsequent conduct. In Case No. 72-5932(CA), he found that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommended that the complaint in that case be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in these cases, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

1/ In Case No. 72-5931(CA), the evidence established that no substantive discussions were held during the meeting at which the Complainant was denied the right to representation by his exclusive representative.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 72-5931(CA) and 72-5932(CA) be, and they hereby are, dismissed.

Dated, Washington, D. C.
October 12, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of DEFENSE SUPPLY AGENCY, DEFENSE CONTRACT ADMINISTRATION SERVICES REGION, Los Angeles, Respondent vs. MARK DANA TREMAYNE, Complainant	CASE NOS. 72-5931(CA) & 72-5932(CA)

John P. Janecek, Esquire
Los Angeles, California
For the Respondent

Mark Dana Tremayne, Pro Se
Buena Park, California
and
Thomas O'Leary, AFGE
Redondo Beach, California
For the Complainant

Before: GORDON J. MYATT
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

On February 23, 1976, a complaint and an amended complaint were filed in Case No. 72-5931 by Mark D. Tremayne (hereinafter called the Complainant) against Defense Supply Agency, Defense Contract Administration Services Region, Los Angeles (hereinafter called the Activity or Respondent Activity, interchangebly). The complaint and amended complaint alleged that Complainant's supervisor and another management official interfered with, threatened and coerced the Complainant in the exercise of rights assured by the Executive Order by their conduct at a meeting with the employee, and by refusing to grant his request for union representation during the meeting.

On the same date a complaint and an amended complaint were filed in Case No. 72-5932 by the Complainant against the Activity. The complaint and amended complaint in this case alleged the Complainant was coerced, threatened, pressured, and cajoled into withdrawing a pending grievance against his supervisor. It is asserted that the Complainant was promised a promotion to a higher grade by management, if the grievance were withdrawn.

The original complaint in Case No. 72-5931 alleged violations of Sections 19(a)(1), (2) and (4) of the Executive Order, as amended. The amended complaint, based on the same conduct, alleged that the Activity violated only Section 19(a)(1) of the Order. Similarly, the original complaint in Case No. 72-5932 alleged violations of Sections 19(a)(1) and (2), but the amended complaint regarding this conduct only asserted a violation of 19(a)(1). [1]

The Regional Administrator for Labor-Management Services Administration for the San Francisco Region issued a Notice of Hearing on Complaint in both cases on August 12, 1976. On the same date he issued an Order consolidating the cases for purposes of hearing.

1. At the hearing, Complainant stated that 19(a)(1) was the only section of the Executive Order claimed to have been violated by the Activity.

The consolidated cases were originally scheduled for hearing on September 21 and 22, 1976. The cases were subsequently rescheduled for hearing on October 18, 1976, and finally set for hearing on November 3, 1976, based on a purported joint request of the parties.[2]

A hearing was held in Los Angeles, California, on November 3 and 4, 1976. In addition to representing himself, Complainant was also represented by an official of the Local Union of American Federation of Government Employees. The Respondent Activity was represented by counsel. All parties were afforded full opportunity to be heard and to introduce material and relevant evidence and testimony on the issues involved. Briefs were submitted by the parties and have been duly considered.

Upon the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

A. The Alleged Misconduct in Case No. 72-5931

The Complainant is a GS-11 contract price analyst employed in the Financial Services Branch, Contract Administration Division of the Defense Contract Administration Services District, Los Angeles. The Defense Contract Administration Services District is a subordinate organization of the Respondent Activity. On Septmber 26, 1975, the Complainant filed a written statement of an intent to file an unfair labor practice charge against the Respondent Activity with the commanding officer, Brigadier General Michael E. DeArmond, USAF. The intended unfair labor practice charge related to a purported incident that had occurred the day before involving the Complainant, his supervisor and a union representative. Upon receipt of the Complainant's notice of intent to file a charge, General DeArmond called in Dempsey W. Jenkins, the labor relations representative for the Activity. He informed Jenkins that the notice of intent did not state enough facts to enable them to evaluate the conduct complained

2. At the hearing, Complainant stated that he had not joined in the request for rescheduling from October 18, 1976. It is noted, however, that the Complainant's objection was not voiced until the date of the hearing, and the Complainant was not prejudiced in any way by the subsequent rescheduling of the cases. Accordingly, Complainant's objection was untimely and, in any event, was moot.

of by the Complainant. He instructed Jenkins to get in touch with the Complainant to get a more complete statement of the facts.

Jenkins contacted George Smooke, Complainant's first-line supervisor, to arrange a meeting with the Complainant in Smooke's office. Complainant was out to lunch at the time, and Jenkins went to Smooke's office to wait for him. In arranging the meeting, Jenkins informed Smooke that he wanted to discuss a matter with the Complainant involving "a correspondence" between the General and the Complainant.

The testimony regarding the sequence of events immediately preceding and during the meeting between Jenkins and the Complainant is in wide conflict. The Complainant testified that when he returned to his office after lunch, he was informed by a secretary that Smooke wanted to see him in his office. The Complainant stated that when he went into Smooke's office, he saw Jenkins there waiting for him and objected to meeting with the management officials. He further testified that Jenkins told him to sit down when he inquired about the purpose of the meeting. Tremayne stated that he then asked to have his union representative present during the course of the meeting, and Jenkins replied that it was "garbage." According to Tremayne, Jenkins stated that he represented the commanding general, and he wanted to settle the unfair labor practice charge which the Complainant had filed 45 minutes previously. Because he was doubtful of Jenkins' motives, the Complainant stated that he wanted to call the General's office to verify that Jenkins had authority to discuss the unfair labor practice charge with him. The Complainant testified that Jenkins refused to allow this and again said it was "garbage." The Complainant testified that Jenkins raised his voice and made threatening gestures in his direction, and insisted that he was there to settle the unfair labor practice charge. While the discussion was going on, according to the Complainant, Smooke "laughed," and the Complainant objected to Smooke's presence. The Complainant testified that Jenkins then asked Smooke to leave the office.

The Complainant further testified that during the discussion Jenkins was "pounding" the table and "waving" his arms. The Complainant stated that Jenkins made "lunges" in his direction and was emphasizing his point with "wild hand gestures." The Complainant stated that Jenkins told him he was "being insubordinate for not cooperating with him as the General's representative in order to settle the unfair labor practice charge." According to the Complainant, the meeting ended with Jenkins

leaving the office, and they never discussed the substance of the purported unfair labor practice charge.

Jenkins and Smooke gave a different version of the events. Jenkins testified that he went to Smooke's office to wait for the Complainant to return from lunch. When the Complainant returned to his desk, Smooke asked him to come into the office and the Complainant hesitated and said, "I'm not going in there with the two of you." Smooke then told the Complainant, as his supervisor he was asking him to come into the office. According to Jenkins, the Complainant replied, "You have to remind me that you are my supervisor," and then entered the office.

Jenkins stated that the Complainant sat at a conference table across from him and Smooke sat at his desk. When Jenkins stated that he was instructed by the General to get more facts on the intended unfair labor practice charge, the Complainant questioned his authority and stated he wanted his union representative present during the discussion. Jenkins explained again that the meeting was merely investigatory to get more facts for the General, and was not for the purpose of discussing the merits of the intended unfair labor practice charge. The Complainant then stated that he wanted to call the General to verify Jenkins' authority, and accused Jenkins of "intimidating" him. At this point Smooke coughed, and the Complainant accused him of laughing. Hoping to relieve some of the tension, Jenkins asked Smooke if he would mind leaving the office. After Smooke left, Jenkins again sought to get facts from the Complainant. The Complainant then accused Jenkins of "threatening" him. In the course of his conversation with the Complainant, Jenkins called him "Mr. Tremayne." The Complainant then accused him of being snobbish. Jenkins at that point called the Complainant by his first name, and the Complainant countered with a statement, "don't get familiar with me." Jenkins testified that he was baffled, and at this point threw his hands up in the air. When he did so, the Complainant accused him of getting ready to strike him. Finally Jenkins decided that nothing would be gained, and he left the office. Jenkins also denied that he ever told the Complainant that he was insubordinate because he had no direct authority over the Complainant.

Smooke's testimony was essentially the same as the testimony of Jenkins. He stated he never knew the purpose of the meeting, only that Jenkins informed him that he wanted to discuss something with the Plaintiff regarding what he had written to the General. When Smooke asked the Complainant to come into his office, the Complainant

stated that he wanted his union representative present. Smooke testified that after he introduced Jenkins to the Complainant, that the Complainant asserted that he was being "threatened." Smooke denied that there was any table pounding during the discussion and that he merely sat at his desk observing. Smooke stated that at one point he coughed, and the Complainant claimed he was laughing at him. This was when Jenkins asked him if he would mind leaving the office, and he did so.

There was one other witness who testified regarding part of the conversation prior to the Complainant entering Smooke's office. Ollie Banks, a secretary in the office, testified that she was instructed by Smooke to tell the Complainant to come into his office when he returned from lunch. When the Complainant returned, Smooke's door was open and he stepped out and asked the Complainant to come in. According to Banks, the Complainant stated, "I am not going in there with the two of you." When Smooke stated that he was his supervisor and asked him to come in, the Complainant replied, "thank you sir, you won't let me forget that you are my supervisor", and went into the office. Banks stated that she did not hear any of the conversation while the parties were in the office.

Jenkins testified that when he returned to the General's office, he informed the General that he had never encountered a situation like that in all of his years of dealing with people at the Activity. He informed the General that it was "weird." The General instructed Smooke to get in touch with the vice-president of the Union and to arrange another meeting as soon as possible. Smooke stated that he contacted Charles Wells, then a vice-president of the Union, and arranged to meet with him and the Complainant at 3 p.m. that same day in a conference room in the building where Smooke's office was located.[3] Jenkins stated that when he met with the Complainant and the union representative, the Complainant became very agitated and upset again. The union official calmed him down and they began to discuss the facts contained in the intended unfair labor practice charge. Jenkins testified that the meeting lasted until 4:15 p.m., which was beyond the normal quitting time.

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3. The Complainant denied that there was ever a second meeting that day with Jenkins. Smooke testified that he was aware that Jenkins had scheduled a meeting later that afternoon with the Complainant.

Concluding Findings

In order to address the ultimate issue presented by this case, it is necessary to first resolve the conflict in the differing versions of the meeting in Smooke's office. Although the Complainant testified in a positive manner and was quite descriptive in his account of the events, I find that throughout the hearing he was prone to over-dramatize. Furthermore, he was suspicious of every act and statement made during the course of the hearing itself. This was true regardless of the source responsible. For example, at one point during the proceeding he became offended at what he felt were derisive smiles by spectators in the courtroom. My observation of his conduct and attitude throughout the trial cause me to conclude that his version of the incident is far less accurate and reliable than the versions given by the other witnesses. Moreover, the Complainant seemed eager to attach malicious motives to seemingly innocent conduct. For these reasons, I credit the testimony of Jenkins and Smooke regarding the events that occurred on September 26, 1976.

Having determined that the events occurred as described by the Respondent Activity's witnesses, the sole issue here is whether the Complainant was unlawfully denied the right to have his union representative present during the meeting in Smooke's office. The Activity argues that the meeting was purely investigatory to gather facts regarding the intended unfair labor practice charge. Therefore, it was an informal meeting and the Complainant was not entitled to union representation. In addition, the Activity argues that if the Complainant were entitled to union representation, the meeting was terminated, due to his unusual conduct, before any discussion on the subject matter was accomplished. Thus, according to the Activity's argument, there was no violation of any rights assured the Complainant by the Executive Order.

In my judgment, the Respondent Activity's construction of the rights and obligations under the Executive Order is much too narrow and restrictive. The Complainant filed an intent to file an unfair labor practice charge, citing certain conduct on the part of his supervisor which he interpreted as interfering with his right to confer with and contact his union representative. Regardless of whether the intended charge was meritorious, it had impact beyond the individual concerns of the Complainant. Section 10(e) of the Executive Order imposes a duty upon a labor organization having exclusive recognition to represent the interests of all employees in the bargaining unit, and affords it the right to be present at formal

discussions between management and employees concerning grievances, personnel policies and practices, and other matters affecting working conditions. Employees have a concomitant right to have their exclusive representative act for and represent their interests in matters set forth in Section 10(e) of the Order.[4] San Antonio Air Logistics, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Texas, A/SLMR No. 540.

Respondent's assertion that the Complainant was not entitled to be represented by the Union because the meeting was merely for the purpose of gathering facts (investigatory) must be rejected. The rights assured the Complainant under the Executive Order cannot be so easily compartmentalized and neatly divided into segments so that representation by the labor organization can be foreclosed at one point and honored at another. Once the intent to file an unfair labor practice charge was lodged with management, the Activity was put on notice that the Union must be afforded an opportunity to be present during any discussion with the Complainant regarding the charge--this is especially true when the Complainant requests such representation. Indeed, hindsight establishes that had this procedure been followed, the bizarre incident which gave rise to this case would never have occurred. Such precautionary measures should be observed by agency management in order to preserve the integrity of the rights assured employees and labor organizations by the Executive Order.

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4. Section 10(e) provides as follows:

> (e) 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.

Were the facts to end here, I would have no difficulty in finding that the Respondent Activity violated Section 19(a)(1) of the Executive Order. However, the record discloses there was a subsequent meeting several hours later between Jenkins and the Complainant at which an official of the Union was present. In my judgment, this meeting, occurring within a short space of time after the unlawful conduct, cured any prior violation of the rights assured the Complainant under the Executive Order. Indeed, the most that can be said was that the prior violative conduct was de minimis and, as such, does not warrant the finding of a violation. Vandenberg Air Force Base, 4392nd Aerospace Support Group, Vandenberg Air Force Base, California, FLRC No. 74A-77 (August 8, 1975).

Accordingly, I find that a violation of the Executive Order, did occur, but was cured by the subsequent conduct on the part of the Respondent Activity. For this reason, I find that the complaint herein should be dismissed in its entirety.

B. The Alleged Unlawful Conduct in Case No. 72-5932

Preliminarily it should be noted that O'Leary, Complainant's co-representative at the beginning of the hearing, was not present at the presentation of the facts in Case No. 72-5932. This evidence was taken the second day of the consolidated hearing. Although Complainant asked for a continuance because of O'Leary's absence, this request was denied. Neither the Complainant nor O'Leary mentioned the possibility of the latter's unavailability during the hearing on the preceding day. Furthermore, both were aware that they considered O'Leary to be a necessary witness on Complainant's behalf, and had sufficient advance notice that the case would proceed on the date scheduled.

The facts in this particular case are somewhat confusing because of the manner in which they were presented. Basically the Complainant asserts that he failed to process a grievance because he was promised a promotion if the matter were dropped. This promise is alleged to have been made by Colonel Harold Echols, Commanding Officer of the Los Angeles Procurement District. The testimony in support of the complaint was given by the Complainant and two union representatives. Sifting through the somewhat disoriented testimony from these witnesses as well as the testimony from witnesses for the Respondent Activity, the following facts are found to have occurred during the times material to the complaint.

The Complainant apparently had a number of complaints and grievances about the way he felt he was being treated by management at the Respondent Activity. Some of these complaints resulted in the filing of formal grievances and unfair labor practice charges, and some did not. The central thrust of all of them, however, was that the Complainant felt he was entitled to a promotion to GS-12, and management was frustrating his chances for a promotion at every conceivable turn. One of the Complainant's grievances involved a GS-12 position available at a TRW plant which he claimed was reclassified to a GS-11--presumably to prevent his applying for the job since he would not accept a lateral transfer. The testimony indicates that sometime in May or June 1975, this position was again classified as a GS-12 and the Complainant was an active candidate for the job.

Another complaint related to the position classification of the Complainant's present job. A desk audit had been conducted and the job was rated a GS-11 position on the basis of the work involved. The Complainant felt his duties had not been classified high enough and that the position warranted a grade of GS-12. He appealed the position classification to David O. K. Lee, the Civilian Personnel Officer of the Respondent Activity. Lee informed the Complainant that if an investigation established that he had been rated unfairly, he (Lee) would recommend to Colonel Echols that the rating be adjusted upward. After an investigation in which the Complainant was allowed to present evidence he thought supported his claim of higher level work, the original classification was found to be accurate. This result was considered grossly unfair by the Complainant, and viewed as further evidence of management's vendetta against him.

Another complaint involved Complainant's job performance rating. The Complainant felt that his performance rating was not sufficiently high enough to qualify him as a candidate for promotion. He also felt that his performance rating did not properly reflect the quality of his work. He insisted that his rating should be upgraded, and pressed this issue personally and through union officials with higher level management.

In addition, the testimony indicates that the Complainant felt that his supervisor, Smooke, had unfairly influenced some of his work. The Complainant had submitted a cost analysis report and Smooke changed portions of it. The Complainant felt that the report was deficient because of the changes and complained to Smooke about the

matter. Smooke instructed him to sign off on the document, and the Complainant did so under strong protest.

Finally, the testimony discloses that the Complainant felt he was being harassed by Smooke. It was asserted that the harassment became more prevalent after the Complainant joined the Union, although Smooke, when questioned by a union representative regarding the purported harassment, denied even knowing that the Complainant was a member of the Union. It was this latter grievance which was apparently the underlying basis for the complaint in this case.

The testimony indicates that the Complainant informed Paul Yampolsky of his belief that he was being harassed by Smooke. Yampolsky was substituting at the time as Complainant's union representative because the regular representative, Margaret Bywater, was on leave due to an accident. Yampolsky approached Smooke on June 25, 1975, regarding the matter and stated he wanted to discuss a "potential" grievance which was affecting the Complainant. Smooke denied the harassment and denied knowing that the Complainant was a member of the Union. Yampolsky testified that he did not consider this discussion to be the first step in the negotiated grievance procedure wherein the matter is taken up with the immediate supervisor of the employee involved. Rather, he felt he was heading off a potential grievance by taking the matter up with Smooke informally. The Complainant, on the other hand, considered this conversation between his union representative and Smooke to be in conformity with the first step of the negotiated grievance procedure.

Prior to the harassment complaint, the Complainant had pressed to get a promotion and had taken the matter up directly with Colonel Echols several times. On one occasion, Echols promised to see if management couldn't combine two positions which were vacant in the Complainant's section and create a GS-12 position which Complainant would fill. However, the Civilian Personnel Office informed Echols that this could not be done as the Respondent Activity would then lose both slots and would not have them available for staffing at a subsequent time. Because of this staffing problem, Echols abandoned the idea of combining the positions in order to upgrade the Complainant.

The first week in July 1975, Complainant was notified that his position classification appeal had been denied. On July 16, he took the matter up with Lee. He also

complained about his performance rating, and he discussed the downgrading of the position at TRW; which he asserted had been promised him by Echols.

That same afternoon the Complainant was told by Bernard Schmitt, his branch chief, to come into Echols' office. Echols told the Complainant in Schmitt's presence that the TRW job had been reclassified to a GS-12 and the Complainant would be interviewed by the selecting official for the position. The Complainant testified that Echols stated, "In all likelihood you will get it." He further testified that Echols said, "You will get it. You will be a temporary in the position." According to the Complainant, when he questioned why he would be a temporary, Echols said it was because of his attitude. Echols stated he was suspicious and suggested that he see a psychiatrist. The Complainant then questioned Echols' qualification to make such a judgment about him. The Complainant testified that on the basis of his conversation in Echols' office, he did not pursue the grievance against Smooke. He also testified that he had been told by Yampolsky that he would get the TRW job in 30 days.

Both Echols and Schmitt testified regarding the conversation in the former's office. Echols, who had since retired from the military, stated that when he called the Complainant in, he told him he would get "a fair shot at the promotion, but that as Commanding Officer he could not promote him." Echols stated that promotions could only proceed on the basis of the merit promotion plan, and he could only make certain that all of the Civil Service Commission requirements were followed. He testified that he told the Complainant that he was on the list for the TRW promotion and that he had to take his chances along with other candidates. He stated that the supervisor was the selecting official who would pick the successful applicant after an interview. Both Schmitt and Echols denied that Echols ever promised the TRW position to the Complainant.

On July 23, 1975, Smooke asked the Complainant to be available for a meeting that afternoon. He informed the Complainant that the meeting involved a reprimand he intended to put in the Complainant's personnel record. Because the Complainant felt this would jeopardize his chances of getting the promotion to the TRW job, he contacted O'Leary, the union president. O'Leary promised to look into the matter and get back to him. The following day O'Leary informed the Complainant that he had discussed the matter with Echols, and the reprimand would be postponed indefinitely so as not to interfere with the TRW interview.

The following week the Complainant was interviewed by the selecting official at TRW. When he sought to discuss his work experience, according to the Complainant, he was informed it was not necessary. He testified that the selecting official stated he knew all about the Complainant from Smooke because he (Smooke) had been on loan to that office for a six-month period some time earlier. The Complainant was subsequently notified that he had not been selected for the TRW position.

On July 31, Smooke called the Complainant into his office. Vandergrif, Deputy of the Contract Administration Division, was present. Smooke reprimanded the Complainant for giving files to union representatives. The reprimand was placed in the Complainant's personnel record. Subsequently, the reprimand was removed by management.

The Complainant continued to press for a promotion through his union representatives. A delegation of the union representatives consisting of O'Leary and Yampolsky met with Echols regarding the Complaint. O'Leary complained that the job performance reports did not properly reflect the quality of the Complainant's work, and that he had to be upgraded in order to receive a promotion. Echols informed the union representatives that the Complainant would be considered for a promotion if he were qualified. Echols testified he told the union representatives that he had attempted to help the Complainant by consolidating two jobs in his section, but could not accomplish this because of the staffing problems and the work load. He also stated that he had attempted to get the Complainant a position at TRW, but the supervisor who had the selecting authority would not select him. He stated that in so doing he had a reprimand deferred in order not to interfere with the Complainant's chances for getting the job. He stated that every time the Complainant went for an interview, "he shot himself in the foot." O'Leary stated that the Complainant had a number of grievances which he would file against the Respondent Activity. Echols testified that he told O'Leary that the Complainant shouldn't file a grievance on the performance reports because he could not win it. He further stated that it would damage his position among the people who would ultimately have to select him for a promotion. He testified that he told O'Leary that if he were going to file a grievance, he should do so "in an area where he had a locked-in situation and could win the case." Echols told O'Leary that if he wanted to do Mark Tremayne a favor, he shouldn't file a grievance that Tremayne could not win.

Concluding Findings

It is evident from the above that the Complainant had a deep and abiding belief that management was engaged in a conspiracy to deny him a promotion. This belief was so strong that it caused him to find promises in statements where none were made or intended, to perceive threats where none existed, and to generally be suspicious of all actions on the part of management.

The Complainant contends that he dropped his grievance against Smooke--one of many grievances and complaints--because Echols had promised him a promotion to the TRW position. As noted in the findings in the preceding case, I find the Complainant's testimony to be unreliable and colored by his intense desire to show that management was frustrating his opportunity for a promotion.

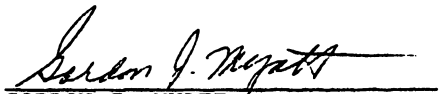
The credible account given by Echols shows that he made every effort to help the Complainant receive a promotion. He attempted to combine two positions in order to upgrade the Complainant, but found that this was not administratively possible. He had a reprimand deferred because of the possible adverse effect it would have on the Complainant's opportunity to get the TRW position. He advised the Complainant's union representative to urge the Complainant not to file frivolous grievances or grievances which he had no chance of winning. This advice was not given to further management's interests but rather, was intended to prevent the Complainant from acquiring a reputation which would cause him to alienate selecting officials when promotion opportunities were available. In spite of this favorable attitude on the part of top-level management, the Complainant continued to be his own worst enemy and, in the words of Echols, "shot himself in the foot" at every opportunity.

I credit the testimony of Echols and Schmitt concerning the conversation on July 16, 1975, regarding the TRW position. I find that Echols never implied or suggested that the Complainant would get the job if he dropped the grievance against Smooke. On the contrary, I find that Echols told him he would be interviewed as a candidate for the position, but the ultimate decision was up to the selecting official. I further find that Echols never told any union official that the Complainant would be promoted if he dropped the Smooke grievance. In my judgment, this is nothing more than an erroneous interpretation the Claimant chose to place upon Echols' comments when he failed to be selected for the job.

Accordingly, I find that the Complainant has failed to establish on this record, by a preponderance of the evidence, that management induced him to drop his grievance on the promise of a promotion. Therefore, I shall recommend that the complaint in this case be dismissed in its entirety.

RECOMMENDED ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations promulgated thereunder, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the complaint in Case Nos. 72-5931 and 72-5932 be dismissed in their entirety.



GORDON J. MYATT
Administrative Law Judge

Dated: 22 JUL 1977
Washington, D. C.

October 13, 1977

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

SECRETARY OF THE NAVY,
DEPARTMENT OF THE NAVY,
PENTAGON
A/SLMR No. 924

This case involved a complaint by the American Federation of Government Employees, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of Executive Order 11491, as amended, by instituting a new policy on contracting out certain services without notice to the Complainant or opportunity to consult, in violation of the Complainant's national consultation rights granted by Section 9(b) of the Executive Order.

The Administrative Law Judge concluded that the Respondent interfered with the Complainant's national consultation rights guaranteed by Section 9(b) and thereby violated Section 19(a)(1) and (6) by failing to notify the Complainant of the proposed new policy which he determined was a substantive change in personnel policy. He also concluded that the Respondent violated Section 19(a)(1) and (6) because the Respondent's altered policy on contracting out constituted a unilateral change in existing personnel policies without notice precluding any opportunity for consultation pursuant to Section 9(b) of the Order; further, that the Respondent's refusal to consult after the Complainant learned of the new policy also violated Section 19(a)(1) and (6) because Section 9(b) requires consultation on personnel policy matters. The Administrative Law Judge found it unnecessary to pass on whether these acts constituted independent Section 19(a)(1) violations. The Administrative Law Judge recommended, among other things, that in lieu of posting, a copy of a remedial notice be sent to each addressee of the revised policy, and that the Respondent be required to restore the status quo ante.

The Assistant Secretary noted that, in his view, Section 9(b) of the Order grants three distinct rights, two of which were at issue in this case, to labor organizations which have been accorded national consultation rights. The first is the right to be notified by the agency of proposed substantive changes in personnel policies affecting unit employees, and to have an opportunity to comment thereon. The second, which is not at issue here, is the right of the organization to suggest changes in the agency's personnel policies and to have its views carefully considered. The third is the right of the organization to consult in person, upon request, with agency management on personnel policy matters and to present its views thereon in writing.

As to the first right established by Section 9(b), the Assistant Secretary found that the institution of the new contracting out policy constituted a substantive change in personnel policy. He held, therefore, that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to notify the Complainant of its proposed substantive change in contracting out policy, thereby depriving the Complainant of its right under Section 9(b) to comment on the proposed change.

The Assistant Secretary also found that the Respondent's failure to notify the Complainant of the new policy violated Section 19(a)(1) and (6) of the Order since it deprived the Complainant of its right to consult in person with appropriate officials and to present its views thereon in writing by reason of the fact that it did not know of the new policy. Moreover, the Assistant Secretary noted that the Respondent's refusal to consult on the impact and implementation of the new policy, after the Complainant learned of it, constituted an additional failure to meet its Section 9(b) obligations in violation of Section 19(a)(1) and (6) of the Order.

Accordingly, the Assistant Secretary ordered the Respondent to cease and desist from its conduct found violative of the Order. Contrary to the recommendation of the Administrative Law Judge, however, the Assistant Secretary determined that it would be inappropriate to order a return to the status quo ante, because, by implication, this would require abrogation of any commitments made under the new policy to contract out, providing potential disruption of the Respondent's operations. The Assistant Secretary also ordered that remedial notices be posted at all units where the Complainant is the exclusive representative.

A/SLMR No. 924

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SECRETARY OF THE NAVY,
DEPARTMENT OF THE NAVY,
PENTAGON

Respondent

and Case No. 22-6787(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Complainant

DECISION AND ORDER

On November 3, 1976, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief 1/ with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, to the extent consistent herewith.

1/In its brief accompanying exceptions to the Administrative Law Judge's Recommended Decision and Order, the Respondent moved to amend the record and documents so that references to the Respondent's Office of Civilian Manpower Management (OCMM) would reflect the new organizational title, Office of Civilian Personnel. The motion is granted.

This case raises questions concerning the definition of rights granted to a labor organization which has been accorded national consultation rights. The facts are not in dispute. The Complainant was granted national consultation rights by the Respondent in 1971. At about the same time, the Respondent implemented a policy on contracting out, referred to hereafter as the 1971 policy or the "old" policy. 2/ In June 1975, the Respondent issued a new instruction regarding contracting out. 3/ This new instruction was re-adopted in November 1975, and gave rise to this dispute.

The Complainant learned for the first time about the new policy, which essentially was one of accelerating contracting out of certain named services, through a newspaper article on January 13, 1976. It requested and received copies of the new policy. The chairman of the Complainant's National Consultation Rights Committee then sought consultation. The request was denied and the instant unfair labor practice complaint followed.

In my view, Section 9(b) of the Order 4/ establishes three distinct rights for labor organizations which have been accorded national consultation rights. The first requires that the labor organization be notified by an agency of proposed substantive changes in personnel policies affecting unit employees, and that the agency provide an opportunity for the organization to comment thereon. The second, which is not at issue here, is the right of the organization to suggest changes in the agency's personnel policies and to have its views carefully considered. The third is the organization's right to consult in person, upon request, with agency management on personnel policy matters and to present its views thereon in writing.

As indicated at footnote 4 above, Section 9(b) limits the third enumerated right by the proviso: "An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and

2/ The 1971 policy is set out in the attached Administrative Law Judge's Recommended Decision and Order beginning at p. 2 thereof.

3/ The 1975 policy, Instruction 6A and 6B, is set out in the attached Administrative Law Judge's Recommended Decision and Order beginning at p. 5 thereof.

4/ Section 9(b) provides:

When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may consult in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition.

confer if the organization were entitled to exclusive recognition." This limitation, however, does not, in my view, affect the right of an organization possessing national consultation rights to comment, as distinguished from consult, upon substantive changes in personnel policies proposed either by the agency or by the organization. To read the restriction more broadly would deprive national consultation rights of any practical significance, since they would amount to no more than duplication of the collective bargaining rights of subordinate organizations enjoying exclusive recognition. A broad reading of the proviso thus would destroy a major purpose of national consultation rights, which is to permit a labor organization to submit its views on matters affecting the working conditions of members at the national level--the only level at which it may be possible to influence the personnel policy itself, as distinguished from the procedures employed in its implementation and the impact, which are proper subjects for local collective bargaining. See Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56. In recognition of this function of national consultation rights, the Federal Labor Relations Council has defined "substantive personnel policy" specifically as including policy which "is formulated within the discretionary authority of the issuing organization. . ."

It is uncontroverted that the Respondent did not notify the Complainant of Instruction 6A and 6B prior to its issuance, and that, therefore, no opportunity was provided for the Complainant to comment thereon. Therefore, if Instruction 6A and 6B constituted a substantive change in personnel policy it follows that the Respondent violated its national consultation rights obligations and thereby violated Section 19(a)(1) and (6) of the Order by its failure to give notice to the Complainant, which was thereby precluded from having a reasonable opportunity to comment on the proposed change. As discussed above, the right to notice and an opportunity to comment is not, in my view, limited to those matters concerning which an agency is required to meet and confer.

Section 2412.1 of the Federal Labor Relations Council's Rules and Regulations defines a substantive change in personnel policy as "a change in the established rights of employees or labor organizations or the conditions relating to such rights." The Respondent argues that, as there is no "established right" to retain one's job in the Federal sector, a change in the conditions under which a job will be either continued or contracted out is not a change in "established rights of employees." This argument is not persuasive. It is not material that the Executive Order itself does not accord to employees the right to retain their jobs. Section 9(b) of the Order and the Council's Regulations cannot be read as referring only to those rights established by Executive Order, since they contemplated the possibility of change in such substantive rights. If the rights are fixed by the Executive Order they are beyond the power of the agency to change. Moreover, although there is no unqualified right to continue Federal employment, there are existing statutes and Civil Service rules and regulations which accord employees many rights with regard to retaining their

jobs. Any proposal which may result in displacement of employees by elimination of their jobs effects a fundamental substantive change in personnel policy. It would, in my view, be untenable to conclude that national consultation rights encompass such matters as transfers of personnel, but not the far more basic problems created by a potential large scale loss of employment.

Nor does there seem to be any ambiguity in the first part of Section 9(b). The duty to notify and offer opportunity to comment before effecting a substantive change in personnel policy is clear. Consequently, I find that the Respondent violated Section 19(a)(1) and (6) of the Order by its failure to notify the Complainant of its proposed substantive change in contracting out policy, thereby depriving the Complainant of its right under Section 9(b) of the Order to comment on the proposed change.

The obligation to consult, however, which, as indicated above, is the third distinct right conferred by Section 9(b), is qualified by the proviso that "an agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition." To determine whether the Respondent was obligated to consult with the Complainant, it must thus be determined whether the matter at issue was one over which the Respondent would be required to meet and confer if the Complainant were entitled to exclusive recognition. Although the actual decision of the agency to contract out has been held to be a reserved right of management, and therefore not negotiable, as indicated above, a labor organization may negotiate over the implementation and impact of the contracting out decision.

Therefore, the Complainant, which has been accorded national consultation rights, had a right to be consulted with on the impact and manner of implementation of the new contracting out policy involved herein. It follows that the failure by the Respondent to afford to the Complainant notice of the new policy violated Section 19(a)(1) and (6) of the Order because it deprived the Complainant of its right to consult on the matter in person with appropriate officials, and to present its views thereon in writing by reason of the fact that it did not know of the existence of the new policy. Moreover, the Respondent refused to consult upon the Complainant's request after the latter learned of the changed policy. In this regard, although the Respondent was not obligated to consult about the policy itself, it was obligated to consult about procedures implementing its policy, and the impact thereof, and its refusal to do so pursuant to the Complainant's request constitutes, in my view, an additional failure to meet its Section 9(b) obligations in violation of Section 19(a)(1) and (6) of the Order.

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 that the Respondent cease and desist therefrom and take certain affirmative actions, as set forth below, designed to effectuate the purposes and policies of the Order.

In his proposed remedy, the Administrative Law Judge recommended a return to the status quo ante by cancellation of the instruction establishing the new contracting out policy and reinstatement of the 1971 policy. In my view, such a remedial order is not warranted in the particular circumstances of this case. Rescission of the new policy by implication would require abrogation of any contractual commitments already made to contract out. In my opinion, the potential disruption of the Respondent's operations that would be created by such an order outweighs the need for a status quo ante remedy in this matter. Rather, a remedial order requiring the Respondent to cease and desist from implementing the new policy in the future without affording to the Complainant the opportunity to comment on proposed substantive changes in personnel policies and to consult about the impact and implementation thereof constitutes, in my view, a satisfactory remedy with respect to the unfair labor practices found herein and I shall so order.

The Administrative Law Judge also determined that posting of a notice, a normal remedy in cases involving a refusal to bargain, would not be appropriate in this case and recommended instead that a copy of the notice be mailed to each addressee of the 1975 policy instructions and to the Complainant. I find no reason why the normal posting remedy is not appropriate herein, and I shall order that the Respondent post notices at all locations where the Complainant is the exclusive representative.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Secretary of the Navy, Department of the Navy, Pentagon, shall:

1. Cease and desist from:

(a) Failing and refusing to notify the American Federation of Government Employees, AFL-CIO, pursuant to its national consultation rights under the Order, of proposed substantive changes in personnel policies that affect employees it represents, and provide it with an opportunity to comment on proposed substantive changes in personnel policies that affect employees it represents.

(b) Failing to provide an opportunity for the American Federation of Government Employees, AFL-CIO, to consult in person and to present its views in writing on personnel policy matters.

(c) Refusing to consult with the American Federation of Government Employees, AFL-CIO, upon request, on personnel policy matters.

(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 policies of Executive Order 11491, as amended:

(a) Upon request, consult with the American Federation of Government Employees, AFL-CIO, pursuant to its national consultation rights under the Order and to the extent consonant with law and regulations, concerning the procedures used in implementing the agency's new contracting out policy and the impact of the change in policy on the adversely affected employees.

(b) Post at units of all Department of the Navy facilities and installations where the Complainant is the exclusive representative 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 Secretary of the Navy and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. The Commanding Officer of each facility or installation shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of the order as to what steps have been taken to comply herewith.

Dates, Washington, D. C.
October 13, 1977

Francis X. Burkhardt

Francis X. Burkhardt, 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 fail or refuse to notify the American Federation of Government Employees, AFL-CIO, pursuant to its national consultation rights under the Order, of proposed substantive changes in personnel policies that affect employees it represents, and provide it with an opportunity to comment on proposed substantive changes in personnel policies that affect employees it represents.

WE WILL NOT fail to provide an opportunity for the American Federation of Government Employees, AFL-CIO, to consult in person and present its views in writing on personnel policy matters.

WE WILL NOT refuse to consult with American Federation of Government Employees, AFL-CIO, upon request, on personnel policy matters.

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, upon request by the American Federation of Government Employees, AFL-CIO, pursuant to its national consultation rights under the Order, consult with that organization, to the extent consonant with law and regulations, concerning the procedures used in implementing our 1975 policy on contracting out, and the impact of the change in policy on adversely affected employees.

_____
(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 any of its provisions, they may communicate directly with the Regional Administrator, 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
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

SECRETARY OF THE NAVY, :
DEPARTMENT OF THE NAVY,
PENTAGON :
Respondent
: Case No. 22-6787(CA)
and
:
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO :
Complainant

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Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order") and concerns "national consultation rights" under Section 9(b) of the Order.

This case was initiated by a charge filed on, or about, January 23, 1976, and a complaint filed on April 9, 1976 (Ass't. Sec. Exh. 1-b) which alleged a violation of Sections 19(a)(1), (5) and (6) of the Order. On June 1, 1976, the Regional Administrator, Mr. Kenneth L. Evans, issued a Notice of Hearing on the alleged violations of Section 19(a)(1) and (6) 1/ pursuant to which a hearing was held before the undersigned on June 30, 1976, in Washington, D.C.

All parties were represented by able counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and excellent briefs have been timely filed by the parties which have been carefully considered. Upon the basis of the entire record, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

1. Complainant was granted national consultation rights by Respondent, Department of the Navy (DoN), by letter dated July 1, 1971 (Jt. Exh. 2).

2. On August 30, 1967, the Bureau of the Budget (BoB) issued Circular No. A-76 Revised (Jt. Exh. 1) which established "Policies for acquiring commercial or industrial products and services for Government use". This Circular replaced BoB Circular A-76 issued March 3, 1966, and paragraph 5e provided, in part, as follows:

> "e. Procurement of the product or service from a commercial source will result in higher cost to the Government. A Government commercial activity may be authorized if a comparative cost analysis ... indicates that the Government can provide or is providing a product or service at a cost lower than if the product or service were obtained from commercial sources.
>
> "... Government commercial activities should not be started or continued for reasons involving comparative costs unless savings are sufficient to justify the assumption of these and similar risks and uncertainties." [removal of property

1/ The 19(a)(5) allegations are not, therefore, before me.

from tax rolls, loss of tax revenue, diversion of management attention from the Government's primary program objectives, obsolescence of plant and equipment, etc.] (Jt. Exh. 1).

Paragraph 7 c. (3) provided, as follows:

> "(3) An activity should be continued for reasons of comparative costs only if a comparative cost analysis indicates that savings resulting from continuation of the activity are at least sufficient to outweight the disadvantages of Government commercial and industrial activities. No specific standard or guideline is prescribed for deciding whether savings are sufficient to justify continuation of an existing Government commercial activity and each activity should be evaluated on the basis of the applicable circumstances." (Jt. Exh. 1)

Paragraph 7b (3), which dealt with "new starts" provided, in part, as follows:

> "(3) ... While no precise standard is prescribed in view of these varying circumstances a 'new start' ordinarily should not be approved unless costs of a Government activity will be at least 10 percent less than costs of obtaining the product or service from commercial sources. It is emphasized that 10 percent is not intended to be a fixed figure." (Jt. Exh. 1)

3. In July, 1971, the Department of Defense (DoD) issued DoD Directive 4100.15 and DoD Inst. 4100.33 which adopted and implemented Circular No. A-76 (Jt. Exh. 4). Section IV B of Directive 4100.15 provided, in part, as follows:

> "B. In conformance with this principle, the Department of Defense will depend upon both private and Government commercial or industrial sources for the provision of products and services, with the objective of meeting its military readiness requirements

> with maximum cost effectiveness, as follows:
>
> "1. DoD commercial or industrial activities may be continued in operation or initiated as 'new starts' only when a clear determination is made that one or more of the following circumstances exists:
>
> * * * *
>
> "e. Procurement of the product or service from a commercial source will result in higher total cost to the Government." (Jt. Exh. 4)

DoD Inst. 4100.33, IV B5. provided, in part, as follows:

> "5. Procurement of the product or service from a commercial source will result in a higher total cost to the Government.
>
> "a. Utilization of this criterion as justification for continuing, or initiating a new start, of a DoD commercial or industrial activity is authorized only if a comparative cost analysis ... indicates that the product or service can be provided from in-house services at an over-all total cost to the Government which is less than from a private commercial source ...
>
> "b. In reaching determinations under this criterion, the disadvantages, risks and uncertainties of starting or continuing a DoD commercial or industrial activity ... must be carefully considered and the amount of the cost savings to be achieved by in-house operation must be sufficient to justify those disadvantages, risks and uncertainties. ..." (Jt. Exh. 4)

4. DoN adopted and implemented the DoD policy by SECNAVINST 4860.44A (October 27, 1971), OPNAV Inst 4860.6 (November 30, 1971) (Jt. Exh. 7); and SECNAVINST 4860.44B (April 4, 1975) (Jt. Exh. 4).

5. DoN issued OPNAV Instruction 4860.6A on June 24, 1975, which cancelled OPNAVINST 4860.6 of November 30, 1971, and provided, in part, as follows:

" ...

"3. Discussion. Based on continuing studies which indicate the cost effectiveness of contract accomplishment of base support services, the Assistant Secretary of Defense ... recently requested the military services to energetically implement the DOD Commercial or Industrial (C/I) Activities Program. In response to this direction, the Assistant Secretary of the Navy ... established goals for contractor performance of custodial, refuse cellection, and guard services which, based on past Navy assessment, have a strong probability of being more economically accomplished by contract. Primary reliance for these functions will be on contract performance unless contract services cannot be obtained, would be significantly more costly, or extraordinary conditions preclude contract consideration. The FY 75-76 goals for the contract accomplishment of the three support services are shown below:

CODE	FUNCTION	FY-75 - FY-76 CONTRACT SUPPORT GOALS
S709	Custodial Services	at least 70%
S712	Refuse Collection and Disposal Services	at least 60%
S724	Guard Services	at least 30%

* * * *
(Emphasis supplied)

"4. Applicability. This instruction applies generally to all commercial or industrial support services and specifically to the above C/I functions when they are performed in-house, wholly or partially, at naval shore activities within the United States, Puerto Rico, Canal Zone, and Guam. ...

* * * *

"6. Action

"a. The Chief of Naval Material shall take the necessary action to implement reference (a) and manage and direct the operation of the Commercial or Industrial Activities Program within the Navy.

"b. Addresses shall take the necessary action to implement the requirements contained in this instruction assuring that:

"(1) The goals established in paragraph 3 are fulfilled within their commands prior to the close of FY-76.

"(2) Comprehensive assessments are made of each function specified above ... Unless excepted, functional conversions to contract shall be accomplished at the earliest possible date.

. . ." (Jt. Exh. 5).

6. DoN issued OPNAV Instruction 4860.6B on November 28, 1975, which cancelled OPNAVINST 4860.6A of June 24, 1975 (Jt. Exh. 6); however, the provisions of OPNAVINST 4860.6A, as set forth above, were re-adopted without change by OPNAVINST 4860.6B (Jt. Exh. 6).

7. Complainant, on January 13, 1976, first heard of the acceleration of contracting out of custodial, refuse collection, and guard services in an article published in the Federal Times, on January 12, 1976, and on January 15, 1976, Respondent supplied Complainant with copies of OPIVAV INSTRUCTIONS 4860.6A and 4860.6B (hereinafter referred to as Instruction 6A or Instruction 6B). Respondent concedes that there had been no consultation.

8. After Mr. L.T. Leavitt, Chairman of Complainant's National Consultation Rights Committee, received Instructions 6A and 6B, he called Mr. D.F. Black, head of Respondent's Labor Relations and Policy and Standards Branch, Office of Civilian Manpower Management, which is responsible for Respondent's National Consultation Rights program, and Mr. Black informed Mr. Leavitt that this was not a matter for national consultation discussions.

9. Complainant had not, previous to January, 1976, sought to discuss Respondent's contracting out policy at the national

level. 2/

POSITION OF THE PARTIES

COMPLAINANT'S POSITION. The Complainant states that Respondent's secret establishment and implementation of new contracting-out policies which significantly affect functions performed by employees represented by it violated Respondent's duties under Section 9(b) of the Order and Respondent thereby violated Section 19(a)(6) of the Order by its refusal to consult and confer with Complainant as required by the Order. The Complaint also alleges a violation of 19(a)(1) of the Order.

In its brief Complainant emphasizes that it does not, and did not, seek to negotiate over contracting-out, which it concedes is a non-negotiable, reserved management right under Section 12(b)(5) of the Order. Rather, that Complainant seeks merely to preserve, define, and enforce its national consultation rights in the face of a substantive change in Respondent's contracting-out program as evidenced by Instruction 6A and Instruction 6B.

Quite succinctly, Complainant's position is that, as it has been accorded national consultation rights by Respondent, Section 9(b) of the Order imposes a duty on Respondent to notify it of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for Complainant to comment on the proposed changes; and, in addition, Complainant may consult on personnel policy matters; that Instruction A, issued June 24, 1975, and Instruction B, issued November 28, 1975, brought about substantive changes in personnel policies that affected employees Complainant represent; that Respondent failed and refused to notify it of the proposed changes; failed and refused to provide any opportunity for Complainant to comment on the proposed changes; and failed and refused upon request to consult on said personnel policy matters in violation of 19(a)(6) and (1) of the Order

2/ Respondent, at pages 4-5 of its Brief, has set forth in considerable detail the "innocent telephone call" from which the present dispute developed. In view of the admission that there was no prior consultation, or even prior notice to Respondent, of Instruction 6A or 6B, if there were an obligation to advise and consult, there was a violation no matter how the disclosure of the failure to consult came about and such background is immaterial to determination of the duty to consult, if any, under Section 9 of the Executive Order. So, too, is Mr. Black's personal unawareness of the existence of Instruction 6A and 6B. The obligation to consult is Respondent's and its

RESPONDENT'S POSITION. Respondent contends First, that its contracting out program is not a "substantive personnel policy" within the meaning of Section 9(b) of the Order and, accordingly, was not, and is not, an appropriate subject for discussion under the "national consultation" provisions of the Order.

Second, that as Section 9(b) provides, in part, that "an agency is not required to consult with a labor organization on any matter which it would not be required to meet and confer if the organization were entitled to exclusive recognition" and since "contracting out" is, as Complainant concedes, a reserved management right, there was no duty to consult on its contracting out policy but only on impact and/or implementation and that no implementation had occurred when this case arose, a fortiori, Respondent had no obligation to consult until some action was taken to implement the established goal.

Third, that consultation under Section 9(b) of the Order is a more limited concept than an exclusive representative's rights to negotiate under Section 11 of the Order and that the proper focus of inquiry under Section 9(b) is predecisional rather than post-decisional, provided that a new or changed substantive personnel policy is involved.

CONCLUSIONS

I. Section 9(b)

Section 9(b) of the Order provides:

> "(b) When a labor organization has been accorded national consultation rights, the agency, through appropriate officials, shall notify representatives of the organization of proposed substantive changes in personnel policies that affect

Footnote continued from page 7.

obligation is not affected by the fact that its agent designated to represent it in national consultations was not advised of a matter requiring such consultation, assuming, of course, that there was a duty to consult.

employees it represents and provide an opportunity for the organization to comment on the proposed changes. The labor organization may suggest changes in the agency's personnel policies and have its views carefully considered. It may consult in person at reasonable times, on request, with appropriate officials on personnel policy matters, and at all times present its views thereon in writing. An agency is not required to consult with a labor organization on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition."

The Regulations further spell out the obligation to consult, in part, as follows:

5 C.F.R. §2412.3 Obligation to consult.

"(a) When a labor organization has been accorded national consultation rights, the agency or the primary national subdivision which has granted those rights shall ... furnish ... the labor organization:

(1) Reasonable notice of proposed new substantive personnel policies and of proposed substantive changes in personnel policies which affect the employees it represents under exclusive recognition;

(2) Opportunity to comment on such proposals;

(3) Opportunity to suggest changes in personnel policies that are of interest to employees it represents under exclusive recognition and to have its suggestions receive careful consideration;

(4) Opportunity to confer in person upon request ... on personnel policy matters; and

(5) Opportunity to submit its views in writing on personnel policy matters at any time.

(b) An agency ... is not required to consult ... on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition.

(c) National consultation rights do not include the right to negotiate. (Emphasis supplied.

Complainant's contention, both in its complaint and in its brief, that Section 9(b) rights include the right to "negotiate" is without basis, is contrary to the quite specific language of 5 C.F.R. §2412(c), as well as the history of Section 9(b) of the Order, and is rejected.

From the standpoint of new substantive personnel policies or of proposed substantive changes in personnel policies, the obvious intent of Section 9(b) is that consultation be pre-decisional. To achieve this, the agency is required to give reasonable notice of such proposed changes. But, certainly, an agency cannot disregard its mandatory obligation under Section 9(b) to provide reasonable notice and then avoid its obligation to consult by making the change and contending that its only obligation to consult was pre-decisional. Moreover, as to existing personnel policy, Section 9(b) assures the right of consultation by the submission of views in writing at any time and to confer in person at reasonable times.

The obligation of an agency to notify the labor organization under Section 9(b) is limited to "substantive changes in personnel policies" which is defined by the Regulations as follows:

"Substantive personnel policy means a standard or rule which (a) creates and defines rights of employees or labor organizations, including conditions relating to such rights; (b) sets a definite course or method of action to guide and determine procedures and decisions of subordinate organizational units on a personnel or labor relations matter; and (c) is formulated within the discretionary authority of the issuing organization and is not merely a restatement of a course or method of action prescribed by higher authority.

> "Substantive change in personnel policy means a change in the established rights of employees or labor organizations or the conditions relating to such rights." (5 C.F.R. §2412.1).

BoB Circular No. A-76 (1971), adopted and implemented by DoD Directive 4100.15 and DoD Inst. 4100.33 (1971), SECNAV inst. 4860.44 A (1971), OPNAV INST. 4860.6 (1971) and SECNAV INST 4860.44 B (1975), admittedly established a policy favoring the contracting out of support services where appropriate and one critical factor was cost. It is quite true that DoD Directive 4100.15, Paragraph Iv B.1. e provided.

> "e. Procurement of the product or or service from a commercial source will result in higher total cost to the Government." (Emphasis supplied.)

It is also quite true that OPNAV INSTRUCTION 4860.6A (June 24, 1975) and, 6B (November 28, 1975) each provided, inter alia,

> "Primary reliance for these functions will be on contract performance unless contract services ... would be significantly more costly ..." (Emphasis supplied.)

Complainant asserts that the change in language from "higher total cost" to "significantly more costly", alone, was a substantive change of policy; Respondent, on the other hand, asserts that there was no change in policy. If this were the only change made by Instructions 6A and 6B it might be debatable whether there was a change in policy, notwithstanding the obvious surface appearance of a change in emphasis, inasmuch as DoD INST. 4100.33, for example, made it plain that the over-all "total cost" required careful consideration of the disadvantages, risks and uncertainties of a DoD commercial or industrial activity and that "the amount of the cost savings to be achieved by in-house operation must be sufficient to justify those disadvantages, risks and uncertainties" and/or, as stated in BoB Circular No. A-76, "whether savings are sufficient to justify continuation of an existing Government commercial activity", so that, certainly, it would be arguable that the language of Instructions 6A and 6B in this respect reflected only a difference in syntax.

But the broader issue in this case is whether Instructions 6A and 6B represented a change in policy and the determination of this issue does not turn merely on the shift in emphasis

from "higher total cost" to "significantly more costly", but rather, on the totality of Instructions 6A and 6B. Instructions 6A and 6B stated, in effect, that: a) based on past Navy assessments, contract performance of custodial, refuse collection, and guard services have a strong probability of being more economical than in-house performance of these services; b) primary reliance for these functions will be on contract service unless contract services cannot be obtained, would be significantly more costly, or extraordinary conditions preclude contract consideration; and c) goals for accomplishment of the three support services (custodial at least 70%, refuse at least 60% and guard at least 30%) in fiscal years 1975-76 were set. Instructions 6A and 6B left no doubt that accomplishment of these goals was directive for they provided, in part, that "Addresses shall take the necessary action ... assuring that ... the goals established ... are fulfilled within their commands prior to the close of FY-76." (Emphasis supplied.)

In totality, it is clear that Instructions 6A and 6B did reflect a change in policy for achievement of contract accomplishment from a policy of favoring contracting out, even if the gloss unless "significantly more costly" represented no change in policy, to a policy of primary reliance on contract for refuse, janitorial and guard service, and a directive minimum percentage conversion for each of these services to be achieved prior to the close of the 1976 fiscal year. Of course, all commercial or industrial support services were to be assessed and the DoD Commercial or Industrial Activities Program was to be implemented but without specific, and directive, goals except for refuse, janitorial and guard services.

Assuming that Instructions 6A and 6B reflected a change in contracting out policy, was this a substantive change in personnel policy? Notwithstanding Respondent's strong assertion to the contrary, I conclude that it plainly was as the terms are defined in the Regulations. Instructions 6A and 6B set forth a standard or rule which (a) created and defined rights of employees and/or labor organization, including conditions relating to such rights (e.g., employment by the Navy in the performance of refuse collection, janitorial or guard service); (b) set a definite course or method of action to guide and determine procedures and decisions of subordinate organizational units on a personnel or labor relations matter; and (c) was formulated within the discretionary authority of the issuing authority, the Department of the Navy, and was not

merely a restatement of a course or method of action prescribed by higher authority, as neither BoB Circular No. A-76 nor DoD Directives or Instructions had established directive minimum goals and timetables; had even singled out janitorial, guard or refuse collection services for expedited attention; or had placed the same standard on cost effectiveness comparisons. Care must be taken that the term "personnel action" is not distorted, for it seems apparent that Section 9(b) of the Order was not intended to subject policy decisions to its terms unless they clearly are personnel policies as defined in the Regulations. That is, while most, if not virtually all, management policy decisions, directly or indirectly, affect employees, Section 9(b) encompasses only policy which, inter alia, "creates and defines rights of employees ... including conditions relating to such rights". Not only do Instructions 6A and 6B meet the tests set forth in the Regulations, but numerous decisions of the Council and the Assistant Secretary have recognized that decisions to contract out work directly affect employee rights from which it must be inferred that contracting out policy is, necessarily, substantive personnel policy within the meaning of Section 9(b) of the Order and 5 C.F.R. 2412.1. Cf. Immigration and Nationalization Service, FLRC No. 70A-10 (April 15, 1971); Plumb 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 (1973); U.S. Department of Interior, Bureau of Indian Affairs, A/SLMR No. 341 (1974); New Mexico Air National Guard, A/SLMR No. 362 (1974); Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 451 (1974).

II. Consultation under Section 9(b)

National consultation rights do not include the right to negotiate and an agency is not required to consult on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition. It is from the latter limitation that Respondent argues that, as the decision on contracting out was a reserved right of management under Section 12(b)(5) of the Order, there is no obligation to consult about the decision but only as to impact and implementation and, because there had been no implementation when this case arose, there was no obligation to consult.

Respondent's interpretation would emasculate national consultation rights and I find, upon careful reflection,no warrant for such interpretation either in logic or in the history of the development of the present language of Section 9(b) of the Order or in the Regulations promulgated pursuant thereto.

The reserved rights of management under Section 12(b) of the Order directly and specifically include matters of personnel policy, e.g., "to hire, promote, transfer, assign, and retain ... to suspend, demote, discharge, or take other disciplinary action ... to relieve employees from duties because of lack of work ...", etc. If Respondent's position were correct then, indeed, Section 9(b) created illusionary rights. Nor is it appropriate to equate consultation to specific impact. To the contrary, national consultation at the agency level relates to policy not to specific applications of that policy. By the same token, however, a new, or changed, personnel policy has immediate impact by virtue of its very existence even though no employee has yet been hired, or fired, or laid off, etc., pursuant to the new, or changed, personnel policy. While the right of agency managemnt to establish personnel policy pursuant to 12(b) is fully insured, Section 9(b) nevertheless assures an organization the right to discuss the new or changed personnel policy and it really is immaterial whether such consultation is considered as impact and implementation, inasmuch as Section 9(b) assures the right to consult about existing personnel policy matters without limitation. The significant difference is that Section 9(b) imposes on the agency a duty to notify the organization of proposed substantive changes in personnel policies and a duty to provide an opportunity for the organization to comment on the proposed changes.

A logical construction of Section 9(b) vis-a-vis reserved management rights would be that the agency is required to give notice of propoosed changes and the organization's right is, simply, to comment on the proposed changes at that stage. In this sense, the right to comment before issuance of the proposed change would not be consultation, i.e., "consult" would be a right to consult in person. While logical and entirely consistent with the intent and purpose of Section 9(b) of the Order, it is recognized that the Regulations, as noted hereinafter, include under the obligation to consult all of the rights set forth in Section 9(b), including the opportunity to comment. Respondent, obviously aware of the flaw in the logic of such argument, asserts that there is no right to consult in any manner, including comment on such proposals, because the last sentence of Section 9(b) provides that the agency is not required to consult on any matter on which it would not be required to negotiate with an exclusive representative.

Accepting Respondent's logic proves very little since Section 9(b) assures the organization the right to consult in person at reasonable times, on request, on personnel

matters, and at all times to present its views thereon in writing. Accordingly, for reasons set forth more fully hereinafter, I conclude that the last sentence of Section 9(b) does no more than insure the right of the agency to determine personnel policy in accordance with the reserved rights of management under the Order and that Section 9(b) does require and permit consultation about the policy.

A recurring frustration to unions in the federal sector is the necessary, but nonetheless troublesom, issuance of a policy determination by higher authority pursuant to the Order and the inevitable bar to discussion of the policy itself, notwithstanding the right to negotiate on impact and implementation. See, e.g., Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677 (1976). One purpose of Section 9(b) of the Order was to provide a means for discussion of personnel policy at the agency level. While the last sentence of Section 9(b) removes from the obligation to consult consultation as to decision itself, when the decision is pursuant to a reserved management right, to the same extent that the same decision would be removed from the obligation to negotiate if the labor organization were entitled to exclusive recognition; nevertheless, Section 9(b) requires that the agency notify the labor organization accorded national consultation rights of proposed substantive changes in personnel policies and imposes an obligation on the agency to consult upon request with the organization concerning that personnel policy. In short, the purpose of Section 9(b) was, and is, to provide a means for labor organizations, at some level, to discuss agency personnel policy matters. As Judge Chaitovitz noted, in Department of Navy, Military Sealift and National Maritime Union of America, Case No. 22-5395(NCR) (1975), aft'd A/SLMR No. 576 (1975),

> "It is clear that NCR, as viewed in both the Order and FLRC's Regulations, is a procedure that was set up in order to permit a labor organization ... to consult and have some opportunity for input with respect to changes in personnel policies on a national level, in those situations where the labor organization would not otherwise have such an opportunity."

Section 9(b) provides, inter alia, that a labor organization may suggest changes in the agencies' personnel policies and have its views carefully considered; that a labor organization may confer in person, on request, at reasonable times on personnel policy matters; and that it may presents its views in writing at all times.

Respondent's syllogism must be rejected for various reasons. First, the obligation of an agency to notify the organization of proposed substantive changes in personnel policies is an absolute obligation independent of the right to consult. Second, the limitation on the obligation to consult, as set forth in the last sentence of Section 9(b), is, simply, that there was no obligation to consult on the decision itself; however, as in the case of an organization entitled to exclusive recogniation, there was at least the right to consult, after reasonable notice, on the affect of such decision. Indeed, the right of a labor organization under Section 9(b) to consult on personnel policy matters is far broader than merely impact or implementation. Section 9(b) plainly contemplates notice by the agency to the organization of purposed substantive changes in personnel policies and the opportunity for the organization to comment thereon. Even though the Regulations include under "Obligation to consult" the various rights and obligations of Section 9(b), including (1) Reasonable notice; (2) Opportunity to comment; (3) Opportunity to suggest changes; (4) Opportunity to confer in person; (5) Opportunity to submit its views in writing at any time (5 C.F.R. §2412.3(a)) and the last sentence of Section 9(b) of the Order and Section 2412.3(b) of the Regulations provide that an agency is not required to consult on any matter on which it would not be required to meet and confer if the organization were entitled to exclusive recognition, I am persuaded that the agency is, nevertheless, required to give the organization notice of proposed new substantive personnel policies and of proposed substantive changes in personnel policies and to provide an opportunity for the organization to comment thereon, with full recognition that the agency is not required to consult on its decision to promulgate new personnel policies or on its decision to change existing personnel policies. In addition, Section 9(b) assures organizations the right, upon request, to consult in person on any personnel policy matter at reasonable times and to present its views thereon in writing at any time. In other words, in this case, even if Respondent had given Complainant notice of its proposed Instruction 6A, and subsequently of proposed Instruction 6B, and, at that point in time, the respective Instruction had become Respondent's policy, nevertheless, Section 9(b) granted Complainant the right to consult about existing personnel policies whether or not it had any right to consult prior to the creation of that policy. Third, the issuance of Instructions 6A and 6B created immediate impact and each Instruction provided for its implementation. The Instruction, directed, inter alia, that addresses "shall take the necessary action to implement the requirements contained in this instruction assuring that ... the goals established ... are fullfilled within their commands prior to the close of FY-76." The fact that no specific in-house service had, at that point, been contracted out cannot

alter the immediate impact of the Instructions on all addresses, including the Chief of Naval Material who was directed to take all necessary action to manage and direct the operation of the Commercial and Industrial Activities Program within the Navy. Not only does Section 9(b) create a right to consult on personnel policy which is broader than merely impact and implementation, but even if the right to consult were limited to the corresponding right of an exclusive representative, Complainant had at least the right to consult about impact and implementation of Instructions 6A and 6B as a Navy personnel policy.

Respondent failed and refused to give Complainant notice as required by Section 9(b) of the Order of proposed substantive changes in personnel policies with respect to contracting out, as set forth in Instruction 6A prior to its issuance on June 24, 1975, and as set forth in Instruction 6B prior to its issuance on November 28, 1975. Each Instruction was effective upon issuance and directive in nature. Respondent's unilateral change of existing personnel policies without notice to Complainant precluded any opportunity for consultation pursuant to Section 9(b) of the Order and Respondent thereby violated Section 19(a)(6) of the Order. United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289 (1973); Department of the Army, Headquarters United States Army Armament Command, Rock Island Arsenal, Rock Island, Illinois, A/SLMR No. 527 (1975); U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 653 (1976); Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia South Carolina, A/SLMR No. 656 (1976).

Complainant first learned of the existence of Instructions 6A and 6B in January, 1976, (Instruction 6B had cancelled Instruction 6A; however the provisions of Instruction 6A, as here material, were re-adopted without change by Instruction 6B) and promptly requested consultation which Respondent refused because Respondent asserted that Instruction 6B was not a matter for national consultation discussions. For the reasons set forth above, notwithstanding that the change in contracting out policy was a reserved right of management, Respondent was required by Section 9(b) of the Order to consult in person at reasonable times, on request, with Complainant on personnel matters and by its refusal to consult upon request Respondent further violated Section 19(a)(6).

Respondent's failure and refusal to notify Complainant of proposed substantive changes in personnel policies, as required by Section 9(b) of the Order, its unilateral change of established

personnel policies, by its issuance and implementation of Instructions 6A and 6B, and its refusal to consult upon request constituted violations of Section 19(a)(6) and, derivatively, also violated Section 19(a)(1). Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454 (1974). It is further recognized that, as the Assistant Secretary stated,

> "... a violation of any of these foregoing subsections of Section 19(a) [19(a)(2), (3), (4), (5), and/or (6)] necessarily tends to interfere with, restrain, or coerce employees in the exercise of their rights assured by the Order and, thereby, also is a violation of Section 19(a)(1)."

Whether Respondent's conduct also constituted an independent violation of Section 19(a)(1) need not be determined as it is clear that, in any event, its conduct in violation of Section 19(a)(6) derivatively violated Section 19(a)(1) of the Order.

REMEDY

To effectuate the purposes and policies of the Order it is necessary to restore the status quo ante as it existed before Respondent's unilateral issuance of Instruction 6A in violation of the Order. The more difficult question is whether posting, which is established normal procedure in cases of a refusal to bargain with an exclusive representative, is appropriate in this case which involves a refusal to consult as required by Section 9(b) of the Order. I have concluded that posting, in this case, would not be an appropriate remedy. In lieu of posting, I shall recommend that a copy of the notice signed by the Secretary of the Navy be sent to each addressee of Instruction 6A and/or Instruction 6B and to Complainant.

RECOMMENDATIONS

Having found that Respondent, Secretary of the Navy, Department of the Navy, engaged in conduct which was in violation of Sections 19(a)(1) and (6) of the Executive Order, 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 203.26(b) of the Regulations, 29 C.F.R. §203.26(b), the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Secretary of the Navy, Department of the Navy, shall:

1. Cease and desist from:

(a) Failing and refusing to notify American Federation of Government Employees, AFL-CIO, pursuant to Section 9(b) of Executive Order 11491, as amended, of proposed substantive changes in personnel policies that effect employees it represents.

(b) Failing and refusing to provide an opportunity for American Federation of Government Employees, AFL-CIO, to comment on proposal substantive changes in personnel policies that affect employees it represents.

(c) Refusing to consult with American Federation of Government Employees, AFL-CIO, upon request, at reasonable times on personnel policy matters.

(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 Executive Order 11491, as amended:

(a) Restore the status quo ante with regard to the Department of the Navy's policy governing contracting out of support services that existed immediately prior to the issuance of OPNAV INSTRUCTION 4860.6A on, or about, June 24, 1975, by

i) cancelling, withdrawing, and rescinding OPNAV INSTRUCTION 4860.6B, issued on or about, November 28, 1975, which Instruction had cancelled OPNAV INSTRUCTION 4860.6A, issued June 24, 1975, and all orders, Instructions, or Directives which may have been issued pursuant to Instruction 4860.6B.

ii) Reinstate SECNAVINST 4860.44 A (issued October 27, 1971), and/or OPNAV INST 4860.6 (issued November 30, 1971), and/or SECNAVINST 4860.44 B (issued April 4, 1975).

b) Mail a copy of the attached notice, signed by the Secretary of the Navy, to each addresse of OPNAV INSTRUCTION 4860.6B and, if the distribution were different, to each addresse of OPNAV INSTRUCTION 4860.6A.

c) Mail a copy of the attached notice, signed by the Secretary of the Navy, to American Federation of Government Employees, AFL-CIO.

d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 3, 1976
Washington, D.C.

APPENDIX

NOTICE

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 fail to notify American Federation of Government Employees, AFL-CIO, pursuant to Section 9(b) of Executive Order 11491, of proposed substantive changes in personnel policies that affect employees it represents and provide an opportunity for American Federation of Government Employees, AFL-CIO, to comment on the proposed changes.

WE WILL NOT refuse to consult with American Federation of Government Employees, AFL-CIO, upon request, at reasonable times on personnel policy matters.

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 RESTORE the status quo ante that existed prior to the issuance of OPNAV INSTRUCTION 4860.6A, on or about June 24, 1975.

WE WILL NOTIFY American Federation of Government Employees, AFL-CIO, of any proposed substantive changes in personnel policies that affect employees it represents, will provide an opportunity for the organization to comment on the proposed changes, and, upon request, will consult in person, at reasonable times, with the organization on personnel policy matters.

Department of the Navy

Dated:_____ By _____
Secretary of the Navy

If any person has any question concerning this Notice or compliance with any of its provisions, such persons may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

October 13, 1977

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 HOUSING AND
URBAN DEVELOPMENT,
MILWAUKEE AREA OFFICE,
MILWAUKEE, WISCONSIN
A/SLMR No. 925

This case involved an unfair labor practice complaint filed by Mary Lou Hinchey alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by the action of its Area Director in basing, in part, his approval of the Complainant's ranking on a list of employees eligible for promotion on the fact that she wrote a letter to the Wisconsin Congressional delegation.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) of the Order when it relied, in part, upon Hinchey's letter in determining that Hinchey lacked the judgment necessary to be ranked for promotion above other eligible employees. In reaching his conclusion, the Administrative Law Judge noted that the fact that the Respondent did not know Hinchey had signed the letter in her capacity as union steward was not important, since it is evident that other employees or union officers would be hesitant to exercise Section 1(a) rights in the future as a result of the Respondent's reaction to the letter. Moreover, he found that since the "unlawful" activity played a part in the promotional standing of Hinchey, such activity also violated Section 19(a)(2) of the Order.

The Assistant Secretary noted that Section 1(a) of the Order assures to employees the right to act in the capacity of a representative of a labor organization, including the right to present the views of their labor organization to the Congress. Hinchey, a union steward, had been authorized to do so by the union membership. The Assistant Secretary agreed with the Administrative Law Judge that the Respondent's treatment of Hinchey in this matter based, in part, upon activity which was protected under the Order, violated Section 19(a)(1) because such treatment would tend to interfere with her rights and the rights of her fellow employees, who could reasonably infer that they would suffer a similar fate if they engaged in the same type of protected activity as had been engaged in by Hinchey as a representative of a labor organization.

In regard to the Section 19(a)(2) allegation, the Assistant Secretary noted, however, that in order to sustain such a finding, generally there must be a specific showing that a discriminatory act was motivated by anti-union considerations. He found that in the instant case, although it has been shown that the Respondent discriminated against Hinchey because she wrote to Congress, it was not established that the Respondent knew that she wrote to Congress in her capacity as a union representative. Nevertheless, he found that where, as here, agency management engages in conduct which is inherently destructive of a basic right guaranteed to employees under the Order, proof of specific knowledge of the union activity involved is not necessary to sustain a finding that such conduct is violative of Section 19(a)(2) of the Order. Under the particular circumstances of this case, therefore, he found that by affecting Hinchey's chances for promotion because she wrote a letter to Congress in her capacity as a union representative, the Respondent discriminated against her in a manner that was inherently destructive of a basic right assured by Section 1(a) of the Order in violation of Section 19(a)(2) of the Order.

Accordingly, 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.

A/SLMR No. 925

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT,
MILWAUKEE AREA OFFICE,
MILWAUKEE, WISCONSIN

Respondent

and Case No. 51-3511(CA)

MARY LOU HINCHEY

Complainant

DECISION AND ORDER

On May 20, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the exceptions and supporting brief filed by the Respondent, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, as modified herein.

The Administrative Law Judge concluded that the Respondent violated Section 19(a)(1) of the Order when it relied, in part, upon Complainant Hinchey's letter to the Wisconsin Congressional delegation concerning a proposed reduction-in-force in determining that Hinchey lacked the judgment necessary to be ranked for promotion above other eligible employees. In reaching his conclusion, the Administrative Law Judge noted that the fact that the Respondent did not know Hinchey had signed the letter in her capacity as union steward was not important, since it is evident that other employees or union officers would be hesitant to exercise Section 1(a) rights in the future as a result of the Respondent's reaction to the letter. Moreover, he found that since the "unlawful" activity played a part in the promotional standing of Hinchey, such activity also violated Section 19(a)(2) of the Order.

Section 1(a) of the Order assures to employees the right to act in the capacity of a representative of a labor organization, including the right to present the views of their labor organization to the Congress. Hinchey, a union steward, had been authorized to do so by the union membership. I agree with the Administrative Law Judge that the Respondent's treatment of Hinchey in this matter based, in part, upon activity which was protected under the Order, violated Section 19(a)(1) because such treatment would tend to interfere with her rights and the rights of her fellow employees, who could reasonably infer that they would suffer a similar fate if they engaged in the same type of protected activity as had been engaged in by Hinchey as a representative of a labor organization.

In order to sustain a finding of a Section 19(a)(2) violation of the Order, however, generally there must be a specific showing that a discriminatory act was motivated by anti-union considerations. In the instant case, although it has been shown that the Respondent discriminated against Hinchey because she wrote to Congress, it has not been established that the Respondent knew that she wrote to Congress in her capacity as a union representative. Nevertheless, I find that where, as here, agency management engages in conduct which is inherently destructive of a basic right guaranteed to employees under the Order, proof of specific knowledge of the union activity involved is not necessary to sustain a finding that such conduct is violative of Section 19(a)(2) of the Order. Under the particular circumstances of this case, therefore, I find that by affecting Hinchey's chances for promotion because she wrote a letter to Congress in her capacity as a union representative, the Respondent discriminated against her in a manner that was inherently destructive of a basic right assured by Section 1(a) of the Order in violation of Section 19(a)(2) of the Order.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Department of Housing and Urban Development, Milwaukee Area Office, Milwaukee, Wisconsin, shall:

1. Cease and desist from:

   (a) Adversely rating or criticizing Mary Lou Hinchey, or any other employee, because they have written letters on behalf of a labor organization to members of the Congress of the United States of America.

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

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

(a) Reappraise Mary Lou Hinchey's work performance as of August 1976, without any consideration or reliance on her union activities, including letters written on behalf of a labor organization to members of the Congress of the United States of America. In the event that such new appraisal results in Hinchey receiving a higher promotional rating than that accorded to the eight individuals promoted pursuant to the August 1976, priority register, then forthwith, to the extent consonant with applicable law and regulations, promote Mary Lou Hinchey to a GS-12 and make her whole for any loss of back wages.

(b) Post in the Milwaukee Area Office of the U.S. Department of Housing and Urban Development, Milwaukee, Wisconsin, 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 Area Director, Milwaukee Area Office, Department of Housing and Urban Development and shall be posted and maintained by the Area Director for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Area Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
October 13, 1977

Francis X. Burkhardt, 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 adversely rate or criticize Mary Lou Hinchey, or any other employee, because they have written a letter on behalf of a labor organization to members of the Congress of the United States of America.

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

WE WILL reappraise Mary Lou Hinchey's work performance as of August 1976, without any consideration or reliance on her union activities, including letters written on behalf of a labor organization to members of the Congress of the United States of America. In the event that such new appraisal results in Mary Lou Hinchey receiving a higher promotional rating than that accorded to the eight individuals promoted pursuant to the August 1976, priority promotion register, then, to the extent permitted by law and applicable regulations, Mary Lou Hinchey will be retroactively promoted to a GS-12 and made whole for any loss of back wages.

_____
(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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of		
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MILWAUKEE AREA OFFICE, MILWAUKEE, WISCONSIN Respondent	:	Case No. 51-3511(CA)
and	:	
MARY LOU HINCHEY (An Individual) Complainant	:	

JOHN C. TALBOTT, ESQUIRE
Area Counsel
Department of Housing and Urban Development
Milwaukee Area Office
744 North Fourth Street
Milwaukee, Wisconsin 53211
For the Respondent

THOMAS J. KENNEDY, ESQUIRE
Goldberg, Previant & Uelmen
788 North Jefferson Street
Milwaukee, Wisconsin 53202
For the Complainant

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint first filed on November 9, 1976, under Executive Order 11491, as amended, by Mary Lou Hinchey, an individual, against the U.S. Department of Housing and Urban Development, Milwaukee Area Office, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Acting Regional Administrator for the Chicago, Illinois Region on December 29, 1976.

The complaint alleges that the Respondent violated Sections 19(a)(1) and (2) of the Executive Order by virtue of its actions in denying union steward Mary Lou Hinchey a promotion to a GS-12 because of her union activities.

A hearing was held in the captioned matter on March 8, 1977, in Milwaukee, Wisconsin. 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 findings of fact, conclusions and recommendations.

Findings of Fact

Miss Hinchey, the alleged discriminatee herein, who was hired by Respondent in 1972, is currently a GS-11, Housing Management Office - - Housing Management Representative (counseling) Series 301. In such capacity she, among other things, supervises, recruits, evaluates and trains eight certified counseling agencies in the State of Wisconsin. Additionally, Miss Hinchey performs mortgagee reviews to see that the mortgagees are in compliance with the Respondent's regulations and requirements of the "235 contract authority".

During the course of her employment with Respondent, Miss Hinchey, in addition to being recommended by her immediate supervisor Mr. Samuel Clemons for promotion to a GS-12, 2/ received two special achievement awards of $250 each for her

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1/ At the opening of the hearing, Respondent, citing Section 19(d), moved to dismiss the complaint on the ground that the issues involved "may properly be raised under" an established appeals procedure. Inasmuch as the established appeals procedure cited by Respondent deals with "classification appeals" and makes no provision for litigation concerning denial of promotions based on union activity or other discriminatory considerations, I find that Section 19(d) of the Order is not applicable and hereby deny Respondent's Motion to Dismiss.

2/ Mr. Clemons had recommended Miss Hinchey for promotion to a GS-12 in December of 1975 and August of 1976.

outstanding and highly professional work. The awards, which are identified in the record as complainant's exhibits 2 and 3, are highly complimentary of Miss Hinchey and note that Miss Hinchey's outstanding work performance has been recognized by the Assistant Secretary, Community Counseling Agencies and the Central Office.

Miss Hinchey has been the sole union steward since October 1974 when a contract was signed between the Respondent and Local 3411, American Federation of Government Employees, AFL-CIO. In such capacity Miss Hinchey has advised fellow employees as to what action to take with respect to their particular complaints, requested staff meetings with Area Director Kane for purposes discussing rumors of a reduction in force and has written Wisconsin senators and congressman soliciting their help in "averting a declared RIF". The latter letters dated April 15, 1976, were signed by Miss Hinchey in her capacity as "Steward AFGE Local 3411" Area Director Kane acknowledges congressional contacts concerning the April 15, 1976 letters, but denies knowledge that Miss Hinchey had written the letters in her capacity as union steward. According to Mr. Kane, he has never seen copies of the April 15, 1976 letters.

On or about August 1, 1976, the Milwaukee area office of the Respondent was requested by the Assistant Regional Administrator for Administration located in Chicago, Illinois to compile a "list of eligible employees who could be promoted without any kind of major restructuring of position subject, of course, to classification, and to submit them". The Milwaukee area office was also instructed to "rank order" the employees which it determined were eligible for promotion. Area Director Kane assigned the task of compiling the list of eligibles and rank ordering same to his deputy Mr. Steve Brown. Mr. Brown determined that there were 11 employees, including Miss Hinchey, in the Milwaukee office eligible for promotion. Thereafter, based upon his own personal knowledge of the eligibles' job performance, the eligibles' supervisor's comments or recommendation about job performance and knowledge of the eligibles' "working relationships within the office", Mr. Brown ranked the 11 eligibles for promotion to higher GS positions. Miss Hinchey was ranked 11 out of 11 primarily because in the past her congressional correspondence written on behalf of the Agency was considered by Mr. Brown to be of a "demeaning" tone. According to Mr. Brown, Miss Hinchey's professional letters indicated a lack of judgment on her part. Subsequently, Mr. Brown submitted his recommendations for final approval to Mr. Kane without further oral comment.

Mr. Kane reviewed the rankings made by Mr. Brown and approved them without any change. Thereafter, on August 16, 1976, Mr. Kane submitted a memorandum to the Director of the Administrative Division wherein he recommended all 11 employees for promotion. Subsequently, the area office was informed that they would have to limit their promotion submission to 10 promotional points. 3/ The limitation of 10 promotional points allowed only the first eight ranked employees to be promoted. Miss Hinchey, being ranked number 11, was of course not promoted.

As noted above, Miss Hinchey was recommended by her immediate supervisor for promotion to a GS-12 in the early part of August 1976. Upon returning from school or vacation, the record is not clear on this point, during the middle of August 1976, Miss Hinchey inquired about the status of her promotion. She was advised that her promotion had not gone through. She immediately contacted Mr. McNeely, the EEO counselor and requested him to determine what were the standards and criteria for promotion. Mr. McNeely checked the matter out with Mr. Kane and subsequently informed Miss Hinchey that the standards for promotion were time in grade, performance and value of the employee to the agency. Inasmuch as Mr. McNeely could not define or explain the standard "value of the employee to the agency", Miss Hinchey asked Mr. McNeely to set up an appointment for her with Mr. Kane.

On August 30, 1976, Miss Hinchey met with Mr. Kane and Mr. McNeely. During the course of the meeting Mr. Kane offered a general explanation of "value of the employee to the agency". In this context he brought up the subject of Miss Hinchey's April 15, 1976 letter to the Wisconsin congressional delegation requesting aid in the matter of the rumored RIF. According to Mr. Kane the letter reflected poor judgment and constituted a minus factor under the standard "value of an employee to the agency". Mr. Kane felt that the letter was uncalled for and an attempt to interfere with Agency management. According to Mr. Kane this was particularly true in view of the fact that the Agency had held a prior meeting with the employees for purposes of discussing

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3/ Each grade increase equals a promotional point. Thus, the promotion of an individual from a GS-7 to a GS-9 would equal two promotional points.

and explaining the rumored RIF.

Subsequent to August 1976, the Milwaukee area office was accorded enough additional promotion points to advance the remaining three employees on the August 1976 list of eligibles. However, as of the time of the hearing Miss Hinchey had not been promoted to a GS-12 since her position was then currently the subject of a classification audit. According to the Respondent, if Miss Hinchey's position falls within a GS-12 classification, she will be promoted immediately. 4/

Discussion and Conclusions

Section 1(a) of the Executive Order guarantees each employee the right to, freely and without fear of penalty or reprisal, join and assist a labor organization. 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 the presentation of its views to officials of the executive branch, the Congress, or other appropriate authority". Abridgement of the aforementioned rights with respect to "hiring, tenure, promotion . . ." is violative of Sections 19(a)(1) and (2) of the Order. Department of the Army, U.S. Army Infantry Center, Civilian Personnel Office, Fort Benning, Georgia, A/SLMR No. 515.

In the instant case, Miss Hinchey has been an active union steward for several years. During such period Miss Hinchey in her capacity as union steward, among other things, wrote a letter to the Wisconsin Congressional delegation wherein she, on behalf of the Union, solicited the delegation's help in the matter of a rumored RIF. Subsequently, Mr. Kane

4/ Respondent in its post-hearing brief notes that the Civil Service Commission has determined, following a desk audit, that the journeyman grade level for Miss Hinchey's position should be a GS-11. In support of this allegation Respondent has submitted a copy of a letter dated April 4, 1977 from the Civil Service Commission. In response to an Order to Show Cause by the undersigned Administrative Law Judge why the April 4, 1977 letter should not be made part of the record evidence since it has a bearing on any possible [footnote continued on next page]

received a congressional inquiry concerning Miss Hinchey's letter and became irritated since he felt that the Activity had in the past adequately discussed and explained the matter of the RIF to the employees. Thereafter, Mr. Kane, admittedly, relied upon Miss Hinchey's action in writing to the congressional delegation about the RIF as a partial ground to support his conclusion that she lacked the requisite judgment necessary to be ranked for promotion above the 10 other eligibles.

The fact that Mr. Kane was not aware of the capacity in which Miss Hinchey signed the letter to the congressional delegation is of no import, since it is the effect of his action and not the intent which is the final test. Accordingly, since it is evident that other employees or union officers will be hesitant in the future to exercise the rights accorded them by Section 1(a), it follows that Mr. Kane's action constituted coercion and restraint within the meaning of Section 19(a)(1) of the Order. Moreover, since the unlawful activity played a part in the promotional standing of Miss Hinchey, such activity was also violative of Section 19(a)(2).

In view of the foregoing, in addition to recommending that Respondent cease and desist from such unlawful activity in the future, it will also be recommended that Respondent be ordered to reappraise Miss Hinchey without any reliance on her union activity and reconsider such new appraisal against the appraisals of the ten other employees appearing on the August 1976 priority register. Should such new appraisal and comparison result in Miss Hinchey achieving a promotional rating or standard higher that the standings or ratings accorded the eight employees who were promoted subsequent to the drafting of the August 1976 priority register, Miss Hinchey shall to the extent permitted by law and Civil Service regulations be immediately promoted to a GS-12 and made whole for any loss of back pay. Cf. National Labor Relations Board, Region 17, and National Labor Relations Board. A/SLMR No. 671.

4/ - cont'd.

remedy, Complainant has registered an objection on the ground that the Civil Service Audit was predicated in part on submissions by the Respondent and no testimony relative thereto was solicited from Miss Hinchey. In view of Complainant's objections, and since the matter of the power to promote [footnote continued on next page]

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 U.S. Department of Housing and Urban Development, Milwaukee Area Office, Milwaukee, Wisconsin shall:

(1) Cease and desist from:

> Adversely rating or criticizing Mary Lou Hinchey, or any other employee, or otherwise interferring with, restraining, or coercing Mary Lou Hinchey, or any other employee, because any such employee has written letters on behalf of a labor organization to members of the Congress of the United States of America.

(2) Take the following affirmative actions in order to effectuate the purposes and policies of the Order

(a) Reappraise Mary Lou Hinchey's work performance as of August 1976 without any consideration or reliance on her union activities, including letters written on behalf of a labor organization to members of the Congress of the United States of America. In the event that such new appraisal results in Miss Hinchey receiving a higher promotional rating than that accorded to the eight individuals promoted pursuant to the August 1976 priority register, then forthwith to the extent consonant with applicable law and Civil Service regulations promote Mary Lou Hinchey to a GS-12 and make her whole for any loss of back wages.

(b) Post in the Milwaukee Area Office, of the U.S. Department of Housing and Urban Development, Milwaukee, Wisconsin, 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

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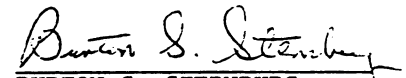
4/ - cont'd.

would best be resolved in any event at the compliance stage of the proceedings, I shall not include the April 4, 1977 letter as part of the record evidence.

Upon receipt of such forms, they shall be signed by the Area Director, Milwaukee Area Office, Department of Housing and Urban Development and shall be posted and maintained by the Area Director for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Area Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.



BURTON S. STERNBURG
Administrative Law Judge

Dated: May 20, 1977
Washington, D. C.

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:

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MILWAUKEE AREA OFFICE, MILWAUKEE, WISCONSIN WILL NOT adversely rate or criticize Mary Lou Hinchey, or any other employee, or otherwise interfere with, restrain or coerce Mary Lou Hinchey, or any other employee, because any such employee has written a letter on behalf of a labor organization to members of the Congress of the United States of America.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MILWAUKEE AREA OFFICE, MILWAUKEE, WISCONSIN WILL forthwith reappraise Mary Lou Hinchey's work performance as of August 1976 without any consideration or reliance on her union activities, including letters written on behalf of a labor organization to members of the Congress of the United States of America. In the event that such new appraisal results in Mary Lou Hinchey receiving a higher promotional rating than that accorded to the eight individuals promoted pursuant to the August 1976 priority promotion register, then to the extent permitted by law and applicable Civil Service regulations Mary Lou Hinchey will forthwith be retroactively promoted to a GS-12 and made whole for any loss of back wages.

Dated:

Area Director, Milwaukee Area Office
U.S. Department of Housing and Urban Development
Milwaukee, Wisconsin

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 any employees have any questions concerning this notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor Management Service Administration, United States Department of Labor, whose address is: Federal Building, Room 1060, 230 South Dearborn Street, Chicago, Illinois 60604.

November 3, 1977

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,
U.S. CUSTOMS SERVICE, REGION VII,
LOS ANGELES, CALIFORNIA
A/SLMR No. 926

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by denying a unit employee her right to be represented by her exclusive representative at a formal discussion, and by denying the NTEU the right to be represented at the same formal discussion. The NTEU asserted that the meeting in question, a classification audit concerning a grievance, was a formal discussion within the meaning of Section 10(e) of the Order. The Respondent contended that the meeting was not a formal discussion.

In agreement with the Administrative Law Judge, the Assistant Secretary concluded that, in the circumstances herein, the meeting involved was an integral part of the grievance process and, thus, constituted a formal discussion within the meaning of Section 10(e). Accordingly, the Assistant Secretary found that the failure of the Respondent to afford the NTEU an opportunity to be represented at such meeting and the failure of the Respondent to afford the unit employee an opportunity to be represented by her exclusive representative constituted a violation of Section 19(a)(1) and (6) of the Order. Under these circumstances, he ordered the Respondent to cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION VII,
LOS ANGELES, CALIFORNIA

Respondent

and Case No. 72-6425(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On July 5, 1977, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions with respect to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions, 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 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the U.S. Customs Service, Region VII, Los Angeles, California, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and unit employees, or their representatives, concerning grievances, without affording

the National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions.

(b) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Order by failing to afford the National Treasury Employees Union the opportunity to be represented at formal discussions between management and employees, or employee representatives, concerning grievances.

(c) Refusing the request made by Alice Kutscher, or any other employee in the bargaining unit, to be represented by a representative of the National Treasury Employees Union, the employees' exclusive representative, at any formal discussions between management and Alice Kutscher, or any other employee in the bargaining unit, concerning grievances.

(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 policies of the Executive Order:

(a) Notify the National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions between management and unit employees, or their representatives, concerning grievances.

(b) Post at its facility at the U.S. Customs Service, Region VII, 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 Regional Commissioner, U.S. Customs Service, Los Angeles, California, and they shall be posted for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
November 3, 1977

Francis X. Burkhardt, 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 unit employees, or their representatives, concerning grievances, without affording the National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Order by failing to afford the National Treasury Employees Union the opportunity to be represented at formal discussions between management and employees, or employee representatives, concerning grievances.

WE WILL NOT refuse the request made by Alice Kutscher, or any other employee in the bargaining unit, to be represented by a representative of the National Treasury Employees Union, the employees' exclusive representative, at any formal discussions between management and Alice Kutscher, or any other employee in the bargaining unit, concerning 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 Executive Order 11491, as amended.

WE WILL notify the National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions between management and unit employees, or their representatives, concerning grievances.

_____
(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 any employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Rm. 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 528
San Francisco, California 94105
(202) 653-5092
(415) 556-0555

In the Matter of

DEPARTMENT OF THE TREASURY
U. S. CUSTOMS SERVICE, REGION VII
LOS ANGELES, CALIFORNIA
Respondent

and

NATIONAL TREASURY EMPLOYEES UNION
Complainant

CASE NO. 72-6425(CA)

Steven H. Leff, Esquire
General Attorney
U. S. Customs Service, Region VII
P. O. Box 2071, Main Post Office
Los Angeles, California 90053
For the Respondent

Mike Gaide
National Field Representative
National Treasury Employees Union
209 Post Street, Suite 1112
San Francisco, California 94108
For the Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding heard in Los Angeles, California, on April 26, 1977, arises under Executive Order 11491, as amended. Pursuant to the regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint was issued on December 13, 1976, with reference to alleged violations of sections 19(a)(1) and (6) of the Order. Although originally scheduled for February 8, 1977, on January 19, 1977, the hearing was rescheduled for April 26, 1977, pursuant to an order issued by the Regional Administrator.

On August 5, 1976, the complaint in the instant case was filed by the National Treasury Employees Union (hereinafter the "Union"). The complaint alleged that the U. S. Customs Service, Region VII (hereinafter the "respondent") engaged in violations of sections 19(a)(1) and (6) of the Executive Order. The issues presented for decision are as follows:

(1) Whether the respondent violated sections 19(a)(1) and (6) by refusing to give the Union the opportunity to be represented at a meeting on May 20, 1976? This issue requires a determination of whether the meeting constituted a "formal discussion" within the meaning of section 10(e) of the Order; and,

(2) Whether the respondent violated section 19(a)(1) by denying an employee's request for assistance by the exclusive representative at the above meeting?

At the hearing, all parties were represented by counsel and afforded full opportunity to be heard, adduce evidence, to examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed excellent briefs which have been duly considered. 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

On April 28, 1976, the Union submitted a fourth-step grievance appeal to the Regional Commissioner of the

U. S. Customs Service in Los Angeles, California, on behalf of various bargaining unit employees. This appeal was signed by Sigrid Helgren, who was the chief shop steward. One of these employees was Alice Kutscher, a GS-5 Manifest Clerk working in the cargo section of the respondent at the Los Angeles International Airport. It was the Union's position that Kutscher should have received a temporary promotion and retroactive pay for work done at a higher grade level. The Union relied upon section 1 of Article 10 of the negotiated agreement, which states, in part, as follows:

> The Employer agrees that an employee who is assigned to a position of higher grade for thirty (30) calendar days or more will be temporarily promoted and receive the rate of pay for the position to which he is temporarily promoted.

Kutscher contended that she had been assigned to the position of GS-6 Customs Entry Aid, and that she had performed the duties of that position in excess of 30 calendar days. Under the circumstances, she felt that she was entitled to a temporary promotion under the above-quoted provision of the agreement.

On May 12, 1976, Alice Kutscher attended a meeting with various representatives from management and the Union to discuss the fourth-step grievance. During the course of this meeting, Peggy Schoeny, who was Chief of the Position Classification and Management Branch of the Personnel Management Division, asked Kutscher to describe some of the duties of a GS-6 Customs Entry Aid. Management was not convinced that Kutscher had been performing this higher graded work. It was decided at this meeting that a resolution of the grievance could not be made until it was determined whether she had actually performed the required duties and had sufficient knowledge of the GS-6 position. The Union stated that one of its representatives would attend the later meeting.

Subsequently, George Candish, the Director of the Personnel Management Division directed Peggy Schoeny to hold a meeting with Kutscher to obtain the desired information. Schoeny scheduled this meeting for May 20, 1976.

Prior to the meeting on May 20, 1976, Kutscher called her Union representative, Sigrid Helgren, and asked her

to represent her at the meeting with Schoeny. Helgren agreed and arrived in time for the meeting. Before the meeting started, Kutscher told Schoeny that she wanted Helgren to represent her. Helgren also told Schoeny that she wanted to attend the meeting. Schoeny refused to hold the meeting while Helgren was present because Candish had told her that no Union representative would be allowed to attend. After Helgren left, Schoeny held the meeting with Kutscher. No other people were present during this discussion.

This meeting lasted about one and a half hours. During the course of the meeting, Schoeny asked Kutscher to describe in detail the duties that she had performed in the GS-6 position. Kutscher also showed Schoeny various records, files, and notations that she had made while performing these duties. She also showed Schoeny a log indicating the dates that she performed these duties. Throughout the entire meeting, Schoeny took notes and verified Kutscher's knowledge of the position by referring to the official position description.

The following day, Schoeny made a formal written report to Candish, who was her immediate supervisor. In the report she briefly described her meeting with Kutscher and concluded that Kutscher must have been assigned to the GS-6 position in view of her extensive knowledge of its duties. Subsequently, Candish determined that Kutscher should receive the temporary promotion because he believed she had met the following requirements: (1) that she had actually performed the duties of a GS-6 Customs Entry Aid, and (2) that she had been assigned to the position for at least 30 calendar days.

Conclusions of Law

The first issue for consideration is whether the respondent violated section 19(a)(1) and (6) of the Order by failing to afford the complainant Union an opportunity to be represented at the May 20, 1976, meeting between employee Kutscher and Schoeny. The latter was Chief of the Position Classification and Management Branch of the Personnel Management Division. The essential question to be resolved is whether this meeting constituted a formal discussion concerning a grievance within the meaning of section 10(e) of the Order. That section provides, in pertinent part, 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 .... The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, ...

The respondent contends that the meeting in question was merely an informal "desk audit" that was unrelated to the pending grievance. I disagree. The meeting was an integral part of the grievance process. In her grievance, Kutscher was requesting additional pay for work performed at a higher grade level. Management was not convinced that she had performed this work. One of the main reasons why the May 20 meeting was held was to determine whether she had, in fact, performed such work. At this meeting, the employee effectively proved her case and was subsequently given the relief requested. Since the meeting had a direct effect upon the disposition of the pending grievance, it necessarily constituted a discussion "concerning" a grievance within the meaning of section 10(e) of the Order. United States Air Force, McClellan Air Force Base, California, A/SLMR No. 830; Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, A/SLMR No. 705.

Furthermore, I must conclude that the meeting constituted a "formal discussion" within the meaning of section 10(e). The meeting was an integral part of a formal, fourth-step grievance proceeding. Supervisor Schoeny asked Kutscher detailed questions regarding the duties that she had performed in the higher graded position. Schoeny took notes during the meeting and subsequently submitted a formal report to the Director of the respondent's Personnel Management Division. The latter individual made the ultimate determination as to the disposition of the grievance.

I must conclude that by failing to afford the complainant an opportunity to be represented at the May 20, 1976, meeting, the respondent violated section 19(a)(6) of the Order. United States Air Force, McClellan Air Force Base, California, A/SLMR No. 830; U. S. Department of the Treasury, Internal Revenue Service, Pittsburgh District, Pittsburgh,Pennsylvania, A/SLMR No. 498. In addition, I find that the failure to allow the Union to

be represented at this meeting had a restraining influence upon unit employees and had a concomitant coercive effect upon their rights assured by the Executive Order. Such conduct is a violation of section 19(a)(1) of the Order. Internal Revenue Service, Cincinnati District, Cincinnati, Ohio, A/SLMR No. 705.

The final issue presented for decision is whether the respondent violated section 19(a)(1) of the Order by refusing to allow employee Kutscher to be represented by the exclusive representative at the May 20, 1976, meeting. The Federal Labor Relations Council has held that an employee in a unit of exclusive recognition has a protected right under the last sentence of section 10(e) to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning a grievance. Statement on Major Policy Issue, FLRC No. 75P-2 (December 2, 1976), Report No. 116. Respondent takes the position that Kutscher did not tell Schoeny of her desire to be represented by chief steward Sigrid Helgren. Schoeny testified that she did not recall Kutscher making such a request. However, I believe Kutscher's testimony that she did make her desire for representation known to Schoeny prior to the meeting. I must conclude that respondent violated section 19(a)(1) of the Order by denying Kutscher representation by her designated Union representative at the May 20, 1976, meeting.

RECOMMENDATION

Upon the basis of the foregoing findings of fact and conclusions of law and pursuant to section 6 (b) of Executive Order 11491, as amended, and section 203.26(b) of the Rules and Regulations, I recommend that the Assistant Secretary of Labor for Labor-Management Relations 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 203.26(b) of the Rules and Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Department of the Treasury, U. S. Customs Service, Region VII, shall:

1. Cease and desist from:

(a) Conducting formal discussions between management and unit employees or their representatives, concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without affording the National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions.

(b) Interferring with, restraining, or coercing its employees in the exercise of their rights assured by the Order by failing to afford the 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.

(c) Refusing the request made by Alice Kutscher, or any other employee in the bargaining unit, to be represented by a representative of the National Treasury Employees Union, the employees' exclusive representative, at any formal discussions between management and Alice Kutscher, or any other employee in the bargaining unit, concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

(d) In any like or related matter interferring 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 Executive Order.

(a) Notify the National Treasury Employees Union of, and afford it the opportunity to be represented at, formal discussions between management and unit employees, or their 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 the U. S. Customs Service, Region VII, 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 Regional Commissioner, U. S. Customs Service, Los Angeles, California, and they shall be posted for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. The Regional Commissioner shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 203.27 of the Regulations, notify the Assistant Secretary in writing within twenty days from the date of this order as to what steps have been taken to comply herewith.

Randolph D. Mason
RANDOLPH D. MASON
Administrative Law Judge

Dated: July 5, 1977
San Francisco, California

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 unit employees, or their representatives, concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit without affording the National Treasury Employees Union, the employees' exclusive representative, the opportunity to be represented at such discussions.

WE WILL NOT interfere with, restrain, or coerce unit employees in the exercise of their rights assured by the Order by failing to afford the 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.

WE WILL NOT refuse the request made by Alice Kutscher, or any other employee in the bargaining unit, to be represented by a representative of the National Treasury Employees Union, the employees' exclusive representative, at any formal discussions between management and Alice Kutscher, or any other employee in the bargaining unit, concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

WE WILL NOT in any like or related matter 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 Regional Administrator 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.

November 3, 1977

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 TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
O'HARE AIRWAY FACILITY SECTOR,
CHICAGO, ILLINOIS
A/SLMR No. 927

This case involved a petition filed by Professional Airways Systems Specialists (PASS) seeking an election in a unit described as all General Schedule and Wage Grade employees assigned to the Airway Facility Sector, O'Hare Airport, excluding all professional employees, clerk-stenographer, GS-0312, secretary, GS-0318, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in Executive Order 11491, as amended. The Activity contended that the unit sought by the PASS is inappropriate as the employees do not share a community of interest separate and distinct from other Agency employees, and that such a unit would lead to fragmentation and would not promote effective dealings or efficiency of Agency operations.

The Assistant Secretary found that the claimed unit is appropriate for the purpose of exclusive recognition under the Order. In this regard, he noted that the claimed unit constitutes, in effect, a residual region-wide unit of all unrepresented nonprofessional employees of the Activity, and that such employees share a common mission, common overall supervision, generally similar job classification and duties, and enjoy uniform personnel policies and practices and labor relations policies. He also found that such unit would promote effective dealings and efficiency of agency operations, noting the long bargaining history in the petitioned for unit, and a recent experience of successful negotiations involving other sector-wide units.

Accordingly, the Assistant Secretary ordered an election in the unit found appropriate.

A/SLMR No. 927

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
O'HARE AIRWAY FACILITY SECTOR,
CHICAGO, ILLINOIS

Activity

and

Case No. 50-15421(RO)

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

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 Timothy McGough. 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, 1/ including briefs submitted by the Activity and the Professional Airways Systems Specialists, herein referred to as PASS, the Assistant Secretary finds:

1/ The Regional Administrator referred to the Assistant Secretary the issue of the timeliness of a request to intervene filed by the Federal Aviation Science and Technology Association/National Association of Government Employees, hereinafter called FASTA/NAGE. The record reveals that the Notice of Petition in this matter was posted by the Activity on March 18, 1977. On March 22, 1977, the FASTA/NAGE sent a letter to the Washington, D.C. Area Office of the Labor-Management Services Administration (LMSA) indicating its desire to intervene in the subject petition. As the LMSA Chicago Area Office was the Office having jurisdiction over the processing of the petition, the FASTA/NAGE thereafter submitted its intervention request to that Office, which request was received on April 4, 1977.

Section 202.5(c) of the Assistant Secretary's Regulations provides, in effect, that no labor organization may participate to any extent in any pending representation proceeding unless within ten days after the initial posting of the Notice of Petition it has notified the appropriate Area Administrator, in writing, of its desire to intervene accompanied by its prescribed showing of interest. Under the circumstances herein, I find that the FASTA/NAGE's request to intervene was untimely. Thus, its letter to the Washington, D.C.

(Continued)

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

2. In its petition, the PASS seeks an election in a unit consisting of all General Schedule and Wage Grade employees assigned to the Airway Facility Sector, O'Hare Airport, excluding all professional employees, clerk-stenographer, GS-0312, secretary, GS-0318, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials and supervisors as defined in Executive Order 11491, as amended. The Activity contends that the unit sought is inappropriate as the employees in the unit do not share a community of interest separate and distinct from other Agency employees. Further, it asserts that such unit would lead to fragmentation and would not promote effective dealings and efficiency of agency operations. The PASS, on the other hand, maintains that the claimed unit is appropriate as there are a number of similar exclusively represented units throughout the Federal Aviation Administration (FAA) and that the unit sought herein has been a viable unit since 1970. In this regard, it contends that the claimed unit would not result in fragmentation or reduce effective dealings and efficiency of agency operations.

The mission of the FAA is to provide a safe and expeditious flow of aircraft in the national airspace system. To achieve its mission, the FAA has been organized into five major operating divisions, among which is the Airway Facilities Division. In addition, the FAA is further organized into a Headquarters, located in Washington, D.C., and twelve geographically defined regions, among which is the Great Lakes Region. Each FAA region is headed by a Regional Director and is divided into the five major operating divisions, each headed by a chief who reports to his Regional Director. The mission of the Airway Facilities Division in the Great Lakes Region is to install and maintain the equipment and facilities of the FAA within the Region. To achieve this mission, the Division is composed of six branches: the Facilities Equipment Branch, the Maintenance Program Branch, the Communication Branch, the Environment Support Engineering Branch, the Automation Engineering Branch, and the Radar Engineering Branch. The Division also contains 21 sectors, of which the Activity is one, each headed by a Sector Manager, who is responsible to the Division Chief.

The history of bargaining within the Airway Facilities Division of the FAA reveals that there are sector-wide units, in some instances less than sector-wide units, and region-wide units. On December 18, 1975, the Assistant Secretary issued a Decision and Direction of Elections in Federal Aviation Administration and Federal Aviation Administration, Eastern Region, A/SLMR No. 600, finding that either a region-wide, a

1/ Area Office was not submitted to the appropriate Area Adminstrator and its subsequent request for intervention, submitted to the appropriate LMSA Area Office specified on the Notice of Petition, was not received until after the prescribed ten-day posting period. Accordingly, I shall deny the FASTA/NAGE's request to intervene in this matter.

nation-wide, or a sector-wide unit of Airway Facilities Division employees may be appropriate for the purpose of exclusive recognition under the Order. 2/ With respect to the petitioned for unit herein, the record reveals that on July 14, 1970, the National Association of Broadcast Employees and Technicians, Local 401, AFL-CIO was certified as the exclusive representative. Thereafter, On December 16, 1975, pursuant to a Consent Election Agreement, the International Brotherhood of Teamsters, Local 781, (Teamsters) was certified as the exclusive representative of the employees in the same unit. Subsequently, on October 26, 1976, as a result of the rejection by the membership of a negotiated agreement between the Activity and the Teamsters, the Teamsters disclaimed any interest in further representing the employees in the unit. 3/ The PASS filed the instant petition on March 4, 1977.

The record reveals that the claimed unit is composed of approximately 60 employees, the majority of whom are classified as Electronic Technicians, GS-0856 series. These employees are responsible for the installation and maintenance of all airspace system facilities within the geographic boundaries of the Activity. The qualifications for such employees are established on a nation-wide basis by the FAA, and all employees engaged in such functions must be certified based on these standardized qualifications. Further, the technical handbooks utilized by such employees have been developed nationally to provide uniformity in the maintenance of equipment nationally. As a result, the job skills and duties of the employees in the sought unit are substantially similar to those of similarly classified employees in the other sectors within the Region, as well as in other FAA Regions throughout the country.

Because of the existence of a large number of employees performing similar duties with similar skills that are easily transportable, there is a substantial amount of transfer of employees from one location to another. However, the record discloses little or no interchange or job related contact between employees in the claimed unit and other employees of the Division.

The record reflects that, consistent with the FAA policy of delegating authority with respect to personnel and labor relations matters to the lowest possible level, the authority for such matters has been delegated to the Regional Director, subject to FAA and Civil Service

2/ At the time of the filing of the petitions which resulted in the Decision and Direction of Elections in A/SLMR No. 600, the employees in the claimed unit herein were included in an exclusively recognized unit which was subject to an agreement bar. Therefore, the employees in the claimed unit were expressly excluded from the units found appropriate therein.

3/ I have been administratively advised that at the time of the filing of the instant petition the employees in the claimed unit were the only unrepresented Division employees within the Region.

guidelines. The area of consideration for promotions involving technicians is frequently determined by the number of qualified applicants available. Thus, while the area of consideration may be confined to an individual sector, it appears to be more frequently region-wide or nation-wide in scope. The area of consideration for reductions-in-force is generally region-wide, although it may be larger in the case of a large scale reduction.

With regard to the Agency's experience in bargaining in less than region-wide units, although the Activity argues that difficulty has been experienced in negotiating agreements with exclusive representatives in certain less than region-wide units, the record reveals that successful negotiations for new agreements have recently been concluded in three sector-wide units located in Minnesota without the participation of the Agency labor relations staff, and with minimal participation by the regional staff. Further, the record discloses that as recently as October 1976, the Activity and the Teamsters successfully negotiated an agreement covering the claimed unit, and there is no evidence to establish that since that time there has been a significant alteration in agency operations. 4/

Based on all the foregoing circumstances, I find that the unit sought herein constitutes a comprehensive grouping of employees who share a clear and identifiable community of interest. Thus, as noted above, all employees of the Activity share in a common mission, common overall supervision, generally similar job classifications and duties, and enjoy uniform personnel policies and practices and labor relations policies. In addition, the claimed unit constitutes, in effect, a residual region-wide unit of all unrepresented nonprofessional employees of the Activity. I find also that such unit will promote effective dealings and efficiency of agency operations. Thus, as noted above, there has been a long bargaining history in the petitioned for unit, and a recent experience of successful and fruitful negotiations involving sector-wide units elsewhere.

Accordingly, I find that the following unit is appropriate for the purpose of exclusive recognition under Section 10 of Executive Order 11491, as amended:

> All General Schedule and Wage Grade employees assigned to the Airway Facility Sector, O'Hare Airport, excluding all professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, employees classified clerk stenographer, GS-0312 and secretary, GS-0318, management officials and supervisors as defined in Executive Order 11491, as amended.

4/ As indicated above, the abortion of the negotiated agreement between the Activity and the Teamsters was not attributable to any change in the scope of the bargaining unit, effective dealings, or efficiency of agency operations. Rather, the membership rejected the agreement.

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 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 wish to be represented for the purpose of exclusive recognition by the Professional Airways Systems Specialists.

Dated, Washington, D.C.
November 3, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

November 7, 1977

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

GENERAL SERVICES ADMINISTRATION,
REGIONAL OFFICE, REGION 4
A/SLMR No. 928

On October 31, 1975, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 575, finding, in essence, that the claimed unit, consisting of all professional and nonprofessional employees at the Regional Office, General Services Administration, Region 4, was appropriate for the purpose of exclusive recognition under the Order. On February 15, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review, remanded the subject case to the Assistant Secretary for reconsideration and clarification in the light of the principles enunicated in its consolidated DCASR decision.

Upon a review of the record in this case, and in the light of the principles enunicated by the Council in its consolidated DCASR decision, the Assistant Secretary remanded the matter to the appropriate Regional Administrator for the purpose of securing additional evidence. In this regard, he suggested certain factors regarding "effective dealings" and "efficiency of agency operations" which should be fully developed.

A/SLMR No. 928

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGIONAL OFFICE, REGION 4

Activity

and

Case No. 40-6038(RO)
A/SLMR No. 575
FLRC No. 76A-64

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2067, AFL-CIO

Petitioner

SUPPLEMENTAL DECISION AND REMAND

On October 31, 1975, the Assistant Secretary issued his Decision and Direction of Election in the above captioned case in A/SLMR No. 575, finding, in essence, that the claimed unit, consisting of all professional and nonprofessional employees at the Regional Office, General Services Administration, Region 4, was appropriate for the purpose of exclusive recognition under the Order. 1/ Thereafter, on February 15, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review in the instant case, remanded the subject case to the Assistant Secretary for reconsideration and clarification in the light of the principles it enunciated in its consolidated decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, FLRC No. 76A-4.

In view of the principles enunciated by the Council in its consolidated DCASR decision, cited above, I find that the record herein does not provide an adequate basis upon which to make the affirmative determinations regarding "effective dealings" and "efficiency of agency operations"

1/ I have been administratively advised that, pursuant to the Decision and Direction of Election in A/SLMR No. 575, a Certification of Representative was issued to the American Federation of Government Employees, Local 2067, AFL-CIO, for the nonprofessional employee unit, and a Certification of Results of Election was issued with regard to the professional employee unit.

as required by the Council. 2/ Therefore, I shall remand the subject case to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence. In this regard, it is noted that the Council held that the Assistant Secretary may not rely on the absence of specific countervailing evidence, but bears the responsibility to develop as complete a record as possible with regard to each of the three criteria set forth in Section 10(b) of the Order. Accordingly, evidence should be developed concerning, but not limted to, the following factors:

1. The past collective bargaining experience of the Activity and Agency.

2. The locus and scope of authority of the responsible personnel office administering personnel policies with regard to employees in the claimed unit.

3. The limitations, if any, on the negotiation of matters of critical concern to employees in the claimed unit, and how these concerns differ from other employees of the Activity and Agency.

4. The availability of personnel with expertise in labor relations matters at the level of the claimed unit in comparision to that of a more comprehensive unit.

5. The level at which labor relations policy is set in the Activity and Agency, and the effectuation of agency training in the implementation of negotiated agreements and grievance procedures covering employees in bargaining units as compared with the claimed unit and/or a more comprehensive unit.

6. Benefits to be derived from a unit structure which bears a relationship to the operational and organizational structure of the Agency.

7. Impact of the claimed unit on agency operations in terms of cost, productivity and use of resources, as compared to the impact of a more comprehensive unit.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Regional Administrator for appropriate action consistent herewith.

Dated, Washington, D.C.
November 7, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

2/ Processing of the subject case was held in abeyance pending the Council's disposition of the appeal in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, et al., FLRC No. 76A-97.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

February 4, 1977

Honorable Bernard E. DeLury
Assistant Secretary of Labor
for Labor-Management Relations
Department of Labor, Room S-2307
200 Constitution Avenue, NW.
Washington, D.C. 20210

Re: General Services Administration, Regional Office, Region 4, A/SLMR No. 575, FLRC No. 76A-64

Dear Mr. DeLury:

Your attention is called to the petition for review filed with the Council by the agency in the above-entitled case. Copies of the case papers are enclosed herewith.

On December 30, 1976, the Council issued its consolidated decision in 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, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, FLRC No. 76A-4, setting aside and remanding the decisions of the Assistant Secretary in those cases. In its consolidated decision herein referred to as the consolidated DCASR decision, the Council set forth and further explicated the responsibilities of the Assistant Secretary which flow from section 10(b) of the Order and, in so doing, further emphasized the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation (at page 9):

> Before the Assistant Secretary may find that a proposed unit is appropriate for purposes of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by section 10(b), find appropriate only units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations. In making the affirmative determination that a proposed bargaining unit satisfies each of the three criteria, the Assistant Secretary must first develop as complete a record as possible,

soliciting evidence from the parties as necessary, and then ground his decision upon a careful, thorough analysis of subsidiary factors or evidentiary considerations which provide a sharp degree of definition and precision to each of the three criteria. Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

Moreover, with respect to the Assistant Secretary's finding in A/SLMR No. 559 that the agency's views as to promoting effective dealings and efficiency of agency operations were "at most, speculative and conjectural," the Council held that such a finding "was inappropriate and a misconception of the nature of these criteria," noting that "[t]he speculative and conjectural nature of a contention, in these circumstances, does not in and of itself render the contention without merit," and finding that the contentions of the agency in that case were valid considerations to be weighed in determining whether the proposed unit would promote efficiency of agency operations. Further, with respect to A/SLMR No. 564, the Council held that "the Assistant Secretary may not rely upon 'the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations' in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit." In both cases, the Council concluded that the Assistant Secretary failed to meet his responsibilities under the Order with respect to the criteria of "effective dealings" and "efficiency of agency operations."

The Assistant Secretary decided the instant case, relying in part on his prior decisions in A/SLMR Nos. 559 and 564, which were set aside and remanded in the Council's consolidated DCASR decision. Likewise, the present case was resolved by the Assistant Secretary without the benefit of the detailed explication of the Assistant Secretary's responsibilities under section 10(b) of the Order as set forth in the DCASR decision.

Under these circumstances, the Council has decided to request clarification of the instant decision by you in the light of the consolidated DCASR decision before the Council determines whether to accept or deny the instant petition for review. Following the issuance of such clarification, the parties are granted thirty (30) days from the date of service thereof to file supplemental submissions with the Council, and twenty (20) days from the dates of service of such supplemental submissions to file respective responses thereto.

Pending the issuance of your decision as clarified, and the supplemental submissions and responses by the parties, the Council shall hold in abeyance its decision on acceptance or denial of the present appeal. Likewise, a decision on the agency's request for a stay of the Order in this

case is held in abeyance, and, in accordance with section 2411.47(d) of the Council's rules, such order shall continue to be temporarily stayed.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

Enclosures

cc: D. P. Miller
GSA

K. T. Blaylock
AFGE

November 7, 1977

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

DEPARTMENT OF STATE,
PASSPORT OFFICE,
CHICAGO PASSPORT AGENCY,
CHICAGO, ILLINOIS
A/SLMR No. 929

On August 11, 1976, the Assistant Secretary issued his Decision and Direction of Election in A/SLMR No. 697, finding that the petitioned for unit in the subject case was appropriate for the purpose of exclusive recognition under the Order. On March 4, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review, remanded the case to the Assistant Secretary for reconsideration and clarification in the light of the principles enunciated in its consolidated DCASR decision.

Upon a review of the entire record in this case, and in light of the principles enunciated by the Council in its consolidated DCASR decision, the Assistant Secretary remanded the matter to the appropriate Regional Administrator for the purpose of securing additional evidence. In this regard, he suggested certain factors regarding "effective dealings" and "efficiency of agency operations" which should be fully developed.

A/SLMR No. 929

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF STATE,
PASSPORT OFFICE,
CHICAGO PASSPORT AGENCY,
CHICAGO, ILLINOIS

Activity

and

Case No. 50-13100(RO)
A/SLMR No. 697
FLRC No. 76A-147

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3671

Petitioner

SUPPLEMENTAL DECISION AND REMAND

On August 11, 1976, the Assistant Secretary issued his Decision and Direction of Election in the above captioned case in A/SLMR No. 697, finding that the petitioned for unit was appropriate for the purpose of exclusive recognition under the Order. 1/ Thereafter, on March 4, 1977, the Federal Labor Relations Council (Council), before determining whether to accept or deny the Activity's petition for review in the instant case, remanded the subject case to the Assistant Secretary for reconsideration and clarification in the light of the principles enunciated by the Council in its consolidated decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, FLRC No. 76A-4.

In view of the principles enunciated by the Council in its consolidated DCASR decision, cited above, I find that the record herein does not provide an adequate basis upon which to make the affirmative determinations regarding "effective dealings" and "efficiency of agency operations" as required by the Council. 2/ Therefore, I shall remand the

1/ I have been administratively advised that, pursuant to the Decision and Direction of Election in A/SLMR No. 697, a Certification of Representative was issued to the American Federation of Government Employees, AFL-CIO, Local 3671.

2/ Processing of the subject case was held in abeyance pending the Council's disposition of the appeal in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, et al., FLRC No. 76A-97.

subject case to the appropriate Regional Administrator for the purpose of reopening the record to secure additional evidence. In this regard, it is noted that the Council held that the Assistant Secretary may not rely on the absence of specific countervailing evidence, but bears the responsibility to develop as complete a record as possible with regard to each of the three criteria set forth in Section 10(b) of the Order. Accordingly, evidence should be developed concerning, but not limted to, the following factors:

1. The past collective bargaining experience of the Activity and Agency.

2. The locus and scope of authority of the responsible personnel office administering personnel policies with regard to employees in the claimed unit.

3. The limitations, if any, on the negotiation of matters of critical concern to employees in the claimed unit, and how these concerns differ from other employees of the Agency.

4. The availability of personnel with expertise in labor relations matters at the level of the claimed unit in comparision to that of a more comprehensive unit.

5. The level at which labor relations policy is set in the Activity and Agency, and the effectuation of agency training in the implementation of negotiated agreements and grievance procedures covering employees in bargaining units as compared with the claimed unit and/or a more comprehensive unit.

6. Benefits to be derived from a unit structure which bears a relationship to the operational and organizational structure of the Agency.

7. Impact of the claimed unit on agency operations in terms of cost, productivity and use of resources, as compared to the impact of a more comprehensive unit.

ORDER

IT IS HEREBY ORDERED that the subject case be, and it hereby is, remanded to the appropriate Regional Administrator for appropriate action consistent herewith.

Dated, Washington, D.C.
November 7, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 4, 1977

Honorable Jack A. Warshaw
Acting Assistant Secretary of Labor
for Labor-Management Relations
Department of Labor, Room S-2307
200 Constitution Avenue, NW.
Washington, D.C. 20210

Re: Department of State, Passport Office, Chicago Passport Agency, Chicago, Illinois, A/SLMR No. 697, FLRC No. 76A-147

Dear Mr. Warshaw:

Your attention is called to the petition for review filed with the Council by the agency in the above-entitled case. Copies of the case papers are enclosed herewith.

On December 30, 1976, the Council issued its consolidated decision in 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, FLRC No. 75A-14; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559, FLRC No. 75A-128; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564, FLRC No. 76A-4, setting aside and remanding the decisions of the Assistant Secretary in those cases. In its consolidated decision herein referred to as the consolidated DCASR decision, the Council set forth and further explicated the responsibilities of the Assistant Secretary which flow from section 10(b) of the Order and, in so doing, further emphasized the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation (at 9):

> Before the Assistant Secretary may find that a proposed unit is appropriate for purposes of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by section 10(b), find appropriate only units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations. In making the affirmative determination that a proposed bargaining unit satisfies each of the three criteria, the Assistant Secretary must first

develop as complete a record as possible, soliciting evidence from the parties as necessary, and then ground his decision upon a careful, thorough analysis of subsidiary factors or evidentiary considerations which provide a sharp degree of definition and precision to each of the three criteria. Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

Moreover, with respect to A/SLMR No. 461, the Council held that "as to the contentions and supporting evidence which were put forward by the activity regarding [effective dealings and efficiency of agency operations], the Assistant Secretary failed to give such contentions and evidence full and careful consideration." Further, with respect to the Assistant Secretary's finding in A/SLMR No. 559 that the agency's views as to promoting effective dealings and efficiency of agency operations were "at most, speculative and conjectural," the Council held that such a finding "was inappropriate and a misconception of the nature of these criteria," noting that "[t]he speculative and conjectural nature of a contention, in these circumstances, does not in and of itself render the contention without merit," and finding that the contentions of the agency in that case were valid considerations to be weighed in determining whether the proposed unit would promote efficiency of agency operations. Finally, with respect to A/SLMR No. 564, the Council held that "the Assistant Secretary may not rely upon 'the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations' in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit." In each case, the Council concluded that the Assistant Secretary failed to meet his responsibilities under the Order with respect to the criteria of "effective dealings" and "efficiency of agency operations."

The Assistant Secretary decided the instant case relying, at least in part, on the basis of certain reasoning which the Council rejected in its consolidated DCASR decision as noted above, and without the benefit of the detailed explication of the Assistant Secretary's responsibilities under section 10(b) of the Order as set forth therein. Under these circumstances, the Council has decided to request clarification of the instant decision by you in the light of the consolidated DCASR decision before the Council determines whether to accept or deny the instant petition for review. Following the issuance of such clarification, the parties are granted thirty (30) days from the date of service thereof to file supplemental submissions with the Council, and twenty (20) days from the dates of service of such supplemental submissions to file respective responses thereto.

Pending the issuance of your decision as clarified, and the supplemental submissions and responses by the parties, the Council shall hold in abeyance its decision on acceptance or denial of the present appeal. Likewise, a decision on the agency's request for a stay of the Order in this case is held in abeyance, and, in accordance with section 2411.47(d) of the Council's rules, such order shall continue to be temporarily stayed.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

Enclosures

cc: P. M. Coran
State

A. H. Kaplan
AFGE

November 7, 1977

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,
WESTERN REGION
A/SLMR No. 930

This case involved an unfair labor practice complaint filed by the National Association of Air Traffic Specialists (Complainant) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to recognize the Complainant's Western Regional Director at the Respondent's Stockton, California, facility when she attempted to file a grievance as the Complainant's representative. The Respondent took the position that under the parties' negotiated agreement the only union representatives who have the authority to institute formal grievance proceedings on behalf of employees are the Facility Representative or the Assistant Facility Representative.

The Administrative Law Judge concluded that the Respondent had not violated Section 19(a)(1) and (6) of the Order. He found that the issue presented concerned a differing and arguable interpretation of the negotiated agreement, as distinguished from an action which would constitute a clear, unilateral breach of the negotiated agreement and, as such, should not be deemed to be violative of the Order. Accordingly, he recommended that the complaint be dismissed.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed.

A/SLMR No. 930

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
WESTERN REGION

Respondent

and Case No. 70-5520(CA)

NATIONAL ASSOCIATION OF AIR TRAFFIC
SPECIALISTS

Complainant

DECISION AND ORDER

On June 9, 1977, Administrative Law Judge James J. Butler issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-5520(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 7, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
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San Francisco, California 94105

(202) 653-5092
(415) 556-0555

NATIONAL ASSOCIATION OF AIR TRAFFIC SPECIALISTS
Complainant

and

DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINSTRATION
Respondent

CASE NO. 70-5520 (CA)

Dorothy Anderson
National Secretary
National Association of Air Traffic Specialists
1311 Webster Street
Alameda, California 90009
For the Complainant

Ross Burnett
Chief, Labor Relations Branch
Labor Relations Branch
Western Region, Awe-16
Federal Building 15000 Aviation Boulevard
Lawndale, California 90261
For the Respondent

Before: JAMES J. BUTLER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended. It was initiated by a complaint dated November 10, 1976. The complaint charged a violation of Sections 19(a)(1) and 19(a)(6) of the Executive Order on the basis of Respondent's alleged refusal to "recognize the Union Director, Ms. Dorothy Anderson at the Stockton Facility" when she attempted to file a grievance on behalf of an employee on May 19, 1976. The complaint was signed by Dorothy Anderson who identified herself on the title line as "National Secretary (Former Director)." Ms. Anderson is also referred to elsewhere in the record as the Union's "Regional Director." As will be seen, Ms. Anderson's exact representative capacity on behalf of the Union and its individual members in formal grievance procedures contemplated by the negotiated agreement between the Union and the agency is determinative of the issue presented by the complaint. It should be noted at the outset, however, that the contention of the complaint does not bear upon any grievance matter, but upon the failure of the Respondent to recognize Ms. Anderson in some representative capacity in the initiation of formal grievance procedures on behalf of a member of the Union employed at the Stockton Flight Service Station. It should also be noted that Mr. Edward L. Harris, Chief of the Stockton Flight Service Station, does not dispute Ms. Anderson's contention that he refused to entertain the formal grievance of May 19, 1976, which Ms. Anderson signed and served as a representative of the Union. (Ms. Anderson at first insisted that the employee involved had also signed the grievance instrument; but when confronted with the original document, quickly changed her mind.) It is Mr. Harris' position, however, that his refusal to entertain the grievance was based upon the uncontroverted fact that Ms. Anderson, whatever her official capacity might be, was not the "Facility Representative" or the "Assistant Facility Representative," and as Mr. Harris contends, it was either one of these two Union representatives who, pursuant to the express terms of the agreement in effect between the Union and the agency, enjoyed the exclusive authority to institute formal grievance proceedings on behalf of employees of the facility in question. It should also be expressly noted that Respondent has not taken the position at any time that an employee of the agency may not institute formal grievance proceedings in his or her own behalf. Thus, the sole issue presented in the instant proceeding is a dispute involving

differing interpretations of the parties' negotiated agreement insofar as it pertains to Ms. Anderson's designated authority to represent the Union in dealing with FAA officials at the facility level.

Discussion, Findings and Conclusions

First, although it is a practice which should be avoided if at all possible, I deem it necessary to take official notice of the material adjudicative fact that at all times in question here, Ms. Dorothy Anderson was the duly designated Regional Representative of the Union in the particular FAA region wherein the facility involved in this matter was situated. This fact may be logically inferred from other facts in issue in the record and does not appear to be subject to reasonable dispute. Further, as this decision rests on official notice of a material fact which does not clearly appear from the evidence in the record, both parties are entitled, on timely request made within ten (10) days from the date hereof, to an opportunity to show to the contrary. 5 U.S.C. § 556(e) and 29 CFR 203.16(l).

The pertinent parts of the negotiated agreement between the parties are set out in Article 2, Sections 5, 6 and 7. They stipulate as follows:

> Section 5. The Parties agree that the Union may designate one Regional Representative and an alternate to function in his absense in each FAA region. The Union shall furnish the name and address of the Regional Representative on a current basis to the FAA Regional Director. The Parties agree that the Union may designate one principal Facility Representative and an alternate to function in his absense in each facility. The Regional Representative shall furnish the name of the principal Facility Representative on a current basis to the Facility Chief.
>
> Section 6. At those locations where there is a FAA Area Manager, the Union may designate a Facility Representative to be the Area Representative in dealing with the area office.

> Section 7. The Union representatives specified in the above Sections of the Article are the only individuals authorized to represent the Union in dealing with FAA officials at the respective levels specified in this Article. Exceptions to this Section may be mutually arranged at these respective levels, or higher.

It is plainly seen that Ms. Anderson was fully authorized to represent the Union in dealing with FAA officials and, in particular with Mr. Harris, at the regional level. Whether this authority at the regional level required Mr. Harris to recognize Ms. Anderson at the lesser level of the facility, as she seems to contend, or, in the alternative, whether Mr. Harris properly refused to entertain the formal grievance matter presented by Ms. Anderson in a representative capacity simply because the agreement between the parties provides that only a Facility Representative or his alternate may deal in a representative capacity with FAA officials at the "respective" level of a facility, as Respondent contends, are questions I need not reach in view of the nature of the allegations contained in the complaint. The mere fact that parties to a collective bargaining agreement legitimately entertain and urge conflicting interpretations of some of its controlling provisions will not, in itself, support a charge of an unfair labor practice by one party against the other. The positions of the parties to this dispute involving the meaning of the above set out sections of the written agreement between them are both fairly arguable. This is so even though the language of the applicable provision might readily suggest but a single interpretation to a more objective mind. "In this regard, the Assistant Secretary has held previously that alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the (Executive) Order." Aerospace Guidance and Metrology Center, Newark Air Force Station, A/SLMR No. 677.

Recommended Decision and Order

For the reasons set forth above, I have concluded that Respondent's conduct complained of did not constitute a clear, unilateral breach of the negotiated

agreement in effect between the parties hereto and recommend that the instant complaint be dismissed.

JAMES J. BUTLER
Adminstrative Law Judge

Dated: June 9, 1977
San Francisco, California

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

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION HOSPITAL,
BOSTON, MASSACHUSETTS
A/SLMR No. 931

This case involved an Application for Decision on Grievability-Arbitrability filed by the Veterans Administration, Veterans Administration Hospital, Boston, Massachusetts (Applicant). The Applicant contends that the grievance filed by the American Federation of Government Employees, AFL-CIO, Local 2143 (AFGE), concerning the selection of a first line supervisor, is not arbitrable under the parties' negotiated agreement. In response, the AFGE contends that the grievance, which concerns the application of the Applicant's Merit Promotion Policy in the selection of a first line supervisor, is subject to the negotiated grievance and arbitration procedure.

The Administrative Law Judge found that the issue raised by the grievance was grievable and arbitrable under the parties' negotiated agreement.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered the Applicant to take appropriate action to implement his finding.

A/SLMR No. 931

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION HOSPITAL,
BOSTON, MASSACHUSETTS

Applicant 1/

and Case No. 31-10003(AP)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2143

Labor Organization

DECISION ON GRIEVABILITY-ARBITRABILITY

On July 20, 1977, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the grievance herein was grievable and arbitrable under the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation. Thus, I find that the issue raised by the grievance herein concerns the application of the Applicant's Merit Promotion Policy, which matter is arbitrable under the parties' negotiated agreement.

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 31-10003(AP) is subject to the arbitration procedure set forth in the parties' negotiated agreement.

1/ In his Recommended Decision and Order, the Administrative Law Judge inadvertently designated as the Applicant the labor organization herein, American Federation of Government Employees, AFL-CIO, Local 2143. This inadvertent error is hereby corrected.

ORDER

Pursuant to Section 6(a)(5) of Executive Order 11491, as amended, and Section 205.12(a) of the Regulations, it is hereby ordered that the Veterans Administration, Veterans Administration Hospital, Boston, Massachusetts, shall notify the Assistant Secretary of Labor for Labor-Management Relations in writing within 30 days from the date of this order as to what steps have been taken to comply with the above finding.

Dated, Washington, D. C.
November 8, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

VETERANS ADMINISTRATION
VETERANS ADMINISTRATION HOSPITAL
BOSTON, MASSACHUSETTS
Activity

and

Case No. 31-10003(AP)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2143
Applicant

Ronald King, Esquire
Guy Colletti, National Representative
AFGE-AFL-CIO
Local 2143
512 Gallivan Boulevard
Dorchester, Massachusetts 02124
For the applicant

Stephen L. Shochet, Esquire
Office of the General Counsel
Veterans Administration
810 Vermont Avenue, N.W.
Washington, D.C. 20420
For the activity

Before: PETER McC. GIESEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding on application for determination of arbitrability filed pursuant to section 13(d) of Executive Order 11491, as amended (hereafter, "the Order") and the provisions of section 205 of the Regulations (40 Fed. Reg. 89 (1975).

A hearing was held in Boston, Massachusetts, on January 25, 1977. Briefly, the record shows the following circumstances.

Statement of the Case

In December, 1975, V.A. Hospital posted an announcement for the position of "Boiler Plant Operator Foreman". The names of three persons were referred to the Chief Engineer for consideration, and in January, 1976, one of these persons was selected. One of the three persons considered but not selected filed a grievance. The grievance was processed through the first three steps of the grievance procedure set forth in the collective bargaining agreement between the Union and V.A. Hospital.

After the third step rejection of the grievance, the Union requested arbitration in accordance with the collective bargaining agreement. At that time, V.A. Hospital disputed the grievability and arbitrability of the grievance under the agreement. The Union filed an application for decision on grievability or arbitrability.

The former chief of personnel of the V.A. Hospital acted as principal negotiator for management at negotiations which led to the effective collective bargaining agreement. He testified that he could not recall any discussion, during negotiations, of the grievability of promotion actions from unit positions to first line supervisory positions. 1/

1/ The pertinent portion of the collective bargaining agreement as contracted reads as follows:

* * *

ARTICLE XXVIII

NEGOTIATED GRIEVANCE PROCEDURE

Section 1. The purpose of this Article is to provide for a mutually acceptable method for the prompt and equitable settlement of grievances.

Section 2. A grievance is defined as an employee's "feelings of dissatisfaction with some aspect of employment or with a management decision affecting the employees covered by this contract". Union grievance is defined as a "grievance involving administrative decisions or policies affecting bargaining unit employees" (as differentiated from a specific supervisory action). (Continued)

Footnote 1 continued from page 2

This procedure will be the exclusive procedure for resolving grievances of employees in the Unit on matters involving:

a. The interpretation, application, or violation of this contract.

b. Disciplinary actions taken by station officials, application of agency policy or regulations or station Merit Promotion Policy.

Those matters covered by the VA Grievance Procedure as specified in Federal Personnel Manual, MP-5, Part I, Chapter 771, Section C, dated September 17, 1974.

In addition to those matters subject to statutory appeal procedures, the following are excluded from this grievance procedure:

(1) The content of published agency policy.

(2) Nonselection of promotion from a group of properly ranked and certified candidates in accordance with the station Merit Promotion Plan.

(3) An action terminating a tempory promotion within a maximum period of two years and returning the employee to the job classification and grade from which he was temporarily promoted.

(4) Nonadoption of a suggestion or disapproval of quality salary increase, performance award, or other kind of honorary or discretionary award.

(5) A preliminary warning or notice of a specific action, which if effected would be covered under the Grievance System (e.g. a notice of proposed reprimand), or would be excluded from coverage of this Section (e.g. an adverse warning of an unsatisfactory performance rating) However, a general (Continued)

The Hospital's personnel officer testified that, shortly after his arrival in Boston in April, 1976, the grievance at issue here was brought to his attention. He stated that, after reviewing the file, he "yelled for help" to the central office and was advised to dispute the grievability and arbitrability of the grievance. He did so.

The Union's assistant director of the contracts department testified that because of a history of difficulties in connection with questions of grievability and arbitrability - mainly delay in determination, - he instructed all local union presidents, district national vice presidents and national representatives concerning a "policy" intended to include in each negotiated collective bargaining agreement a requirement that management raise any question concerning grievability or arbitrability before the third step of the grievance procedure. He also testified that although he did not participate in the negotiation of the agreement between the Union and V.A. Hospital, he had occasion to advise the chief negotiator of that policy

Footnote 1 continued from page 3.

warning that some (unspecified) disciplinary action may be taken if certain deficiencies are not corrected would be covered.

(6) Separation during probationary period. However, management will advise the Union prior to notice of separation and will meet with the Union and employee upon request.

Section 3. Management agrees to request an agency decision on the grievability or arbitrability of a grievance prior to the consultation meeting with the Union representative at Step 3. A rejection of a grievance on the grounds that it is not a matter subject to this grievance proceudre or is not subject to arbitration shall be served upon the Union in writing and if alleged to be subject to statutory appeal procedures, shall state that it is the final rejection of the matter for the purpose of requesting a decision from the Assistant Secretary of Labor.

All disputes of grievability or arbitrability shall be referred to the Assistant Secretary of Labor.

* * *

on "at least three or four different contracts ... including the contract in question." 2/

A national representative of the Union, assigned to the Union's New England district testified that he served as the Union's chief negotiator in dealings with V.A. Hospital. He stated that in negotiating section 3 of Article XXVIII, the Union's underlying policy and purpose was fully explained to the management representative. He further testified that "the issue of ... threshold supervisory positions was not discussed" in the negotiation of Article XV, 3/ but that, while negotiating Article XXVIII (grievances) "the subject of threshold supervisory positions was discussed ... we said, certainly, that any action that affected unit employees first line supervisory positions would be covered under the grievance procedure." He further explained;

> ... we recognized at the [bargaining] table that the Union had no jurisdiction beyond the non-supervisory personnel, we were not discussing ... promotion action from one supervisory position to [an]other. We were discussing ... first line supervisory positions as they affect unit employees.

He testified that management representatives "raised the question and once the question was raised there was no further argument from management after we got through with our explanation as [to how the] actions affect[ed] unit employees."

Findings of Fact and Conclusions of Law

All witnesses were credible. There were no contradictions concerning matters of substance. The only question of fact presented is whether the parties agreed to include within the negotiated grievance procedure grievances filed by members of the bargaining unit whose grievance is based upon their non-

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2/ The contract includes a provision reflecting the policy. N.1, supra, sec. 3.

3/ Article XV concerns promotions, evaluations, detailing to positions of higher grade, reassignment and the employee's rights under the V.A.'s merit promotion program. No specific reference is made to promotion to, or evaluation for supervisory positions.

selection for first line supervisory positions. Because neither the wording of the collective bargaining agreement 4/ nor the Federal Labor Relations Council's interpretation of the Order precludes such inclusion, 5/ this record leaves no room to question the grievability and arbitrability of the grievance in question.

Thus, the Union's negotiator credibly testified to the parties having discussed the matter and having the basis for its inclusion explained without objection by management spokesmen. The fact that management's chief negotiator cannot recall the discussion does not detract from this uncontroverted evidence. Moreover, though neither probative nor corroborative, the fact that management neglected to raise the question concerning arbitrability until the third step of the grievance procedure was completed is consistent with the conclusion that management agreed until its agent's conversation with a third party (personnel at the central office) that the matter was within the grievable and arbitrable matters contemplated when Article XXVIII of the collective bargaining agreement was consumated. Had it a contrary view before the time the issue was raised, it was obligated by the terms of section 3 of the "Negotiated Grievance Procedure" in the contract to raise the question "prior to the consultation meeting with the Union representative at step 3."

It is perhaps unnecessary to point out that I am unwilling to believe that, because the TANG decision (n. 5, supra) had not been decided when this contract was negotiated, management's agents refrained from disputing the grievability of the subject matter of this case in the belief that Union negotiators would be misled into believing that they had obtained a contractual agreement on a matter which would later be determined to be non-negotiable. Such techniques have no place in good faith bargaining, and there is nothing on this record to indicate that the parties have ever dealt with one another in other than good faith.

4/ N.1, supra.

5/ Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71, p. 4;

> ... the Agency may, at its option, bargain over the proposal but it is not obligated to do so under the Order.

Accordingly, I recommend that the Assistant Secretary determine that the application has merit and that this matter is grievable and should now be submitted to arbitration in accordance with the terms of the collective bargaining agreement.

PETER McC. GIESEY
Administrative Law Judge

Dated: July 20, 1977
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

DEFENSE LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, CLEVELAND
A/SLMR No. 932

This case arose as the result of an RA petition filed by the Defense Logistics Agency, Defense Contract Administration Services Region, Cleveland, Ohio, in which it was contended by the Activity that due to the July 31, 1976, reorganization which disestablished its local Toledo office, the unit of all nonsupervisory General Schedule employees represented by the National Federation of Federal Employees, Local 142 (NFFE) was no longer appropriate. The NFFE contended that the reorganization was merely a "paper change" and that the unit as certified was still viable and extant.

The Assistant Secretary found that the July 31, 1976, reorganization, which abolished the Defense Contract Administration Services Office in Toledo (DCASO Toledo) effected a substantial change in both the scope and character of the exclusively recognized unit, the former DCASO Toledo, and, in effect, rendered such unit inappropriate. Thus, he concluded that the Activity was under no obligation to recognize the NFFE as the exclusive representative of the employees in such unit. The Assistant Secretary based his finding on the fact that the employees of the disestablished DCASO Toledo had been assigned to two separate Defense Contract Services Administration Management Areas (DCASMAs) where they are under separate personnel policies and practices, separate secondary supervision and have no job contacts with employees of other DCASMAs.

Accordingly, the Assistant Secretary ordered that the petition be dismissed.

A/SLMR No. 932

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, CLEVELAND

Activity/Petitioner

and

Case No. 53-9580(RA)

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 142

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 Carolyn Hawkins. 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 National Federation of Federal Employees, Local 142, herein called NFFE, 1/ the Assistant Secretary finds:

On December 15, 1970, the NFFE was certified as the exclusive representative of a unit of all nonsupervisory General Schedule employees of the Defense Contract Administration Service Office, Toledo, Ohio, (DCASO Toledo). The Activity herein, the Defense Contract Administration Services Region (DCASR) Cleveland, filed the subject RA petition contending that due to a reorganization on July 13, 1976, the unit represented by the NFFE was no longer appropriate.

DCASR Cleveland is one of nine regions of the Defense Logistics Agency, formerly the Defense Supply Agency. Each region provides contract administration services and support for the Department of Defense as well as other Federal agencies. Prior to the July 31, 1976, reorganization, each region had a three-tiered organizational structure headed by a regional office (DCASR) with district offices (DCASDs), the secondary level, and supervising local offices, DCASOs, the third level. As a result of the reorganization, the local offices, DCASOs, were abolished and many of their functions were transferred to the former DCASDs which were designated as Defense Contract Administration Services Management Areas (DCASMAs). The DCASMAs now perform the basic mission functions of the region in their respective areas.

As a result of the disestablishment of DCASOs, there was a significant reduction in the number of Activity employees within the former DCASO Toledo area, from 89 to 39. Geographic boundaries were shifted so that the DCASO Toledo area was divided approximately evenly between two new DCASMAs located in Cleveland and Detroit. The Activity asserts that the net effect of the disestablishment of the DCASOs in Columbus, Toledo and Akron has been to cause such a substantial change in the character and scope of each of the bargaining units at those locations so as to warrant a finding that all former Akron, Toledo and Columbus DCASO employees, as well as all other DCASR Cleveland elements in North Central and Northeast Ohio, should now be represented by a single labor organization. The Activity also argues that since, under the reorganization, a substantial portion of former DCASO Toledo employees are now assigned to DCASMA Detroit, and since a single organization presently represents employees in DCASMAs located in Grand Rapids and Detroit, it would be appropriate to have the same labor organization represent the employees in the Toledo area as well.

The NFFE, on the other hand, contends that the reorganization, which led to the disestablishment of the DCASO Toledo and the dividing of its personnel between the DCASMA Cleveland and DCASMA Detroit, was merely a "paper change," and that the unit as certified is still extant and viable. According to the NFFE, the 39 employees who remain in the former DCASO Toledo area remain in the same location, perform the same duties, and are under the same immediate supervision as before the reorganization.

The record reveals that as a result of the reorganization, personnel and managerial authority over the former DCASO Toledo were delegated to DCASMA Cleveland and DCASMA Detroit. The reduction in the number of DCASO Toledo employees occurred when 14 positions were abolished. Twenty-three employees were separated and numerous employees were transferred to other areas. Of the original DCASO Toledo workforce, 34 persons were transferred to DCASMA Detroit and 16 were transferred to DCASMA Cleveland. And of the 39 employees still within what was the former DCASO Toledo area are 27 employees in Toledo performing quality control functions who are now assigned to the Toledo Operational Branch of the Quality Assurance Division, DCASMA Detroit, and 12 employees in Mansfield, Ohio, who are now assigned to the Mansfield Branch of DCASMA Cleveland's Quality Assurance Division.

The evidence establishes that those employees who remain in the former DCASO Toledo area have remained at the same physical location, under the

1/ The Activity submitted an untimely brief which has not been considered.

same immediate supervision, and continue to perform the same functions as prior to the reorganization. However, the record also discloses that there has been no job contact subsequent to the reorganization between employees of the former Toledo area now belonging to DCASMA Detroit and those in the Mansfield area now assigned to DCASMA Cleveland. Further, as a result of the reorganization, personnel decisions formerly made at the DCASO level are now being made by the Region and the new DCASMAs.

In view of the foregoing, and noting particularly that the employees of the disestablished DCASO Toledo have been assigned to two separate DCASMAs of the Activity where they are subject to separate personnel policies and practices, separate secondary supervision, and have no job contacts with employees of other DCASMAs, I find that the July 31, 1976, reorganization of the Cleveland DCASR, which abolished the DCASO Toledo, effected a substantial change in both the scope and character of the exclusively recognized unit and thus rendered such unit inappropriate. Furthermore, the former unit recognition does not comport with the current organizational structure of the Region, and, in my view, no longer promotes effective dealings and efficiency of agency operations. Consequently, I find that the Activity is under no obligation to recognize the NFFE as the exclusive representative of the employees in such unit. 2/

Accordingly, and noting that the evidence herein was considered insufficient to establish that the employees who transferred to DCASMAs Cleveland and Detroit constituted an accretion to the existing units in such DCASMAs, I shall order the petition herein be dismissed. 3/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 53-9580(RA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 8, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

2/ See U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, 5 A/SLMR 92, A/SLMR No. 482, and Defense Contract Audit Agency, 6 A/SLMR 251, A/SLMR No. 657.

3/ It should be noted that, while it has been found that the unit herein is no longer in existence, this finding would not preclude the filing of an appropriate petition for clarification of unit seeking a determination as to whether or not any of the disputed employees have accreted to any other grouping of employees within the Activity. Nor would this finding preclude any labor organization through the filing of an appropriate petition for election from seeking certification as exclusive representative of any appropriate unit of employees resulting from the Activity's reorganization.

November 9, 1977

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

ROCKY MOUNTAIN ARSENAL,
DENVER, COLORADO
A/SLMR No. 933

This proceeding arose upon the filing of an amended unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 2197 (Complainant) alleging, in substance, that the Respondent violated Section 19(a)(1) and (6) of the Order by conducting a meeting with unit employees without notifying the Complainant in advance.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. He concluded that the disputed meeting was not a "formal discussion" within the meaning of Section 10(e) of the Order because the Respondent made no effort to bargain or negotiate with unit employees on any of the matters discussed at the meeting, nor did it make any offers, proposals, or suggestions as to what course of action the employees should pursue. Further, he found no evidence to support a finding that the Respondent's conduct resulted in interference, restraint, or coercion of unit employees.

The Assistant Secretary found that the meeting in question concerned a discussion between agency management and unit employees with respect to the procedures to implement the agreement between the Respondent and the Complainant regarding the voluntary reassignment of employees, clearly a matter having impact on the general working conditions of employees in the unit. Consequently, the Assistant Secretary found that the contested meeting constituted a formal discussion within the meaning of Section 10(e). However, as the evidence further established that the Complainant was represented at the meeting by its president and its shop steward, the Assistant Secretary concluded that the Section 10(e) requirement that an exclusive representative have the opportunity to be represented at formal discussions was fulfilled. Under these circumstances, he found that the Respondent's conduct herein was not violative of Section 19(a)(1) and (6) of the Order.

Accordingly, the Assistant Secretary concurred in the recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 933

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ROCKY MOUNTAIN ARSENAL,
DENVER, COLORADO

Respondent

and

Case No. 61-3283(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2197

Complainant

DECISION AND ORDER

On July 15, 1977, Administrative Law Judge John D. Henson issued his Recommended Decision and Order 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. 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 Recommended Decision and Order and the entire record in the subject case, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation, as modified herein.

In recommending dismissal of the complaint herein, the Administrative Law Judge determined, among other things, that a meeting held by the Respondent with unit employees on March 17, 1976, was not a "formal discussion" within the meaning of Section 10(e) of the Order. I disagree. Thus, the contested meeting concerned a discussion between agency management and unit employees with respect to the procedures to implement the parties' agreement for the voluntary reassignment of employees, clearly a matter having impact on the general working conditions of employees in the unit. 2/ Consequently, I find that the March 17, 1976, meeting constituted a formal discussion within the meaning of Section 10(e). However, as the evidence further establishes that the Complainant was represented at the meeting by its president and its shop steward, I conclude that the Section 10(e) requirement that an exclusive representative have the opportunity to be represented at formal discussions was fulfilled. Under these circumstances, I find that the Respondent's conduct herein was not violative of Section 19(a)(1) and (6) of the Order and shall order that the instant complaint be dismissed.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-3283(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 9, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ The Complainant's request for an extension of time in which to file exceptions was untimely filed and is hereby denied. Consequently, since its exceptions were filed untimely, they were not considered. Under these circumstances, the Respondent's answering brief to the Complainant's exceptions also was not considered.

2/ Cf. U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, 3 A/SLMR 290, A/SLMR No. 278.

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In the Matter of

ROCKY MOUNTAIN ARSENAL
DENVER, COLORADO
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2197
Complainant

CASE NO. 61-3283(CA)

Michael R. Watts, Esquire
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Rocky Mountain Arsenal
Commerce City, Colorado 80022
For Respondent

Kenneth J. Bull
National Representative
American Federation of Government Employees
5001 South Washington
Englewood, Colorado 80110
For Complainant

Before: JOHN D. HENSON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to an amended complaint filed on February 2, 1977, under Executive Order 11491, as amended, by American Federation of Government Employees, AFL-CIO, Local 2197, hereinafter called the Complainant, against the Rocky Mountain Arsenal, Department of the Army, Denver, Colorado, hereinafter called the Respondent, a notice of hearing on complaint was issued by the Regional Administrator for the Kansas City Region on February 17, 1977.

The Complainant alleges that the Respondent violated section 19 (a)(1) and (6) of Executive Order 11491, as amended, by meeting with unit employees without notifying the Complainant in advance of said meeting, thereby denying Complainant the opportunity to request negotiations on the subject matter of said meeting.

A hearing was held in the captioned matter on May 3, 1977, in Denver, Colorado. 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 entire record, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

1. In the early part of February 1976, Respondent detailed approximately 20 employees of its Denver facility to a new division within the facility and referred to as the "honest John" project which was then under construction but nearing completion. It was stipulated that Respondent may detail, i.e., to select and dispatch for a particular duty, unit employees for a period of 120 days pending formal reassignment procedures. The immediate detailing of personnel was made at that time in order to implement a familiarization and training program prior to commencing actual operational procedures.

2. On February 23, 1976, Respondent and Complainant met to discuss the formal reassignment. Under existing Civilian Personnel Regulations, an employee may voluntarily consent to a reassignment. Whenever the employee fails to consent to reassignment, the employee must be given an advance notice setting forth the reasons for the proposed reassignment and the reasons why he was selected,

and giving him an opportunity to reply.1/ It was agreed by Respondent and Complainant at the February 23, 1976, meeting that unit employees shall first be given the opportunity to either consent to the reassignment or proceed under the involuntary procedure of the regulations.

3. In order to implement and document the agreement for voluntary reassignment, the personnel office of Respondent issued and distributed U. S. Civil Service Commission Standard Form 52, which is entitled Request For Personnel Action, with the request that those employees consenting to the reassignment sign the Form 52 and return it to the personnel office.

4. After receipt of the Forms 52 and prior to March 17, 1976, there was much concern among the employees as to how to execute the voluntary reassignment and the implications involved.

5. On March 17, 1976, Carl Loven, plant manager, informed the employees that it was necessary to respond to the personnel office concerning their decision to sign or not to sign the Form 52. Two or three of the employees requested permission to go to the personnel office to seek information concerning the Civilian Personnel Regulations aspects of signing. Permission was granted and a canvas of the remaining employees disclosed that about all the employees wanted to seek information from the personnel office before making their decision.

6. Carl Loven decided that it would disrupt plant operations for all employees to leave the job site and, as an alternative, made arrangements for Connie Martin of the personnel office to come to the job site during the lunch period to answer questions of employees "regarding the Administrative implications of these personnel regulations" (T. 74).

7. Carl Loven informed Mr. Crane, union steward, of the meeting with Connie Martin and attempted to locate Gilbert Espinoza, President of Local Union 2197. Mr. Espinoza was away from the job site on union business but was later informed of the meeting by Carl Loven at about 11:00 a.m. Mr. Espinoza voiced no objection to the meeting when informed by Carl Loven.

8. At approximately 1:00 p.m., Connie Martin arrived at the plant and was met by Mr. Espinoza who informed her that he objected to the meeting.

1/ See Civilian Personnel Regulation 300, Chapter 335.

9. The discussion at the meeting was opened by Carl Loven who informed the employees that Connie Martin was there to answer any questions concerning the reassignment action. Mr. Crane and Mrs. Espinoza were present. Connie Martin answered numerous questions of employees concerning the procedure to implement the agreement for a voluntary reassignment. She also advised the employees of the applicable regulations for involuntary reassignment.

Discussion and Conclusion

Complainant takes the position that the meeting of March 17, 1976, between Connie Martin of the personnel office of Respondent and unit employees amounted to an attempt by Respondent to bypass Complainant as exclusive representative and to negotiate directly with unit employees. It relies on the decision in Department of the Navy, Naval Air Station, Fallon, Nevada, A/SLMR No. 587, FLRC No. 74A80 (November 26, 1975).

The Decision in that case does not have the broad sweep given to it by Complainant's interpretation.

The obligation of Respondent with regard to the participation of Complainant in meetings or discussions with unit employees are set out in section 10(e) of the Order. That section provides that the labor organization shall be given the opportunity to be represented at formal discussion between management and employees or employee representative concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

The language of section 10(e) is clear that it is not the intent of the Order to grant to an exclusive representative a right to be represented in every discussion between agency management and employees. Rather, such a right exists only when the discussions are determined to be formal discussions and concern grievances, personnel policies and practices, or other matters affecting the general working conditions of unit employees.2/

2/ See National Aeronautics and Space Administration (NASA), Washington, D. C. and Lyndon B. Johnson Space Center (NASA) Houston, Texas and American Federation of Government Employees, Local Union 2284, AFL-CIO, A/SLMR No. 457, FLRC No. 74A-95 (September 26, 1975)

It is clear from the record in the instant case that there had been discussions between Complainant and Respondent as to whether or not the reassignment could be made on a voluntary basis. That issue was resolved at the February 23, 1976, meeting or at least is not objected to by Complainant (T. 8 and 32). Only the individual employee could make the voluntary decision. It is equally apparent that the employees, including Mr. Espinoza, Local President and Mr. Crane, Local Steward, were seeking information before making that decision. They individually chose to avail themselves of information from the personnel office and so expressed themselves to Carl Loven, plant manager. Carl Loven concluded that the information could best be supplied by Connie Martin of the personnel office making herself available at the job site.

The record further reflects and I so find that Carl Loven or Connie Martin made no effort to bargain or negotiate on any of the issues involved in the reassignment nor did they make any offers, proposals or suggestions as to what course of action the employees should pursue.

I therefore conclude that the meeting of March 17, 1976, was not a "formal discussion" within the meaning of section 10(e) of the Order.

Having concluded that the meeting of March 17, 1976, was not a "formal discussion" within the meaning of section 10(e) and considering the entire record, I find no evidence to support a finding that the conduct of Respondent resulted in interference with, restraint, or coercion of unit employees in the exercise of their rights under section 19(a)(1) of the Order.

I further fail to find any evidence in the record to support a finding that Respondent refused to consult, confer, or negotiate with Complainant as required by section 19(a)(6) of the Order.

Recommendation

Having found that Respondent has not engaged in conduct violative of section 19(a)(1) and (6) of Executive Order 11491, I recommend that the complaint herein be dismissed in its entirety.

JOHN D. HENSON
Administrative Law Judge

Dated: July 15, 1977
San Francisco, California

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

ELECTRONICS ENGINEERING DIVISION,
PACIFIC MARINE CENTER,
NATIONAL OCEAN SURVEY,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE,
SEATTLE, WASHINGTON
A/SLMR No. 934

This case arose as the result of a petition filed by the National Weather Service Employees Organization, Branch 4-29, MEBA, AFL-CIO (NWSEO) seeking an election in a unit of all employees of the Activity, one of the four land-based Divisions of the Pacific Marine Center (PMC). The Radio Officers Union contended that the General Schedule (GS) Electronics Technicians, who make up the bulk of the employees of the Activity, accreted to its pre-existing unit of Electronics Technicians aboard the vessels of the PMC when the Activity was established in 1973, that it has represented the GS Electronics Technicians since that time, and that there are insufficient reasons for severing the GS Electronics Technicians from the unit which it currently represents. The Activity was neutral with respect to the question of whether the GS Electronics Technicians accreted to the pre-existing Radio Officers Union unit. It contended, however, that should the Assistant Secretary find that the GS Electronics Technicians did not accrete to the pre-existing unit, the unit petitioned for by the NWSEO was an appropriate unit.

Under all the circumstances, the Assistant Secretary found that the GS Electronics Technicians who rotate aboard the ships of the PMC are an integral part of the PMC Electronics Technician unit exclusively represented by the Radio Officers Union as, since the establishment of the rotating GS Electronics Technicians' program, the employees of the Activity assigned to that program have been administratively and functionally integrated into the Radio Officers Union's existing unit of PMC Electronics Technician employees and share a clear and identifiable community of interest with such employees. Having found that the bulk of the employees sought in this matter by the NWSEO had accreted to the existing Radio Officers Union unit at the PMC, the Assistant Secretary noted that the NWSEO's petition was, thus, tantamount to a request for severance of the subject employees from the existing exclusively recognized unit. The Assistant Secretary concluded that there were no unusual circumstances in the instant case warranting a severance of the rotating GS Electronics Technicians from the unit represented by the Radio Officers Union. Accordingly, he ordered that the NWSEO's petition be dismissed.

A/SLMR No. 934

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ELECTRONICS ENGINEERING DIVISION,
PACIFIC MARINE CENTER,
NATIONAL OCEAN SURVEY,
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE,
SEATTLE, WASHINGTON 1/

Activity

and

Case No. 71-4177(RO)

NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION,
BRANCH 4-29, MEBA, AFL-CIO 2/

Petitioner

and

RADIO OFFICERS UNION,
AFL-CIO

Party-in-Interest

DECISION AND ORDER

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer John Scanlon. 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 Party-in-Interest, Radio Officers Union, AFL-CIO, the Assistant Secretary finds:

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

2. The Petitioner, National Weather Service Employees Organization, Branch 4-29, MEBA, AFL-CIO, hereinafter called NWSEO, seeks an election in a unit of all employees of the Activity, including regular part-time employees and temporary full-time and part-time employees with a reasonable expectation of continuing employment, excluding professionals, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, supervisors, and units subject to agreement bars. 3/ In the alternative, the NWSEO indicates its willingness to represent a unit limited to the Electronics Technicians employed by the Activity. The NWSEO contends that the employees in the unit sought have a community of interest separate and distinct from other employees of the Pacific Marine Center (PMC) and that such a unit would promote effective dealings and efficiency of agency operations.

The Radio Officers Union takes the position that the General Schedule (GS) Electronics Technicians, who make up the bulk of the employees of the Activity, accreted to its pre-existing unit of Electronics Technicians aboard the vessels of the PMC when the Activity was established in 1973, that it has represented the GS Electronics Technicians since that time, and that there are insufficient reasons presented for severing the GS Electronics Technicians from the unit which it currently represents.

The Activity is neutral with respect to the question of whether the GS Electronics Technicians accreted to the existing Radio Officers Union unit. It contends, however, that should the Assistant Secretary find that the GS Electronics Technicians did not accrete to such unit, the unit petitioned for by the NWSEO is an appropriate unit.

The PMC is one of two such centers operated by the National Ocean Survey (NOS). Its mission is to direct the operation of oceangoing survey ships, maintain a base for the ships, and operate shore facilities for the processing of various types of data. It is headed by a Director, who reports directly to the Director, NOS. The PMC has four land-based Divisions: Operations, Marine Engineering, Processing, and Electronics Engineering, the Activity herein. In addition, there are 13 ships assigned to the PMC. The Activity is responsible for the maintenance, installation and repair of the electronics equipment at the PMC and on board its ships. There are approximately 80 eligible employees working at the land-based operations of the PMC.

On March 7, 1969, the Director, PMC, granted exclusive recognition to the Radio Officers Union for a unit of all Electronics Technicians and Radio Operators aboard the vessels under his jurisdiction. A negotiated agreement between the Radio Officers Union and the Coast and Geodetic Survey, the predecessor agency of the NOS, became effective on July 21, 1970. This agreement covered, in part, employees in Electronics Technician

1/The name of the Activity appears as amended at the hearing.
2/The name of the Petitioner appears as amended at the hearing.
3/ The claimed unit appears essentially as amended at the hearing.

and Communication Technician positions on the vessels under the jurisdiction of the Director, PMC. 4/ There were two subsequent negotiated agreements covering the same employees, entered into on August 5, 1971, and August 4, 1972. The August 4, 1972, agreement, by its terms, terminated on June 15, 1973, and was then extended for 90 days by the agreement of the parties. On May 8, 1977, the NOS and the Radio Officers Union entered into a new agreement covering, in part, employees on vessels under the jurisdiction of the Director, PMC, who are assigned to Electronics Technician positions. 5/

In August 1973, officials of the National Oceanic and Atmospheric Administration (NOAA), the parent agency of the NOS, met with the national president of the Radio Officers Union for the purpose of outlining an Electronics Support Program which NOS intended to implement. The program would gradually replace the Wage Marine Electronics Technicians working at that time aboard the NOS vessels with GS Electronics Technicians. The latter would rotate between sea duty aboard the NOS vessels and shore duty at the NOS Centers. The PMC began implementing this program in December 1973. Wage Marine employees are not subject to the Civil Service requirements of the Federal competitive service. The record reveals that all of the civilian employees aboard NOS vessels were Wage Marine personnel until the establishment of the rotation program.

At the time of the hearing, the Activity herein, which was created to implement the Electronics Support Program, consisted of 31 full-time nonsupervisory employees. This included 26 GS Electronics Technicians, a Clerk-Typist, a Program Support Assistant, a Wage Grade Laborer and a Wage Grade Instrument Repairman. Of the 26 GS Electronics Technicians, 19 participate in the rotation program. Thus, they spend alternating 60-day periods assigned first to a ship and then to the PMC. However, they are assigned to sea duty only during the field season of the PMC's vessels, which averages nine months a year. At all other times, they are assigned to the Activity. At the time of the hearing, there were also 19 Wage Marine Electronics Technicians who were assigned to their vessels for the full field season. While on shore, the GS Electronics Technicians are supervised by an Engineer who reports directly to the Chief of the Activity. While at sea, both the Wage Marine and the GS Electronics Technicians are part of the Engineering Department aboard the ship on which they are sailing, and they are supervised by a department head, who is the senior GS or Wage Marine Electronics Technician on

4/ The agreement also covered a similar unit represented by the Radio Officers Union at the Atlantic Marine Center.

5/ The International Association of Machinists, Hope Lodge 79, AFL-CIO, represents the employees of the Processing Division of the PMC. Other shipboard employees of the PMC are represented by various maritime unions. The remaining employees of the PMC are unrepresented.

board, who, in turn, reports to the ship's commander. The department head makes all task assignments while aboard ship. The qualifications of the Wage Marine and the GS Electronics Technicians are similar and there is no distinction in the work they perform or the equipment they maintain while at sea.

Since the inception of the Electronics Support Program, three Wage Marine Electronics Technicians have converted to GS status and one GS Electronics Technician converted to Wage Marine status. While the Activity's supervisors are responsible for granting sick leave, shore leave, and annual leave for the GS Electronics Technicians, even while they are at sea, such decisions are made for all practical purposes by the vessel's commander.

Under all the foregoing circumstances, I find that the GS Electronics Technicians who rotate aboard the ships of the PMC are an integral part of the PMC Electronics Technicians unit exclusively represented by the Radio Officers Union. Thus, since the establishment of the rotating GS Electronics Technician program, the employees of the Activity assigned to that program have been administratively and functionally integrated into the Radio Officers Union's existing unit of PMC Electronics Technicians employees and share a clear and identifiable community of interest with such employees. In this regard, the evidence establishes that the rotating GS Electronics Technicians have similar job skills, and for a substantial portion of their working time, similar functions, supervision, and working conditions with respect to the employees in the existing unit. All of the employees involved share similar personnel policies and practices established by NOAA's Area Personnel Office and the Director, PMC, and there have been employee transfers between the GS and Wage Marine Electronics Technician categories. Moreover, the inclusion of the rotating GS Electronics Technicians into the unit represented by the Radio Officers Union, under the circumstances outlined above, will, in my view, promote effective dealings and efficiency of agency operations and reduce unit fragmentation.

As the bulk of the employees sought herein by the NWSEO have accreted to the existing Radio Officers Union unit at the PMC, the NWSEO's petition is tantamount to a request for severance of the subject employees from the existing exclusively recognized unit. In this regard, it has been held previously that, absent unusual circumstances, severance from an established more comprehensive unit will not be permitted. I find that no unusual circumstances in the instant case exist warranting severance of the rotating GS Electronics Technicians from the existing unit represented by the Radio Officers Union. 6/ The record indicates that the Radio

6/ Cf. Department of Health, Education and Welfare, Food and Drug Administration, Region I, Boston Regional Field Office, Boston, Massachusetts, A/SLMR No. 823.

Officers Union has, since the inception of the rotating GS Electronics Technicians' program, considered these employees to be part of its exclusively recognized unit at the PMC. There is no evidence that the Radio Officers Union has failed to represent GS Electronics Technician employees or that it has treated them in a manner inconsistent with its representation of other unit employees. Accordingly, I shall order that the NWSEO's petition be dismissed. 7/

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 71-4177(RO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 10, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

7/ While I have dismissed the RO petition herein, it is noted that such finding would not preclude the filing of an appropriate petition for clarification of unit in order to conform the recognition herein to the existing circumstances.

November 10, 1977

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,
4392nd AEROSPACE SUPPORT GROUP,
VANDENBERG AFB, CALIFORNIA
A/SLMR No. 935

This case involved an unfair labor practice complaint filed by the National Federation of Federal Employees, Local 1001 (NFFE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally changing the negotiated agreement regarding procedures the NFFE's president was to use for obtaining official time for representational activities in a manner which constituted a clear, unilateral breach of the agreement. It was also alleged that the Respondent violated the Order by changing past practice regarding the securing of official time, and that the changed procedures interfered with, restrained and coerced the NFFE's president, an independent violation of Section 19(a)(1).

The Administrative Law Judge recommended that the complaint be dismissed. He found that the procedures for obtaining official time were arguably within the meaning of the negotiated agreement, and that absent evidence of a flagrant and deliberate breach, the proper forum for resolution of the issue is the negotiated grievance procedure. The Administrative Law Judge also found that the negotiated agreement superseded any past practice that may have been established regarding the securing of official time for representational activities, and that the Respondent acted with due diligence in attempting to gain the NFFE president's compliance with the negotiated agreement. The Administrative Law Judge also concluded that the NFFE failed to sustain its burden of proving any independent 19(a)(1) violations, including the allegation that its president was treated differently from its other officers and stewards.

The Assistant Secretary adopted the recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 935

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE AIR FORCE,
4392nd AEROSPACE SUPPORT GROUP,
VANDENBERG AFB, CALIFORNIA

Respondent

and

Case No. 72-5770(CA)

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES,
LOCAL 1001

Complainant

DECISION AND ORDER

On June 16, 1977, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order 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 Recommended Decision and Order and the Respondent filed a response to the Complainant's exceptions. 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and a supporting brief and the Respondent's response thereto, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

1/ The Respondent filed a Motion to Quash and Dismiss the exceptions submitted by Marie Brogan on behalf of the Complainant based, in part, on its contention that NFFE Local 1001 has been in trusteeship since May 1, 1977, and its locally elected officers, including Brogan, have been displaced. In the absence of a disclaimer by any representative of NFFE Local 1001 that Brogan had standing to file exceptions on its behalf, the Respondent's Motion is hereby denied.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-5770(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 10, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

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U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of

DEPARTMENT OF THE AIR FORCE
4392ND AEROSPACE SUPPORT GROUP
VANDENBERG AFB, CALIFORNIA
Respondent

and

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1001
Complainant

CASE NO. 72-5770(CA)

James H. London, Captain, USAF
Frank L. Sprague, Esquire
4392nd Aerospace Support Group/JA
Vandenberg AFB, California 93437

William C. Walker, Captain, USAF
HQ SAC/JAC
Offutt AFB, Nebraska 68113
For Respondent

Bruce M. Stark, Esquire
Suite 301
10203 Santa Monica Boulevard
Los Angeles, California 90067
For Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding heard in Santa Maria, California, on February 10, 1977, arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint was issued on December 7, 1976, with reference to alleged violations of section 19(a)(1) and (6) of the Order. Although originally scheduled for January 5, 1977, the hearing was rescheduled for February 10, 1977, pursuant to an order issued by the Regional Administrator.

On December 23, 1975, the complaint in the instant case was filed by Marie C. Brogan, President of the National Federation of Federal Employees, Local 1001 (hereinafter the "Union"). The complaint alleged that the 4392nd Aerospace Support Group, Vandenberg Air Force Base, California (hereinafter the "respondent") engaged in a number of violations within the ambit of section 19(a)(1), (2) and (6) of the Executive Order. The issues properly presented for decision are whether certain actions by respondent prior to the filing on October 31, 1975, of the pre-complaint charge violated the Order by (1) unilaterally modifying the terms of the collective bargaining agreement regarding the procedure to be taken by a Union officer for obtaining official time for union-related duties, (2) by changing the Union president's past practice with respect to the securing of official time, and (3) by interfering with or restraining the Union president in the exercise of a right assured her under the Order. Issues not raised at the hearing or on brief are deemed abandoned.

The complaint also alleges certain violations of the Order arising out of events that occurred subsequent to the filing of the pre-complaint charge on October 31, 1975, but prior to the filing of the complaint on December 23, 1975. These allegations were dismissed by the Regional Administrator on the ground that they were not filed timely in accordance with the requirements of § 203.2 of the Regulations of the Assistant Secretary. That section of the Regulations provides that the complaint must be limited to the matters raised in the pre-complaint charge. In view of the fact that the events occurring between October 31 and December 23, 1975, were not raised in a charge, the Assistant Secretary upheld the dismissal of the allegations pertaining to these events. Therefore,

these untimely allegations will not be considered in the instant proceeding.

At the hearing, all parties were represented by counsel and afforded full opportunity to be heard, adduce evidence, to examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed briefs which have been duly considered. 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

At all times material herein, the Union has been the exclusive collective bargaining representative of certain employees of the respondent. In January of 1975 the parties executed an agreement which became effective on June 12, 1975, when it was approved.

Article IX of the agreement sets forth the grievance and arbitration procedure and provides in pertinent part as follows:

> Section 2. Definitions. For the purpose of the Agreement, a grievance is defined as a request for relief in a matter of concern arising over the interpretation, application or implementation of this Agreement .... This procedure shall be the exclusive procedure to be utilized in adjusting such grievances.

Section 9 of the above article sets forth a three-step grievance procedure. Section 10 provides that unresolved grievances may be submitted to arbitration.

Article XXXV of the agreement provides as follows:

> OFFICIAL TIME
>
> Section 1. The parties agree that generally, labor relations activities are matters of mutual concern to the Employer and the Union. Accordingly, the parties agree that they will endeavor to fully

> communicate with, and inform each other so that matters of form, or technicalities will not cause administrative leave or official time to be denied, under the provisions of this and other articles which pertain to official time.
>
> Section 2. Employees acting for the Union will be excused from duty without charge to leave or loss of pay in order to perform duties as Union representatives. Such excuse from duty shall not extend to the conduct of internal Union business, and is subject to any limitations which have been negotiated in other articles of this agreement and subject to appropriate regulations.
>
> Section 3. Stewards, when desiring to leave their work areas to transact appropriate Union business during working hours, shall first obtain authority from their immediate supervisors. Authority to leave the work area will then be granted promptly in the absence of compelling circumstances. Before leaving for another area, the officer or steward will verify that the person or group with whom the business is to be transacted is available. This availability shall be determined by the steward by calling the supervisor or supervisors of the employee or employees. Upon entering a shop or work area under the cognizance of a supervisor other than his own, an officer or steward shall contact the supervisor and advise him of his presence and the name of the employee or employees to be contacted. Cognizant supervisors shall promptly make such employees available to the Union representative in the absence of compelling circumstances to the contrary without requiring detailed explanation of the Union business to be conducted.

> Section 4. Upon return to the work area, the Union representative will report to the supervisor the amount of time used and the amount of time shall be recorded.

Article XXXVII provides that in the temporary absence of an assigned steward and a chief steward because of reasons such as taking leave or temporary additional duty away from the activity, a Union officer may serve as the substitute steward. This article also states in part that "Union officials must have sufficient freedom of movement and availability to fulfill their obligations to the employees in the Unit."

At all times relevant hereto, Marie Brogan was president of Local 1001 of the National Federation of Federal Employees. Brogan was chairman of the Union's negotiating team with regard to the above-mentioned agreement. During 1975, Brogan was an employee of the respondent and was assigned to the Construction Management Section. Her immediate supervisor was John S. McComb, who was chief of that section.

Subsequent to June 12, 1975, the effective date of the agreement, Brogan purportedly spent 100 percent of her time on union-related activities. At all times during 1975 subsequent to the agreement, she performed little, if any, construction management work and rarely spoke to McComb.

During 1975, when the employees in McComb's section found it necessary to leave the office on construction management business, they would write certain information on a blackboard located in the office prior to leaving. In this regard the employee would indicate his name, his destination, the telephone number at which he could be reached, his time of departure and an estimated time of return. Between June 12 and October, 1975, Brogan used the above "sign-out board" procedure about 25 to 30 percent of the time for her union activities. However, she usually did not keep McComb informed of her whereabouts.

McComb did not become aware of Article XXXV of the negotiated agreement until September of 1975. As set forth above, Article XXXV relates to the procedures for the granting of administrative leave or official time for representational activities by employees acting for the Union.

On September 26, 1975, James A. Hunt, a labor relations specialist in the respondent's Civilian Personnel Office, issued a memorandum addressed to "Supervisors of Union Representatives" relating to the implementation of the official time provisions of the agreement. A copy of this memorandum was sent to Mr. Rodgers, McComb's supervisor; McComb did not receive or read a copy of this memorandum until March of 1976. The memorandum "suggested" that Union representatives should make verbal requests for official time to perform union-related tasks as far in advance as possible. It also suggested that the Union representative identify the specific nature of the activity in enough detail to allow the supervisor to validate the authorization of official time.

Soon after September 26, 1975, Brogan received a copy of the Hunt memorandum and apparently alleged in a pre-complaint charge filed on October 8, 1975, that the memorandum violated the Executive Order. In November of 1975, Brogan filed an unfair labor practice complaint (Case No. 72-5710(CA)) with respect to the Hunt memorandum. On April 13, 1976, the Regional Administrator dismissed that complaint and stated as follows:

> It does not appear that further proceedings are warranted inasmuch as a reasonable basis for the complaint has not been established. The suggested guidelines issued by Mr. Hunt regarding the granting of official time to union representatives is considered to be intermanagement correspondence and there is no indication that the guidelines were meant to be used to bypass the exclusive representative since Mr. Hunt requested to meet with you in this regard. Moreover, it would appear that resolution of this dispute should be made through the negotiated grievance procedure since it involves varying interpretations of the agreement. See Assistant Secretary Rule No. 49.

Immediately prior to October 2, 1975, McComb's supervisor, Mr. Rodgers, told McComb that he had received a number of complaints regarding Brogan from other

supervisors. He told McComb that the supervisors were bothered by Brogan's visits to their sections without prior notification and by her "chatting" about non-union matters with the employees during duty time.

During October of 1975, McComb became very concerned that Brogan was failing to abide by the provisions of Article XXXV of the agreement relating to the procedure for obtaining official time for union-related duties. He felt that Article XXXV required the Union president to request permission for the use of official time for union business. He also interpreted Article XXXV as requiring Brogan to "fully communicate" with him on these occasions in order that he would be in a position to determine whether official time should be granted. During October of 1975, McComb advised Brogan of his interpretation of the official time provisions of the agreement and asked her to comply with these provisions. 1/

In spite of these requests by McComb, Brogan refused to comply. McComb's notes reflect that during the month of October, Brogan left the office on several occasions without indicating to anyone where she was going. At the end of the month, Brogan did not come into the office at all on three separate days and did not leave word as to her whereabouts.

Subsequently, on October 29, 1975, McComb issued the following memorandum to Brogan:

> 1. Since the approval of the base wide contract in June of 1975 I have discussed with you the contract provisions for release from duty station and use of official time for union related business. In spite of the discussions you continue to be away from your duty station for prolonged periods of time without making prior arrangements for release and without

1/ Since McComb was responsible for maintaining Brogan's time cards reflecting official time granted (in addition to other types of leave), he felt that it was particularly important that official time be granted only in those circumstances contemplated by the negotiated agreement.

> providing adequate information needed to make determinations on the granting of official time.
>
> 2. Accordingly as of 3 November 1975 the following will apply:
>
> a. Release from Duty Station:
>
> Any absence from your duty station during normal duty hours without prior approval from me will be treated as absence without leave. As you know this is unpaid time and could lead to disciplinary action.
>
> b. Allowance of Official Duty Time:
>
> Official duty time will be allowed in accordance with the policies and procedures set forth in Article XXXV of the contract.
>
> Official duty time will be allowed for prior approved absence only when you provide enough information to me to enable me to make a valid determination as to what is appropriate.
>
> 3. All arrangements for release from duty station or use of official time must be made with me personally. In my absence Mr. Courtney is your supervisor and will be your point of contact. Should both Mr. Courtney and I be unavailable you may make arrangements with Mr. Rodgers, Chief, Engineering and Construction Branch.

It was McComb's own idea to write the above memorandum. As previously stated, he had never received the Hunt memorandum dated September 26, 1975. The ideas contained in McComb's memorandum reflect his own interpretation of the agreement. Prior to issuing his memorandum,

however, McComb "coordinated" the memorandum with the chief of his organization and several of the respondent's technical advisors specializing in labor law and labor relations. All of these individuals concurred in McComb's interpretation of the contract and considered the memorandum appropriate under the circumstances.

The procedures required by McComb for obtaining official time for union-related business were essentially the same as those employed by other supervisors at Vandenberg with respect to employees who were Union representatives. All of these employees were required to ask permission of their supervisors for the use of official time and give sufficient information in order that the supervisors could determine whether the request for official time should be granted. In addition to following the above procedure, one of the Union's vice presidents kept a log with his supervisor reflecting the dates, hours, and purpose of his Union activities.

Immediately after receiving McComb's memorandum, on October 31, 1975, Brogan filed the pre-complaint charge in the instant case.

For the next few weeks, Brogan ignored McComb's memorandum and continued to leave her office without requesting permission for the use of official time. As a result of these actions, Brogan was charged with absence without leave (AWOL) on a number of occasions. On December 16, 1975, a meeting was held between the Union and management at which the question of requesting permission for the use of official time by Union representatives was discussed. Although it appears that the parties at this meeting agreed that the negotiated agreement required Brogan to request such permission, no final agreement was reached in view of the "heated discussion" and controversy regarding other issues. In this regard, the parties could not agree as to the amount of information and detail that a Union representative would be required to give to his supervisor for him to determine whether official time was warranted. It appears that some time during November or December of 1975 McComb decided that it was necessary for Brogan to reveal the name of the grievant in order for him to make his determination. Brogan refused to give the grievant's name because she felt that it constituted an invasion of his privacy.

Conclusions of Law

The first issue presented for decision is whether certain actions taken by the respondent constituted a unilateral modification of the negotiated agreement in violation of section 19(a)(6) of the Executive Order. The Union alleges that the following actions violated the Order in this regard: (1) the requirement that the Union president, Marie Brogan, obtain permission from her supervisor prior to leaving her office on official time for union-related duties; (2) the requirement that she give her supervisor "enough information" to determine whether official time should be granted; and (3) the statement to Brogan that any absence from her office without prior approval from her supervisor would be treated as absence without leave.

In Watervliet Arsenal, U. S. Army Armament Command, Watervliet, New York, A/SLMR No. 726, the Assistant Secretary held that if the negotiated agreement is susceptible to varying interpretations, then any alleged breach of the agreement should be resolved through the grievance-arbitration procedures set forth in the agreement. On the other hand, it was also held that a flagrant and patent breach of an agreement may rise to the seriousness of a unilateral change in the contract and constitute an unfair labor practice. The Assistant Secretary has recently held that a breach of contract will not violate the Order unless it is "flagrant and deliberate." Social Security Administration, Great Lakes Program Center, Chicago, Illinois, A/SLMR No. 804.

The Union first complains that McComb's requirement that Brogan ask his permission for the use of official time for union-related duties constituted a clear, unilateral breach of Article XXXV of the agreement. I disagree with the Union and find that the contract can reasonably be interpreted to require that permission be requested. In this regard, section 2 of Article XXXV states that employees acting for the Union will be "excused" from duty in order to perform duties as Union representatives. One of the dictionary definitions of the word "excuse" is "to give (someone) permission to leave." The American Heritage Dictionary, (1976). Likewise, the words "administrative leave" in section 1 reasonably comprehend the requirement of permission.

In addition, the Union alleges that McComb's requirement that Brogan give him "enough information" for him to determine whether official time should be granted was a contractual breach rising to the level of a unilateral

modification of the agreement. Again, I find that McComb's construction of the agreement was not unreasonable. Section 1 of Article XXXV states in part as follows:

> Accordingly the parties agree that they will endeavor to fully communicate with and inform each other so that matters of form, or technicalities will not cause administrative leave or official time to be denied .... (Emphasis supplied)

McComb testified that he felt that Brogan was not complying with the terms of this Article because she was not fully communicating with him. Certainly one interpretation of the above-quoted sentence would allow McComb to deny Brogan official time unless she endeavored to "fully communicate" with him. In addition, section 2 states that the "excuse from duty shall not extend to the conduct of internal union business ...." Therefore, it is arguable that McComb would need "enough information" to determine whether the activities in which Brogan wished to engage constituted appropriate Union business.2/

Finally, the Union alleges that McComb unilaterally modified the contract when he told Brogan that she would be charged AWOL if she failed to ask his permission for the use of official time for union-related duties. The Union relies on section 2 of Article XXXV which states that employees acting for the Union will be excused from duty "without charge to leave or loss of pay" in order to perform duties as Union representatives. However, the following sentence of that section indicates that excuse from duty will not extend to the conduct of internal Union business. Therefore, it would be reasonable to assume that

---

2/ It appears that subsequent to the pre-complaint charge, McComb decided that, when a grievance was involved, Brogan should tell him the name of the grievant. Even assuming arguendo that this requirement had been imposed prior to the charge, it would not have constituted a flagrant and deliberate breach of the contract. Since section 3 of Article XXXV clearly required the Union representative to tell the grievant's supervisor the name of the grievant it would not be unreasonable for McComb to expect the name to be given to him for his purposes also in view of the "full communication" clause.

an employee who insists on conducting internal Union business during duty hours would be required to be on annual leave, leave without pay, or AWOL. In addition, section 1 of this Article could reasonably be interpreted to allow the denial of administrative leave or official time unless the Union representative "fully communicated" with his supervisor. If the employee left his office under these circumstances, it would seem reasonable to charge him with leave or AWOL.

In conclusion, there is no evidence of record of a flagrant and deliberate breach of the negotiated agreement by respondent, and it cannot be said that respondent violated the Order by unilaterally changing the terms of the agreement. The proper forum for resolving this issue lies within the grievance machinery of the parties' negotiated agreement rather than through the unfair labor practice procedures. Social Security Administration, Great Lakes Program Center, Chicago, Illinois, A/SLMR No. 804.

The Union also contends that McComb's memorandum of October 29, 1975, unilaterally changed one of Brogan's working conditions in violation of sections 19(a)(1) and (6) of the Executive Order. Between June 12, 1975 and the end of October of 1975, Brogan did not request permission to leave her office when she wished to engage in union-related activities. However, about 25 to 30 percent of the time she would indicate on a blackboard in the office the building to which she was going, a telephone at which she could be reached, and, in some instances, a word such as "grievance" to indicate the general purpose of her trip. It was not until September of 1975 that McComb became aware of the provisions regarding the use of official time which had become effective on June 12, 1975. He did not feel that Brogan was complying with the terms of the agreement. As previously stated, he sincerely felt that the agreement required that Brogan ask his permission for the use of official time for union-related duties and that it required her to provide him with sufficient information to enable him to determine whether or not official time was warranted on each occasion. He spoke with her several times during the month of October for the purpose of getting her to comply with the terms of the contract. However, Brogan refused to comply with his requests. Finally, on October 29, 1975, McComb issued his memorandum to Brogan directing her to comply with his requests.

The negotiated agreement of June 12, 1975, superseded any former practice Brogan may have used regarding the

securing of official time for her representational activities. Veterans Administration Center, Bath, New York, A/SLMR No. 335. The new language contained in Article XXXV was dispositive as to Brogan's rights in this regard. McComb acted with due diligence in attempting to gain Brogan's compliance with the contract soon after he became aware of the relevant provisions. McComb's insistence upon compliance with the negotiated agreement did not constitute a unilateral change in a "past practice." The so-called "practice" was utilized by Brogan no more than 30 percent of the time and, in addition, it was stopped by McComb before it had matured into an established policy and practice. Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, A/SLMR No. 771.

The next issue for decision is whether Brogan was treated differently from other Union officials or otherwise discriminated against by virtue of McComb's actions prior to the filing of the pre-complaint charge on October 31, 1975. With respect to the procedures imposed by McComb for obtaining official time for Union business, the Union has failed to sustain its burden of proving that Brogan was treated differently from the other Union officers and stewards. The evidence presented establishes that the other Union representatives were also required to ask permission for official time for representational activities; moreover, they were required to give their supervisors "enough information" to enable the supervisors to determine whether official time was warranted. The complainant argues that nothing was said to the other Union representatives regarding the possibility of AWOL charges. However, it is clear that AWOL was not mentioned to these individuals because they complied with their supervisors' procedures. On the other hand, Brogan repeatedly refused to ask McComb's permission for official time after he had requested her to do so.

The Union also alleges that McComb's actions were taken for the sole purpose of harassing the Union president and that he was merely carrying out the instructions of a group of the respondent's officials whose primary motivation was to harass Brogan. Although I recognize that Marie Brogan sincerely feels that this is true, I cannot reach this conclusion based upon the evidence adduced at the hearing. I believe McComb's testimony that he was essentially acting on his own. McComb was not trying to harass Brogan; his actions were motivated by a desire to obtain her compliance with the agreement. I conclude that the complainant has

failed to sustain its burden of proof with respect to any violation of section 19(a)(1) of the Order.3/

Finally, it is necessary to dispose of a written motion to dismiss filed by the respondent at the outset of the hearing. The first contention is that the basic issues of the instant case have previously been litigated in Case No. 72-5710(CA). The only allegation in that case which even remotely relates to the instant case concerned Hunt's memorandum of September 26, 1975. In view of the fact that McComb did not see that memorandum until long after the complaint in the instant case had been filed, and in light of the additional issues contained herein, the motion must be overruled on that ground. The only other ground asserted in the motion to dismiss is that "the question presented here is solely one of contract interpretation, and therefore, the only appropriate disposition of the case must be under the grievance procedure of the parties' negotiated agreement." As I indicated in my conclusions with respect to the first issue presented for decision, I agree that a question of contract interpretation is involved; however, that was not the sole issue in the case. Therefore, respondent's motion must be overruled on both grounds.

Recommendation

In view of the foregoing Findings of Fact and Conclusions of Law, I hereby recommend to the Assistant Secretary that the complaint be dismissed in its entirety.

Randolph D. Mason
RANDOLPH D. MASON
Administrative Law Judge

Dated: June 16, 1977
San Francisco, California

3/ In view of my conclusions with respect to the section 19(a)(1) issues, it is not necessary for me to decide whether the procedure for obtaining official time for employee representational activities (as contrasted with the use of such time) was connected to a right guaranteed by the Order. Cf. Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, FLRC No. 75A-25.

November 11, 1977

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

BILLETING FUND OF CHARLESTON
AIR FORCE BASE, SOUTH CAROLINA
A/SLMR No. 936

This case arose as a result of a petition filed by an individual seeking the decertification of the Intervenor, International Brotherhood of Firemen and Oilers, AFL-CIO, Local 41 (IBFO) as the exclusive representative in a unit of nonappropriated fund activity employees of the Activity. The IBFO took the position that the decertification petition was untimely filed. The Regional Administrator sent the matter to hearing solely on the issue of the timeliness of the petition.

In September 1976, the Labor-Management Services Administration (LMSA), in response to the Petitioner's inquiry on behalf of herself and other employees concerning how to decertify the IBFO as their exclusive representative, informed the Petitioner that this was a matter for the National Labor Relations Board (NLRB) rather than for the LMSA. The LMSA forwarded the Petitioner's letter and copy of its reply to the NLRB. Thereafter, the NLRB wrote the Petitioner explaining the requirements for filing a timely decertification petition under its procedures and forwarding NLRB decertification petition forms to the Petitioner. Relying on the information and instructions supplied by the NLRB, the Petitioner filed the decertification petition with the NLRB in the open period of the parties' negotiated agreement. The NLRB thereafter notified the Petitioner that the LMSA had jurisdiction over the matter and subsequently the NLRB approved the Petitioner's withdrawal request. Shortly thereafter, but subsequent to the open period of the parties' negotiated agreement, the Petitioner filed the subject decertification with the LMSA.

Under all of the particular circumstances of this case, the Assistant Secretary concluded that the Petitioner's decertification petition should be treated as timely filed. He found it evident that but for the mistaken directions given the Petitioner, the subject petition would have been timely filed under Executive Order 11491, as amended, with the LMSA, and that it would be unfair to penalize the Petitioner for acting in good faith on the erroneous advice of agents of the LMSA. Therefore, pursuant to the provisions of Section 206.9 of the Assistant Secretary's Regulations, he found the petition to be timely filed and ordered an election in the unit found appropriate.

A/SLMR No. 936

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

BILLETING FUND OF CHARLESTON
AIR FORCE BASE, SOUTH CAROLINA

Activity

and

Case No. 40-8012(DR)

CHRISTENIA AIKEN

Petitioner

and

INTERNATIONAL BROTHERHOOD OF
FIREMEN AND OILERS, AFL-CIO, LOCAL 41

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 Renee B. Rux. 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, Christenia Aiken, an employee of the Activity, seeks the decertification of the Intervenor, International Brotherhood of Firemen and Oilers, AFL-CIO, Local 41, hereinafter called IBFO, as the exclusive representative of certain employees of the Activity.

As none of the parties questioned the appropriateness of the unit, the Regional Administrator sent the matter to hearing solely on the issue of the timeliness of the subject petition. 1/ In this regard, the

1/ See Department of Transportation, Federal Aviation Administration, Airway Facilities Sector, Fort Worth, Texas, 2 A/SLMR 613, A/SLMR No. 230.

IBFO contends that the petition was untimely as it was not filed within the valid challenge period provided for in Section 202.3(c) of the Assistant Secretary's Regulations. 2/

The record indicates that the IBFO was recognized as the exclusive representative of the employees in the unit in September 1969. On June 13, 1973, the Activity and the IBFO executed a negotiated agreement of two years duration, effective from the date of its approval by Headquarters, United States Air Force. The agreement, which was automatically renewable for two year periods, was approved by Headquarters on July 9, 1973. It was amended July 8, 1975, and under the new agreement the open period for filing a timely petition under Section 202.3(c) of the Assistant Secretary's Regulations became April 9 through May 8, 1977.

On September 29, 1976, the Atlanta Area Office of the Labor-Management Services Administration (LMSA) advised the Petitioner, in response to her earlier inquiry concerning her and other employees desire to decertify the IBFO as their exclusive representative, that there were procedures for decertifying an exclusive representative, but that it was a matter for the National Labor Relations Board (NLRB) rather than for the LMSA. LMSA forwarded its September 29 letter and the inquiry from the Petitioner to the NLRB.

On October 8, 1976, the NLRB wrote the Petitioner, referring to the letter it had received from the LMSA, explaining the requirements for filing a timely decertification petition under NLRB procedures and enclosing NLRB decertification petition forms. The letter raised no questions concerning NLRB jurisdiction over the potential decertification petition. Relying on the information supplied by the NLRB and the instructions contained in the NLRB's letter of October 8, the Petitioner waited until the open period in the negotiated agreement and on April 14, 1977, filed a timely decertification petition with the NLRB. Thereafter, by letter of April 26, 1977, to the Petitioner, the NLRB confirmed an earlier telephone conversation with the Petitioner which explained that the LMSA office in Atlanta, Georgia, had jurisdiction over the matter, and enclosed a withdrawal request. The subsequent withdrawal request was approved by the NLRB on May 4, 1977. On June 2, 1977, a date which was after the open period in the negotiated agreement between the IBFO and the Activity, the Petitioner filed the subject decertification petition with the LMSA.

2/ Section 202.3(c) states, in pertinent part:

> When an agreement covering a claimed unit has been signed and dated by the activity and the incumbent exclusive representative, a petition for exclusive recognition 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 and dated by the activity and the incumbent exclusive representative; ...

Under the particular circumstances of this case, I shall treat the Petitioner's decertification petition of June 2, 1977, as timely filed. Thus, only after the Petitioner was incorrectly informed by the LMSA that the NLRB had jurisdiction in the matter, and after following the instructions and directions of the NLRB, which were apparently based on the erroneous jurisdictional conclusions of the LMSA, did the Petitioner first learn that, in fact, she had been improperly informed about where and how to file her decertification petition. Noting that her petition was timely filed with the NLRB in accordance with its instructions, it is evident that but for the mistaken directions given the Petitioner, her decertification petition would have been timely filed under Executive Order 11491, as amended, with the LMSA. In my view, it would be unfair to penalize the Petitioner for acting in good faith on the erroneous advice of agents of the LMSA. 3/ Accordingly, pursuant to the provisions of Section 206.9 of the Assistant Secretary's Regulations 4/, I shall treat the Petitioner's decertification petition of June 2, 1977, as timely filed and I shall direct an election in the following unit which I find appropriate for the purpose of exclusive recognition under Executive Order 11491, as amended:

> All nonappropriated fund employees of the Billeting Fund of Charleston Air Force Base, South Carolina, excluding all professional employees, off-duty military personnel, employees engaged in Federal personnel work in other than a purely clerical capacity, management officials, and supervisors 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.

3/ Cf. Department of the Navy, Naval Air Station, Corpus Christi, Texas, 2 A/SLMR 219, A/SLMR No. 150.

4/ Section 206.9 of the Assistant Secretary's Regulations states:

> (a) The regulations in this chapter may be construed liberally to effectuate the purposes and provisions of the order.
>
> (b) When an act is required or allowed to be done at or within a specified time, the Assistant Secretary may at any time order the period altered where it shall be manifest that strict adherence will work surprise or injustice or interfere with proper effectuation of the order.

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 been rehired or reinstated before the election date. Those eligible shall vote whether or not they wish to be represented by the International Brotherhood of Firemen and Oilers, AFL-CIO, Local 41.

Dated, Washington, D. C.
November 11, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

November 11, 1977

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,
U.S. CUSTOMS SERVICE,
ST. THOMAS, VIRGIN ISLANDS
A/SLMR No. 937

The subject case involved a representation petition filed by the American Federation of Government Employees, AFL-CIO, Local 3514 (AFGE) seeking a unit consisting essentially of all employees of the U.S. Customs Service, Virgin Islands. These employees are encompassed within a more comprehensive unit which is currently represented on an exclusive basis by the National Treasury Employees Union (NTEU).

The Activity and the NTEU contended that the existing negotiated agreement constituted a bar to the instant petition. They argued that the petition was untimely as it had not been filed during the "open" period pursuant to the Assistant Secretary's Regulations but, instead, had been filed during the period when the existing negotiated agreement had been extended. They also contended that the severance sought by the AFGE would be inappropriate because it would disturb an established and effective bargaining relationship. The NTEU further asserted that its National and Regional offices never failed to provide representation to the petitioned for employees when it was requested. The AFGE, on the other hand, contended that the instant petition was timely filed, and that the sought unit is appropriate because the NTEU has failed to provide full and fair representation to the sought employees.

The Assistant Secretary noted that when the NTEU notified the Activity of its intent to modify the existing agreement through negotiations, such notice had the effect of terminating the agreement on its anniversary date for bar purposes. Further, the agreement of the parties to extend the existing negotiated agreement for an indefinite duration, in the Assistant Secretary's view, did not constitute a final, fixed term agreement which would bar a petition otherwise timely filed. Accordingly, the Assistant Secretary found the instant petition was timely filed.

However, the Assistant Secretary further found the claimed unit was inappropriate for the purpose of exclusive recognition under the Order. In this regard, the instant petition sought to sever a portion of an already existing, more comprehensive bargaining unit. The Assistant Secretary noted that the absence of local union representatives, standing alone, does not, in his view, establish an absence of full and fair representation. Accordingly, noting that the record established that the sought employees received full and fair representation when it was requested, and in the absence of evidence of unusual circumstances, the Assistant Secretary ordered the petition dismissed.

A/SLMR No. 937

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
ST. THOMAS, VIRGIN ISLANDS

Activity

and

Case No. 37-01717(RO)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3514

Petitioner

and

NATIONAL TREASURY EMPLOYEES UNION

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 Mario Paoli. 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 briefs filed by the Petitioner, the American Federation of Government Employees, AFL-CIO, Local 3514, hereinafter called AFGE, and the Intervenor, the National Treasury Employees Union, hereinafter called NTEU, the Assistant Secretary finds:

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

2. The AFGE seeks an election in a unit consisting of: "All employees employed at the U.S. Customs Service in the U.S. Virgin Islands, 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." The petitioned for unit is encompassed within an existing Region-wide unit which currently is represented on an exclusive basis by the NTEU. 2/ A negotiated agreement was signed and dated by the Activity and the National Customs Service Association, hereinafter called NCSA, on May 9, 1973, and became effective on July 2, 1973, upon the approval of the Commissioner of Customs. The agreement was to remain in effect for three years from the date of approval and was subject to automatic renewal for an additional three year term unless either party gave written notice of its desire to terminate or modify the agreement as required by Article XII of the agreement. 3/

The mission of the U.S. Customs Service is enforcing customs laws and other related laws of the United States. The U.S. Customs Service is organized into a National Office located in Washington, D.C., and nine Regions. Each of the Regions, with the exception of Region II, is further subdivided into Districts, Ports, and Stations. Region IV, headquartered in Miami, Florida, is headed by a Regional Commissioner and encompasses seven Districts, among which is the Activity. Each District is under the supervision of a District Director. The Virgin Islands District (Activity) is composed of three islands, St. Thomas, on which the District Office is located, St. Croix, and St. John, with duty Stations located throughout the three islands.

The collective bargaining history of the U.S. Customs Service indicates that eight of its nine Regions are exclusively represented by the NTEU on a Region-wide basis. In Region IV, the NTEU is the exclusive representative in six of the seven Districts with the employees in the Puerto Rico District represented by the American Federation of Government Employees, AFL-CIO, Local 2577.

1/ At the hearing, the Hearing Officer sustained objections to certain evidence proffered by the Petitioner. Thereafter, the Petitioner made an offer of proof on the record. Since the evidence proffered by the Petitioner would not affect my disposition of the subject petition, I find it unnecessary to pass on the propriety of the Hearing Officer's ruling.

2/ On December 16, 1975, an Amendment of Certification was issued by the Regional Administrator changing the designation of the exclusive representative from the National Customs Service Association to the National Treasury Employees Union.

3/ Article XII (2) provides:

> This agreement shall remain in full force and effect for the three (3) year period following its effective date and shall be automatically extended for three (3) year periods thereafter, unless between the ninetieth (90th) and sixtieth (60th) day prior to the agreement's extension date, either party hereto shall notify the other, in writing, of intention to terminate or modify this agreement. Upon such giving of notice of intention to terminate, the agreement shall terminate upon its anniversary date. Upon such giving of notice of intention to modify this agreement, negotiations between Management and Association concerning a new agreement shall commence no later than thirty (30) calendar days prior to its anniversary date and this agreement shall remain in full force and effect until the new agreement is executed by the parties, duly approved, and effective, . . .

The Activity and the NTEU contend that the existing negotiated agreement constitutes a bar to the instant petition. They argue that the subject petition is untimely as it was not filed during the "open" period provided for in Section 202.3(c)(2) of the Assistant Secretary's Regulations 4/ but, instead, was filed during a period when the existing negotiated agreement had been extended due to a timely filed notice of intent to modify said agreement as provided for in Article XII of the agreement. They also contend that if the claimed unit was found to be appropriate the existing bargaining unit would be fragmented and that an established and effective bargaining relationship would be disrupted. The NTEU further contends that its National and Regional Offices never failed to provide representation to the petitioned for employees when requested.

The AFGE, on the other hand, contends that the instant petition was timely filed because Article XII provides no fixed term for the extension of the agreement, and, therefore, a petition for exclusive recognition would be blocked for an indefinite period. The AFGE also asserts that the NTEU failed to provide full and fair representation to the petitioned for employees when it became the exclusive representative since it did not designate local union representatives to replace the incumbent NCSA branch officers who resigned.

The record reveals that, in accordance with Article XII of the existing negotiated agreement, the NTEU notified the Activity on April 2, 1976, of its intent to modify the agreement, which was due to expire on July 2, 1976. On May 17, 1976, the NTEU forwarded its bargaining demands to the Activity, and on July 9, 1976, negotiations commenced between the parties. The instant petition was filed on July 29, 1976.

The record also reveals that the NCSA branch officers resigned on September 30, 1975, in response to a request from the membership. Since that time, there have been no local NCSA or NTEU representatives at the Activity. However, the record further indicates that the NTEU's National Office assisted an employee in the claimed unit in obtaining a promotion and in receiving payment for a health insurance claim. Another employee in the claimed unit received counseling assistance from the NTEU's National Office concerning a disciplinary matter. There is no record evidence indicating that the NTEU has failed or refused to represent any of the petitioned for employees regarding matters affecting their terms and conditions of employment.

4/ Section 202.3(c)(2) provides that:

> When an agreement covering a claimed unit has been signed and dated 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: . . . (2) Not more than ninety (90) days and not less than sixty (60) days prior to the expiration of the initial three (3) year period of an agreement having a term of more than three (3) years from the date it was signed and dated by the activity and the incumbent exclusive representative; . . .

Based on all the above circumstances, I find the instant petition to be timely filed. Thus, it has been held previously that where, as here, a negotiated agreement provides for automatic renewal unless one of the parties requests renegotiation, a party's request to renegotiate serves to terminate such negotiated agreement for bar purposes. Further, where the parties agree to an extension of the negotiated agreement to serve merely as an interim arrangement during a period of further negotiations, such an arrangement does not constitute a final, fixed term agreement, and may not operate as a bar to a petition otherwise timely filed. 5/ Under these circumstances, I find that when, on April 2, 1976, the NTEU notified the Activity of its intent to modify the existing agreement through negotiations, such notice had the effect of terminating the existing agreement for bar purposes on July 2, 1976. The further agreement of the parties to extend the existing negotiated agreement for an indefinite duration then does not, in my view, constitute a final, fixed term agreement which can serve to bar a petition. Accordingly, the instant petition was timely filed since it was filed after the expiration date of the parties' negotiated agreement.

However, I further find the claimed unit to be inappropriate for the purpose of exclusive recognition under the Order. The Assistant Secretary has held previously that, absent unusual circumstances, where the evidence shows that an established, effective, and fair collective bargaining relationship has existed, severance of a group of employees from an existing, more comprehensive unit will not promote the purposes and policies of the Order. 6/ In the instant case, the evidence establishes that the NTEU has provided full and fair representation to the petitioned for employees. There is no evidence that the NTEU has failed or refused to represent the petitioned for employees or that it has treated them in a disparate manner. Although the record indicates that there have been no local representatives in the Virgin Islands since the NTEU became the exclusive representative, in my view, the absence of local union representatives, standing alone, is not sufficient evidence to establish that the NTEU failed to represent the petitioned for employees in a fair and effective manner.

Accordingly, and in the absence of unusual circumstances, I find that the unit sought by the AFGE is inappropriate for the purpose of exclusive recognition, and I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 37-01717(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 11, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

5/ See Department of Housing and Urban Development, Greensboro Area Office, Greensboro, North Carolina, A/SLMR No. 813.

6/ See Veterans Administration Hospital, Montrose, N.Y., A/SLMR No. 872, and the cases cited therein at footnote 7.

November 15, 1977

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,
GREAT LAKES NAVAL BASE,
PUBLIC WORKS CENTER,
GREAT LAKES, ILLINOIS
A/SLMR No. 938

This case involved a petition filed by Local 2326, American Federation of Government Employees, AFL-CIO (AFGE) seeking an election in a unit described as all Wage Grade employees of the Activity. The Intervenor, Local R7-51, National Association of Government Employees (NAGE) and the Activity contended that the petition was filed untimely under Section 202.3(d) of the Assistant Secretary's Regulations. The matter was transferred to the Assistant Secretary by order of Regional Administrator for Labor-Management Services pursuant to Section 206.5(a) of the Assistant Secretary's Regulations.

The NAGE was certified as the exclusive representative of the sought unit on June 26, 1973, and the parties executed a negotiated agreement covering the bargaining unit on March 11, 1974. The negotiated agreement, by its terms, had a duration of three years from the date of approval by higher authority, which approval was given on April 4, 1974.

On January 28, 1977, the AFGE filed a petition in Case No. 50-15414(RO) seeking an election in the same unit sought herein. Thereafter, on March 22, 1977, the AFGE's request for withdrawal of its petition in Case No. 50-15414(RO) was approved. The instant petition was filed by the AFGE on April 4, 1977.

The Assistant Secretary concluded that the instant petition was filed untimely. In reaching this conclusion, he noted that the AFGE withdrew its petition in Case No. 50-15414(RO) within the 60 day "insulated" period, and that the Activity and incumbent NAGE were entitled to a 90 day period from the date of approval of such withdrawal, free from rival claim, within which to negotiate a new agreement. As the instant petition was filed within this 90 day period, it was found to have been untimely filed.

Accordingly, the Assistant Secretary ordered that the instant petition be dismissed.

A/SLMR No. 938

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE NAVY,
GREAT LAKES NAVAL BASE,
PUBLIC WORKS CENTER,
GREAT LAKES, ILLINOIS

Activity

and Case No. 50-15435(RO)

LOCAL 2326, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Petitioner

and

LOCAL R7-51, NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES

Intervenor

DECISION AND ORDER

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

Upon consideration of the entire record in the subject case, including the findings of the investigation, accompanying exhibits, and briefs filed by the Activity and Local R7-51, National Association of Government Employees, hereinafter referred to as NAGE, the Assistant Secretary finds:

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

2. On April 4, 1977, Local 2326, American Federation of Government Employees, AFL-CIO, hereinafter referred to as AFGE, filed a petition seeking certification as the exclusive representative of a unit described as: "All Wage Grade employees of the Department of Navy, Public Works Center, Great Lakes, Illinois, excluding all management officials, General Schedule employees, employees engaged in Federal personnel work in other than a purely clerical capacity, supervisors, and confidential employees as defined by Executive Order 11491, as amended." The NAGE and the Activity contend that the petition is untimely under the provisions of Section 202.3(d) of the Assistant Secretary's Regulations.

The undisputed facts are as follows:

On June 26, 1973, the NAGE was certified as the exclusive representative for the bargaining unit which is the subject of the instant petition. On March 11, 1974, the Activity and the NAGE executed a negotiated agreement which, by its terms, provided for a duration of three years from the date of its approval by higher authority. On April 4, 1974, this agreement was approved by the Department of the Navy's Office of Civilian Manpower Management.

On January 28, 1977, in Case No. 50-15414(RO), the AFGE filed a petition seeking an election in the same unit sought herein. On March 3, 1977, the Chicago Area Office of the Labor-Management Services Administration solicited withdrawal of the petition based on its view that the petition was filed untimely. 1/ On March 17, 1977, the AFGE requested withdrawal of its petition in Case No. 50-15414(RO), which was approved by the Area Administrator on March 22, 1977. As noted above, the AFGE filed the instant petition on April 4, 1977.

The Activity and the NAGE argue that the subject petition should be dismissed as untimely filed, despite the fact that it was filed subsequent to the termination of their negotiated agreement. In this regard, they contend that by reason of the AFGE's petition in Case No. 50-15414(RO), they were deprived of their "insulated" period within which to negotiate and consummate a new agreement free from rival claim, and, thus, under the provisions of Section 202.3(d) of the Assistant Secretary's Regulations, they were entitled to a period of 90 days from the date of the approval of the AFGE's withdrawal of its petition free from rival claim. 2/ I agree.

1/ As indicated above, the negotiated agreement between the Activity and the NAGE provided for a duration in excess of three years from the date of execution by the parties. Section 202.3(c) of the Assistant Secretary's Regulations provides that a petition for exclusive recognition or other election petition will be considered timely when filed -- "(2) Not more than ninety (90) days and not less than sixty (60) days prior to the expiration of the initial three (3) year period of an agreement having a term of more than three (3) years from the date it was signed and dated by the activity and the incumbent exclusive representative; . . ." Thus, with regard to the negotiated agreement involved herein, the initial three year bar period ran from the date of its execution by the Activity and the NAGE on March 11, 1974, until March 10, 1977, and the 60-90 day "open" period within which to file a timely petition for an election was from December 10, 1976, to January 9, 1977. See Naval Air Station, Willow Grove, Pennsylvania, A/SLMR No. 772. Hence, the AFGE's petition of January 28, 1977, was, in fact, filed untimely.

2/ Section 202.3(d) of the Assistant Secretary's Regulations provides:

When there is an agreement signed and dated by the activity and the incumbent exclusive representative having a term not exceeding three (3) years from the date it was signed, and a petition has

(Continued)

The underlying purpose of Section 202.3(c) of the Assistant Secretary's Regulations is to balance the right of employees in an exclusively represented unit to vote whether or not they desire to continue such exclusive representation with the purposes and policies of the Order to foster labor peace and the stability of exclusive representation. Hence, the Assistant Secretary's Regulations provide that a negotiated agreement between an activity and an incumbent exclusive representative would "bar" any petition for an election for a period of no more than three years from the date of its execution by the parties, irrespective of the agreed-upon duration of such agreement. Further, the Regulations provide for an "open" period within the "bar" period of such an agreement in which a petition for an election may be filed timely. The "open" period has been established as 60-90 days prior to the termination of the "bar" period in order to provide an "insulated" period of 60 days prior to the termination of the bar period during which the incumbent exclusive representative and the activity can negotiate a new agreement free from rival claim.

Where, as here, a petition for an election is filed and subsequently dismissed or withdrawn during the "insulated" period, or thereafter, the activity and the incumbent exclusive representative have been effectively deprived of the full "insulated" period within which to negotiate a new agreement. Section 202.3(d) of the Regulations was promulgated to rectify such a contingency by providing an additional "insulated" period to the activity and the incumbent exclusive representative within which to negotiate a new agreement. In the instant matter, as the AFGE's petition in Case No. 50-15414(RO) was filed during the "insulated" period of the negotiated agreement between the Activity and the NAGE, and withdrawn thereafter, the Activity and the NAGE were entitled, under Section 202.3(d) of the Regulations, to a 90 day period from March 22, 1977, the date of approval of the AFGE's withdrawal request, free from rival claim, to negotiate a new agreement. 3/ As the AFGE's petition herein was filed during this 90 day "insulated" period, it was untimely filed. Accordingly, I shall order that it be dismissed. 4/

2/ been filed challenging the representation status of the incumbent exclusive representative and the petition is subsequently withdrawn or dismissed less than sixty (60) days prior to the terminal date of that agreement, or any time thereafter, the activity and incumbent exclusive representative shall be afforded a ninety (90) day period from the date the withdrawal is approved or the petition is dismissed free from rival claim within which to consummate an agreement. . ."

3/ Cf. Denver Airways Facilities Hub Sector FAA, Rocky Mountain Region, DOT, Aurora, Colorado, A/SLMR No. 535.

4/ As the Activity and the NAGE were deprived, by the filing of the instant petition, of an "insulated" period within which to negotate a new agreement, under the provisions of Section 202.3(d) of the Regulations they shall be afforded an additional period of 90 days from the date of this decision, free from rival claim, within which to negotiate a new agreement.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 50-15435(RO) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 15, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

November 15, 1977

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

OFFICE OF THE SECRETARY,
DEPARTMENT OF TRANSPORTATION
A/SLMR No. 939

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3313 (Complainant) alleging that the Respondent violated Section 19(a)(1) of Executive Order 11491, as amended, by changing parking and building entry procedures over the 1976 Bicentennial weekend, and refusing to discuss the impact of these changes with the Complainant. The Respondent took the position that it was under no obligation to meet and confer with the Complainant because the changes had no "material impact on personnel policies, practices and general working conditions" as defined in Section 11(a), and the matter was an "internal security practice" within the scope of Section 11(b).

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. He concluded that the matter was an "internal security practice" within the meaning of Section 11(b), and that the Complainant never requested bargaining.

The Assistant Secretary, noting particularly 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.

A/SLMR No. 939

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

OFFICE OF THE SECRETARY,
DEPARTMENT OF TRANSPORTATION

Respondent

and Case No. 22-7520(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3313

Complainant

DECISION AND ORDER

On July 26, 1977, Administrative Law Judge Robert J. Feldman issued his Recommended Decision 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 Recommended Decision.

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 Recommended Decision and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 22-7520(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 15, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
OFFICE OF THE SECRETARY DEPARTMENT OF TRANSPORTATION Respondent	:	
and	:	Case No. 22-7520(CA)
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3313 Complainant	:	

David Cassidy, Executive Director
Local 3313, American Federation
of Government Employees
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Washington, D.C. 20024
For the Complainant

Robert I. Ross, Esq.
T.G.C. 30, Office of General Counsel
Office of the Secretary
U.S. Department of Transportation
Washington, D.C. 20590
For the Respondent

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION

This is an unfair labor practice proceeding in which a formal hearing of record was held pursuant to Executive Order 11491 as amended (hereinafter referred to as the Order) and 29 C.F.R. Part 203.

Respondent is charged with violating Section 19(a)(1) of the Order by unilaterally changing parking and building entry procedures over the July 4th, 1976 weekend. Upon all the evidence adduced, my observation of the witnesses, and my judgment

of their credibility, I make the Findings of Fact and reach the Conclusions of Law set forth below.

FINDINGS OF FACT

1. Complainant is the exclusive representative of certain collective bargaining units composed of non-supervisory, general schedule professional and non-professional employees of the Office of the Secretary of Transportation, Headquarters, Washington, D.C.

2. Employees represented by Complainant work in the following divisions or elements of the Department of Transportation: Office of the Secretary, Materials Transportation Bureau, Urban Mass Transportation Administration, Coast Guard, and National Highway Traffic Safety Administration.

3. Employees represented by Complainant are located in each of three buildings: DOT-HQ or Nassif Building; FOB-10A Building; and TRPT or Trans Point Building at Buzzard Point.

4. Each of the three buildings contains garage space for which parking permits are issued to employees pursuant to published departmental rules.

5. Normally, employees who do not have parking permits are allowed to park their cars in the garage facilities after hours and on weekends upon presentation of Government identification without a parking permit, thus facilitating their earning overtime.

6. Normally, employees are allowed to bring family members into the office areas of the buildings during working hours and on weekends as well.

7. Shortly before the weekend of Saturday, July 3, 1976, through Monday, July 5, 1976, Mr. Frank Stanton, Respondent's Director of Investigations and Security, was advised by the Federal Protective Service of the General Services Administration of the need for tightening security in nearby Government facilities because of anticipated demonstrations and possible violence during the Bicentennial celebrations.

8. At a meeting on Thursday, July 1st, the Federal Protective Services requested Mr. Stanton, as well as representatives of other agencies, to have the buildings closed over the weekend to all persons except those to be designated on a written list of people to be admitted.

9. Following that meeting, Mr. Stanton conferred with the Assistant Secretary of Transportation for Administration and the Director of Administrative Services. He also ascertained that no over-time work was required over the weekend in any of the bargaining units concerned.

10. Because of the necessity of making the buildings accessible, however, to a considerable number of employees who might be called for emergency duty in the event of an airplane crash or hi-jacking over the weekend, it was determined not to prepare a list of persons entitled to enter, but to tighten security by allowing parking by permit at the Nassif Building only and by limiting access to any of the buildings solely to employees holding Government identification cards.

11. On Thursday, July 1st, Respondent caused to be published in a special edition of "Southwest Seventh", a bulletin distributed in the Department of Transportation Headquarters Buildings, the following notice:

> DOT GARAGE OPERATION OVER JULY 4TH WEEKEND
>
> On Saturday, Sunday, and Monday, July 3, 4, and 5, the Nassif Building garage will be open continuously. The FOB-10A and Trans Point Building garages will be closed. Admission to the Nassif Building garage will be by parking permit for either the Nasiff Building, FOB-10A, or Trans Point Building garages. Admission by DOT identification card will not be permitted for this period.

12. On Friday, July 2nd, Respondent caused to be published in a special edition of the same bulletin the following notice:

> JULY 4TH WEEKEND ACCESS TO DOT BUILDINGS (OFFICE SPACE)
>
> The General Services Administration (GSA) has imposed a Government-wide security requirement during 3, 4 and 5 July 1976, which limits entry into all Government office space to Government employees, who present official identification cards.
>
> GAS Federal Protective Officers have been instructed not to admit anyone but Government employees, thus excluding families

or other groups desiring to enter Government work space on a single identification card.

The previously issued requirement for access to the garage space by parking permit remains unchanged.

13. Both of the actions above referred to were determined and announced without prior notice to or consultation with any representative of the Complainant Union.

14. No request for consultation with respect to either action or its impact upon employees was made by Complainant or any of its officers or representatives prior to the transmittal of an unfair labor practice charge dated August 4, 1976.

15. No proof was offered that the request of any employee for a temporary parking permit for the weekend in question was denied, or that any employee was refused entry to either the garage space or the office space over such weekend.

CONCLUSIONS OF LAW

The stated ground for this unfair labor practice complaint is the failure of Respondent to consult with Complainant as to the impact on employees of Respondent's unilateral change in working conditions during non-working hours. The real "gripe", however, is that for a period of two days (Monday, July 5, being an official holiday, was excluded under the extant rules for parking), some employees may have been denied the dubious privilege of parking their cars on a weekend in Respondent's garages, and their children may have been deprived of their inherent right to use the Respondent's toilet facilities after prolonged abstinence due to watching the Bicentennial celebration. More pragmatic than facetious is the assumption that formal remedial action is thought to be necessary to forestall the imminent threat of a similar tragic occurrence during Tricentennial observances in the year 2076.

It is elementary, of course, that a privilege once granted can, if continued, ripen into an inalienable right. So we may assume that the practice of permitting employees to park in the garage space on weekends without a permit while working over-time became a working condition. It is extremely doubtful, however, that parking on weekends for purposes of unorganized recreation or personal convenience and bringing family members into office space can be reasonably construed to be "matters affecting working conditions" with respect to which the agency is required to meet and confer pursuant to Section 11(a) of the Order.

Moreover, any obligation to confer regarding the impact of the change on employees in the units represented by Complainant is negated by the exemption in Section 11(b) for matters which relate to internal security practices. Also, the short time available for initiating the change deprived Complainant of an adequate opportunity to request prior consultation and no doubt contributed to Respondent's failure to notify any Union official prior to distribution of the announcement. The purported discriminatory effect of permitting certain officials of the Department to enter the Nassif building via private elevator is clearly outside the scope of this proceeding.

What we have then is an offense which, in my view, is not cognizable under the Order. Yet it is an affront to sensibilities and pride which, in the development and preservation of sound labor relations, might have been avoided, despite the time pressure, by a courtesy telephone call before the announcement appeared. Under the circumstances, a suitable recognition of mutual obligations, short of a formal unfair labor practice remedy, might be in order. The apparent inability of the parties to resolve their contretemps without official administrative intervention suggests a reciprocal rigidity that precludes successful negotiation. In the words of the Federal Labor Relations Council:

> "Cooperative labor relations are not established or maintained when a labor organization or the management of an agency establishes as its first priority ... the vindication of its position in an unfair labor practice proceeding." Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, FLRC No. 74A-77, Report No. 79, at p. 7.

In view of the recommended disposition on the merits, I find it unnecessary to discuss Respondent's argument as to Complainant's alleged lack of standing by reason of the circumstance that as a union local it is without national consultation rights. Additionally, I fail to see any Fourth Amendment question in this case and decline to pass upon it, but note for the record that a constitutional issue was timely raised by Complainant.

RECOMMENDATION

In view of the foregoing Findings of Fact and Conclusions of Law, I recommend to the Assistant Secretary that the complaint be dismissed in its entirety.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: July 26, 1977
Washington, D.C.

November 15, 1977

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,
SHERIDAN, WYOMING
A/SLMR No. 940

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1219, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally discontinuing a past practice, i.e., the purchase of impact-resistant eyeglasses for certain employees.

The Assistant Secretary adopted the Administrative Law Judge's recommended dismissal of the complaint. In this regard, the Administrative Law Judge noted that the Respondent's past practice of purchasing impact-resistant glasses for certain of its employees who wore glasses and who worked with psychiatic patients dated back to a period when impact-resistant glasses were not readily available. However, the Administrative Law Judge noted as of 1972 the Food and Drug Administration required that all glasses sold in the United States be impact-resistant. Thus, the Administrative Law Judge concluded that the eyeglasses in question no longer constituted "special equipment" within the meaning of 5 U.S.C. § 7903 under which the Respondent received its authority to use appropriated funds for the purchase of such equipment. Therefore, he concluded that the Respondent's decision to discontinue purchasing what are now defined as "standard eyeglasses" was necessary in view of the applicable law.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 940

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
SHERIDAN, WYOMING

Respondent

and

Case No. 61-3227(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1219, AFL-CIO

Complainant

DECISION AND ORDER

On August 2, 1977, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-3227(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 15, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ Cf. Department of the Army, Dugway Proving Ground, Dugway, Utah, 6 A/SLMR 618, A/SLMR No. 745.

U.S. DEPARTMENT OF LABOR
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In the Matter of

VETERANS ADMINISTRATION HOSPITAL
SHERIDAN, WYOMING
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1219, AFL-CIO
Complainant

CASE NO. 61-3227(CA)

Daniel T. McCarthy, Esquire
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Veterans Administration
Office of District Counsel
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Phoenix, Arizona 85012
For the Respondent

Kenneth Bull
National Representative
American Federation of Government Employees
5001 South Washington Street
Englewood, Colorado 80110
For the Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding was heard in Sheridan, Wyoming, on May 24 and 25, 1977, and arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint was issued on April 8, 1977. This case was initiated by a complaint filed on August 23, 1976, by the American Federation of Government Employees, AFL-CIO, Local 1219 (hereinafter the "Union"). The complaint alleged that the Veterans Administration Hospital at Sheridan, Wyoming, (hereinafter the "respondent") violated sections 19(a)(1) and (6) of the Order by refusing to negotiate with the Union regarding its decision to discontinue purchasing impact-resistant eyeglasses for certain employees.

At the hearing, all parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed briefs which have been duly considered. 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

At all times relevant to this proceeding, the Union was the exclusive representative of various nonprofessional employees at the Veterans Administration Hospital, Sheridan, Wyoming. The negotiated agreement between the Union and the respondent pertaining to the period in question is dated February 14, 1974.

For many years prior to 1976, respondent purchased impact-resistant eyeglasses for employees working with mentally ill patients at the hospital. Since most glasses available to the public prior to 1972 were made with ordinary crown glass lenses which were more easily shattered, respondent considered the impact-resistant glasses as special equipment for the protection of its personnel. It was on this ground that the respondent justified the purchase of these glasses with public funds.

In 1972, however, the Food and Drug Administration held that in order "(t)o protect the public more adequately from potential eye injury, eyeglasses and sunglasses must be fitted with impact-resistant lenses ..." 21 C.F.R. § 3.84 (effective February 2, 1972). On February 10, 1972, the Veterans Administration Central Office in Washington, D. C., advised the respondent by telegram of the new FDA regulation. The telegram further stated:

> ... However, if station management determines that an employee requires safety glasses, purchase is authorized as a protective item under VAPR 8-74.106. Safety glasses will meet the requirements of Federal Specification GGG-G-513B.

The above-mentioned Federal Specification required that the lenses meet the standards established by the American National Standards Institute (ANSI) for occupational eye protection. Lenses meeting ANSI requirements are capable of withstanding a much greater impact than lenses which only satisfy the 1972 FDA requirements.

For reasons undisclosed by the record, the respondent ignored the above telegram from its Central Office, and continued to purchase impact-resistant eyeglasses for certain of its employees even though these glasses were required for the general public. It was not until October of 1975, that respondent appeared to question its authority to purchase these glasses. On October 14, 1975, the Hospital Director wrote the following memorandum to all employees regarding "Employee Safety Glasses":

> 1. The practice of providing glasses to employees coming in contact with mentally ill patients goes back a number of years to a time when glasses with heat-strengthened lenses were not routinely available. The 1972 FDA ruling requiring that all eyeglasses sold be made of plastic, impact-resistant glass, or laminated glass, subsequently changed the picture. All glasses sold including those we purchased on VA contract, now conform to FDA requirements.
>
> 2. By teletype of February 10, 1972, VACO states that safety glasses authorized for purchase under this authority (VAPR 8-74.106) are to meet the requirements of Federal Specification GGG-G-513B. This specification covers industrial goggles and lenses.

3. Our current practice of buying so-called safety glasses for employees therefore becomes questionable particularly since they are no longer any different from those sold by opticians to the general public and since they cannot be classified as industrial type safety glasses.

4. The purchase of impact-resistant eyeglasses will be discontinued as all glasses sold meet this standard by the 1972 FDA ruling. Provision is made for reimbursement to an employee for glasses damaged or destroyed by a patient.

Prior to issuing this, management showed the Union president a rough draft of the above memorandum and noted that he had "no problem" with it. However, on October 21, 1975, the Union filed a pre-complaint charge alleging a violation of section 19(a)(1) and (6) of the Executive Order. Subsequently, on December 1, 1975, the Hospital Director rescinded the above-quoted memorandum.

In February of 1976, respondent provided the Union with a copy of a proposed Hospital Memorandum entitled "Protective Eye Equipment." The purpose of the memorandum was to establish a policy and procedure by which appropriate protective eye equipment would be provided. Under this proposal, the past practice of purchasing standard impact-resistant eyeglasses would have been discontinued and respondent would only purchase glasses meeting the more rigid ANSI requirements. Furthermore, such glasses would only be purchased when an "above average hazard existed; moreover, the need for safety glasses would be determined on an individual basis." On March 8, 1976, Floyd E. Burrows, the Union's president, informed the Hospital Director by memorandum that the Union did not approve of any change in respondent's past practice of providing impact-resistant eyeglasses to employees who work with mentally disturbed patients. Burrows further stated that the proposed change in working conditions would have an adverse economic impact upon the employees and that the issue should be negotiated.

On March 16, 1976, Frederic E. Wessel, the new Hospital Director, wrote a memorandum to Burrows in which he reminded Burrows of the Veterans Administration procurement regulation (VAPR 8-74.106) describing respondent's authority to purchase protective equipment. The regulation is entitled "Protective Items" and states, in part, as follows:

> The purchase and maintenance from available appropriations, of special clothing and equipment for the protection of personnel in the performance of their assigned tasks is authorized by [5 U.S.C. § 7903].

Wessel also reviewed the change in circumstances brought about by the 1972 FDA standards and stated as follows:

> The management of this VA Hospital will continue to provide authorized protective eye equipment to all employees where need of such equipment is established. VA Regulations provide for the purchase of protective items; eyeglasses of standard impact-resistant lenses do not meet this criteria. [The proposed] hospital memorandum will cause the discontinuance of the purchase of eyeglasses of standard impact-resistant lenses.

Wessel concluded by inviting the Union to discuss the impact of the proposed hospital memorandum.

On March 29, 1976, a labor-management meeting was held to discuss this issue. The Union was represented by Burrows and Wayne Doyle; respondent was represented by the Hospital Director, the Assistant Director, and a personnel officer. At this meeting the difference between "safety glasses" and standard impact-resistant glasses was discussed. The Union took the position that the discontinuance of the purchase of standard impact-resistant glasses should be negotiated. Management told the Union at this meeting that the purchase of these glasses was unlawful because they could no longer be considered true "safety glasses." Burrows further asked the Hospital Director to request guidelines from OSHA for safety glasses.

On April 5, 1976, Wessel wrote a memorandum to the Occupational Safety and Health Administration requesting "criteria for provision of eye protective equipment" for the employees in question. On April 27, 1976, the Director of the Office of Federal Agency Safety Programs, U. S. Department of Labor, replied to Wessel's letter. He referred Wessel to the OSHA standards for employees in the private sector set forth in 29 C.F.R. § 1910.133. That section requires employers to supply safety glasses meeting ANSI standards. However, he was unable to provide any specific guidelines applicable to respondent's Federal employees. He concluded by referring Wessel to the VA's occupational safety and health "designee" in Washington, D. C. On May 19, 1976, Wessel wrote a memorandum to this designee in which

he set forth management's position and requested information regarding the appropriate criteria for eye protective equipment. Wessel received a reply dated June 28, 1976, which concurred with his opinion that the purchase of impact-resistant eyeglasses should be discontinued.

By memorandum of July 15, 1976, Wessel informed Burrows that he had decided to discontinue the purchase of impact-resistant eyeglasses for the employees. He also provided Burrows with a copy of the June 28, 1976, letter from the VA Central Office. He further stated as follows:

> You also mentioned [in your March 8, 1976, memorandum] that the practice of providing eyeglasses for a period of years is a drastic change in working conditions "via the economic route." Fringe benefits for Federal employees are established by the United States Government and nowhere has it stated that Federal employees who work with psychiatric patients are entitled to free eyeglasses.

On July 21, 1976, Burrows demanded that the matter be negotiated pursuant to the rules set forth in the parties' negotiated agreement.

By memorandum dated July 29, 1976, Wessel again informed Burrows that respondent did not have the authority to purchase standard impact-resistant glasses because they were not "truly safety glasses." He then stated:

> ... Therefore, our decision to discontinue the purchase of impact-resistant glasses is not negotiable.
>
> As you know we have met with you to discuss the impact of this decision. At those times your comments have been restricted to the decision itself. We are willing to meet with you again to further discuss the impact and method of implementation of this decision. Please notify the Chief, Personnel Service by August 10, 1976, if you desire to meet and confer over the impact and method of implementation of this decision.

The Union filed a pre-complaint charge dated August 4, 1976. Wessel responded to this charge by letter of August 12, 1976, in which he made it clear that his decision to discontinue the purchase of impact-resistant glasses was final and was not negotiable. He reasoned

that "(s)ince the use of impact-resistant lenses is now the norm for all eyeglasses, there is no longer any authority to purchase this type of eyeglass as a special safety item."1/

On August 23, 1976, the Union filed its complaint against the respondent alleging violations of the Order by virtue of respondent's refusal to negotiate "the matter of continuing to supply the glasses to the employees as in the past."

On September 3, 1976, the Hospital Director issued "Hospital Memorandum No. A-25" stating his position with respect to protective eye equipment. This memorandum was essentially the same as the Hospital Memorandum which had been proposed in February of 1976.2/

Conclusions of Law

The issue presented for decision is whether respondent violated section 19(a)(1) and (6) of the Executive Order by refusing to negotiate with the Union prior to discontinuing the practice of purchasing standard impact-resistant eyeglasses for certain employees. Section 11(a) requires the parties to meet and confer with respect to personnel policies and practices and matters affecting working conditions "so far as may be appropriate under applicable laws and regulations."3/ Thus, the agency's decision to

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1/ Wessel acknowledged that a proposal to negotiate on the purchase of "true safety glasses" could be negotiable; however, the Union was only interested in negotiating with respect to the discontinuance of the purchase of standard impact-resistant glasses.

2/ The September 3 memorandum was, in effect, merely a formal announcement of the final decision that had been made prior to the filing of the complaint. In view of this finding, respondent's motion to dismiss the complaint as premature is denied. Furthermore, assuming arguendo that the complaint was premature, it should be noted that respondent did not raise this objection until the day of the hearing. Since the complaint could easily have been amended if the alleged procedural deficiency had been raised earlier, it would be patently unfair to dismiss the complaint on this ground.

3/ Section 11(a) qualifies the applicable regulations as those "for which a compelling need exists under criteria

discontinue the purchase of these eyeglasses would not be negotiable if the purchase of these glasses was not authorized by law. If this was true, only the impact of the decision upon the employees, and the method of implementation, would be negotiable.

The respondent's authority to purchase safety glasses or other protective eye equipment derives from 5 U.S.C. § 7903 (1970).[4] That section is entitled "Protective Clothing and Equipment" and states, in part, as follows:

> Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks.

I must conclude that the eyeglasses discontinued by respondent in 1976 did not constitute "special equipment" for the protection of respondent's personnel. Those glasses were the same as all glasses being sold to the general public at that time. Respondent discontinued the purchase of the glasses because they merely satisfied the Food and Drug Administration's standards for impact resistance applicable to all eyeglasses and could not therefore be considered special safety glasses. Since the glasses could not be considered "special equipment" within the meaning of 5 U.S.C. § 7903 (1970), respondent did not possess the requisite authority to purchase them with public funds.

Further support for the above conclusion is found in decisions of the Comptroller General, which are binding on the Government agencies.[5] It has been held that when a federal employee reasonably might be expected to furnish equipment as a part of the official equipment of his position, appropriated funds are not available for the purchase thereof. 32 Comp. Gen. 229 (1952) (and decisions cited therein). Clearly, all federal employees who require corrective lenses are expected to furnish their own eyeglasses.

3/ (continued) established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision...." The ultimate conclusion in the instant case does not rest upon any VA regulation.

4/ It is clear that the VA's annual appropriation for the year 1976 did not specifically provide for the purchase of standard eyeglasses for employees.

5/ See Comptroller General Decision B-161038, July 25, 1967; 31 U.S.C. §§ 44 and 74; and 32 Comp. Gen. 229, at 231 (1952).

Therefore, respondent's decision to discontinue purchasing standard eyeglasses for its employees was necessary in view of the applicable law. The Executive Order does not contemplate negotiations with respect to a decision of this nature.

Under the circumstances, it was only necessary for the respondent to give the exclusive representative a reasonable opportunity to meet and confer concerning the impact and implementation of its decision. Respondent complied with this requirement but complainant did not request consultation or bargaining on these matters. Since there was ample opportunity for complainant to request such bargaining or consultation prior to implementation of the decision, and complainant never requested such bargaining or consultation, I conclude that respondent did not refuse to consult, confer, or negotiate with respect to the impact of its decision. Department of Air Force, 4392 Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 350 (1974); United States Air Force Electronics Systems Division (AFSC), Hanscom Air Force Base and Local 975, National Federation of Federal Employees, A/SLMR No. 571 (1975).

RECOMMENDATION

Having found that respondent has not engaged in certain conduct prohibited by section 19(a)(1) and (6) of Executive Order 11491, as amended, I recommend that the complaint herein be dismissed in its entirety.

Randolph D. Mason
RANDOLPH D. MASON
Administrative Law Judge

Dated: August 2, 1977
San Francisco, California

November 16, 1977

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

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, ATLANTA, GEORGIA
A/SLMR No. 941

This case involved a petition for clarification of unit (CU) filed by the Defense Contract Administration Services Region, Atlanta, Georgia, (Activity) which, in effect, sought a determination by the Assistant Secretary as to the impact of a December 3, 1976, reorganization on certain units represented by the American Federation of Government Employees, AFL-CIO, Local 1858 (AFGE Local 1858) and American Federation of Government Employees, AFL-CIO, Local 3024 (AFGE Local 3024).

The Activity took the position that as a result of the reorganization, the unit represented by AFGE Local 1858 no longer remained appropriate for the purpose of exclusive recognition under the Order and that the employees formerly represented by AFGE Local 1858 accreted into the unit represented by AFGE Local 3024. The Activity took the further position that the unit represented by AFGE Local 3024 remained, subsequent to the reorganization, appropriate for the purpose of exclusive recognition under the Order. On the other hand, AFGE Local 1858 took the position that its unit remained, after the reorganization, viable and appropriate for the purpose of exclusive recognition under the Order.

Prior to the reorganization, the Activity was composed of a number of Defense Contract Administration Services Districts (DCASDs) and Defense Contract Administration Services Offices (DCASOs). DCASD Birmingham, Alabama, had attached to it four DCASOs located at New Orleans, Louisiana; Huntsville, Alabama; Hayes (Birmingham, Alabama); and Hayes (Dothan, Alabama). AFGE Local 1858 represented all nonprofessional employees assigned to DCASO Huntsville, and AFGE Local 3024 represented all other nonprofessional employees in DCASD Birmingham, including employees assigned to DCASOs at New Orleans, Birmingham, and Dothan. As a result of the reorganization in December 1976, DCASO Huntsville was disestablished, DCASOs Hayes (Birmingham) and Hayes (Dothan) became Defense Contract Administration Services Plant Representative Offices (DCASPROs), and DCASD Birmingham and DCASO New Orleans became Defense Contract Administration Services Management Areas (DCASMAs).

The Assistant Secretary found that the employees of the former DCASO Huntsville had become organizationally and operationally integrated with the employees of DCASMA Birmingham, and, as a consequence, the unit represented by AFGE Local 1858 no longer remained appropriate for the purpose of exclusive recognition under the Order. He also found that the employees remaining in Huntsville accreted to the bargaining unit represented by AFGE Local 3024 and that this unit, subsequent to the reorganization, remained appropriate for the purpose of exclusive recognition under the Order.

Accordingly, the Assistant Secretary ordered that the unit be clarified consistent with his findings.

A/SLMR No. 941

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, ATLANTA, GEORGIA

Activity/Petitioner

and Case No. 40-07911(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1858

Labor Organization

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3024

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 Robert F. Woodland, 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, including a brief filed by the Activity/Petitioner, 1/ the Assistant Secretary finds:

The Defense Contract Administration Services Region, Atlanta, Georgia, herein called the Activity, filed the subject petition seeking a determination by the Assistant Secretary as to the effect of a reorganization of December 3, 1976,on the exclusively recognized bargaining units located at Huntsville, Alabama, 2/ and Birmingham, Alabama. 3/ The Activity and AFGE Local 3024 contend that, as a result of the December 3, 1976, reorganization, the unit represented by AFGE Local 1858 is no longer appropriate for the purpose of exclusive recognition under the Order and that employees currently assigned to Huntsville have accreted into the unit represented by AFGE Local 3024. In essence, the Activity takes the position that the unit represented by AFGE Local 3024 should be clarified to reflect certain changes in its organization resulting from the reorganization. Thus, it asserts that the unit represented by AFGE Local 3024 should include all nonprofessional employees assigned to the Defense Contract Administration Services Management Areas (DCASMAs) located at Birmingham, Alabama, and New Orleans, Louisiana, as well as employees assigned to the Defense Contract Administration Services Plant Representative Offices (DCASPROs) at Birmingham, Alabama and Dothan, Alabama. On the other hand, AFGE Local 1858 contends that its unit continues, after the reorganization, as a viable and appropriate unit for the purpose of exclusive recognition under the Order.

The Activity is 1 of 9 regions of the Defense Logistics Agency, formerly known as the Defense Supply Agency. Headquartered in Marietta, Georgia, it provides contract administration services in support of the Department of Defense and other Federal agencies and is headed by a Regional Commander, a military officer. Reporting to the Commander, and located at the headquarters, are several offices and directorates which are responsible for planning and monitoring all regional operations. The offices are concerned primarily with matters regarding planning and management, command support, civilian personnel administration, and legal counsel. The directorates oversee matters regarding systems and financial management, contract administration, production, quality assurance, industrial security, and contractor employment compliance. In addition, the Activity is organizationally composed of operations offices located throughout the geographic area under its jurisdiction. These offices are responsible for the achievement of the Activity's mission within the geographic area of their respective responsibilities.

Prior to the reorganization of December 3, 1976, the Activity was composed of three Defense Contract Administration Services Districts (DCASDs), among which was DCASD Birmingham, Alabama. Further, the DCASDs were organizationally composed of Defense Contract Administration Services Offices (DCASOs) which reported to the Activity through the DCASD.

1/ The brief filed by the American Federation of Government Employees, AFL-CIO, Local 1858, herein called AFGE Local 1858, was submitted untimely and has not been considered.

2/ AFGE Local 1858 was recognized as the exclusive representative of employees in a unit described as: "All current and future eligible civilian employees of DCASO Huntsville, Alabama, . . . excluding management officials (as defined by Executive Order 11491), employees engaged in personnel work in other than purely clerical positions, supervisory employees, professional employees, consultants, co-operative students, employees under the category as defined in 10 USC 1581 (a) as amended through PL-87-267 dated 4 October 1961 and PL-85-322 dated 11 February 1958 (formerly PL-313 Type Positions) and supergrade employees, and temporary employees (appointment for 90 days or less)."

3/ The American Federation of Government Employees, AFL-CIO, Local 3024, herein called AFGE Local 3024, was recognized as the exclusive representative of employees in a unit described as: "All eligible employees in the Defense Contract Administration Services District, Birmingham, Alabama, area, excluding Defense Contract Administration Services Office, Huntsville, Alabama, . . . /and excluding/ management officials or supervisors as defined by /Executive Order/ 11491, as amended, employees engaged in Federal personnel work in other than a purely clerical capacity, guards, professional employees, employees serving on temporary appointments of 90 days or less, consultants and experts, part-time employees, co-op students, /and/ employees whose assigned duties require that they represent the interest of DCASR Atlanta in consultation or negotiations with the union."

Attached to DCASD Birmingham were four DCASOs: DCASO Hayes (Birmingham, Alabama), DCASO Hayes (Dothan, Alabama), DCASO New Orleans, Louisiana, and DCASO Huntsville, Alabama. The unit represented by AFGE Local 1858 was restricted to nonprofessional employees assigned to DCASO Huntsville, while the unit represented by AFGE Local 3024 included all other nonprofessional employees of DCASD Birmingham, including DCASO Hayes (Birmingham), DCASO Hayes (Dothan) and DCASO New Orleans.

As a result of the reorganization, the Activity abolished the DCASDs and the DCASOs and created DCASMAs and DCASPROs, each of which is independently responsible to the Activity Commander. The record reveals that subsequent to the reorganization, the Activity is composed of six DCASMAs, among which are DCASMA Birmingham and DCASMA New Orleans, and six DCASPROs, among which are DCASPRO Hayes (Birmingham) and DCASPRO Hayes (Dothan). The former DCASO Huntsville ceased, after the reorganization, to constitute a separate organizational component of the Activity with certain employees being transferred to DCASMA Birmingham and the employees remaining at Huntsville becoming organizationally and operationally integrated into DCASMA Birmingham.

Under the new organizational structure, all Huntsville employees are subject to the supervision of the DCASMA Birmingham Commander and make operational reports to the Activity through the DCASMA Birmingham organization. 4/ The record further reveals that all employees of DCASMA Birmingham, including employees assigned to Huntsville, Alabama, enjoy essentially similar job classifications, skills, and duties pursuant to policies and procedures established by the Activity, and enjoy uniform personnel and labor relations policies and practices administered by the Activity's Personnel Office.

Under all the foregoing circumstances, I find that the Activity's employees assigned to Huntsville, Alabama, do not enjoy a clear and identifiable community of interest separate and distinct from other employees of DCASMA Birmingham and that a unit limited to employees at that location will not promote effective dealings or efficiency of agency operations. Thus, as noted above, as a consequence of the 1976 reorganization, the employees assigned to Huntsville became organizationally and operationally integrated with the employees of DCASMA Birmingham; and thereafter all employees of DCASMA Birmingham enjoy common supervision, essentially similar working conditions, and are subject to the same personnel policies and practices administered by the same Personnel Office.

In these circumstances, I find that the employees assigned to Huntsville accreted to the bargaining unit represented exclusively by AFGE Local 3024 and that such unit, subsequent to the reorganization, includes employees who share a clear and identifiable community of interest separate and distinct from other employees of the Activity and will promote effective dealings and efficiency of agency operations.

4/ As part of the reorganization, a Resident-in-Charge was appointed at Huntsville. The Resident-in-Charge is responsible only for certain housekeeping and administrative matters attendant upon maintaining the office at Huntsville.

Accordingly, I shall clarify the unit represented by AFGE Local 3024 by including in such unit the employees formerly represented by AFGE Local 1858 and by changing the unit description to reflect the organizational changes resulting from the December 3, 1976, reorganization.

ORDER

IT IS HEREBY ORDERED that the unit sought to be clarified herein, for which the American Federation of Government Employees, AFL-CIO, Local 3024 was recognized in 1969 as the exclusive representative, be, and it hereby is, clarified by including in said unit employees assigned to Huntsville, Alabama, and by substituting and adding certain designations to reflect the organizational elements in said unit. The unit description, as clarified, is as follows:

> All employees of Defense Contract Administration Services Region, Atlanta, assigned to DCASMA Birmingham, DCASMA New Orleans, DCASPRO Hayes (Birmingham), and DCASPRO Hayes (Dothan), excluding professional employees, management officials, confidential employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order.

Dated, Washington, D. C.
November 16, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

November 18, 1977

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,
INTERNAL REVENUE SERVICE,
IRS CHICAGO DISTRICT
A/SLMR No. 942

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU Chapter 010 (Complainants) alleging that the Respondent violated Section 19(a)(1) of the Order by a supervisor questioning one of his employees who had been engaged in a conversation with other employees, including NTEU stewards, during a coffee break. The supervisor allegedly inquired as to whether the employee was seeing the stewards on union business. If so, he allegedly indicated that the employee was required to have the supervisor's permission in advance.

The Administrative Law Judge concluded that the supervisor's inquiry was reasonable under the circumstances, that his statement to the employee with respect to the necessity for advanced permission before meeting with the steward was meant to apply to meetings during working time, in accordance with the parties' negotiated agreement, and that the employee so understood the comment. The Administrative Law Judge, therefore, recommended that the complaint be dismissed in its entirety.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 942

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
IRS CHICAGO DISTRICT

Respondent

and Case No. 50-13151(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 010

Complainants

DECISION AND ORDER

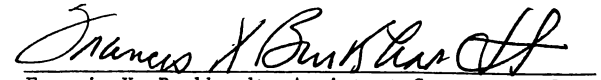
On August 16, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 50-13151(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 18, 1977



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
IRS CHICAGO DISTRICT
Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION, NTEU CHAPTER 010
Complainant

Case No. 50-13151(CA)

Appearances:

William E. Persina, Esq.
Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
For the Complainant

David J. Murphy, Esq.
Internal Revenue Service
Office of Regional Counsel
219 South Dearborn Street
22nd Floor South
Chicago, Illinois 60604
For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated May 20, 1976 and filed May 21, 1976 alleging that on October 15, 1975 the Respondent had violated Section 19(a)(1) of the Executive Order. The violation was alleged to consist of a supervisor of the Respondent approaching a group of employees including several NTEU

representatives and one of his supervisees, who were engaged in conversation during a coffee break, asking whether the representatives were talking to his supervisee about a union matter, and taking the supervisee aside and telling him "if you are discussing union business, you should let me know first." On June 24, 1976 the Respondent filed a response to the complaint which contained a motion to dismiss.

On November 16, 1976 the Regional Administrator issued a Notice of Hearing to be held January 18, 1977 in Chicago, Illinois. On January 4, 1977 he issued an Order Rescheduling Hearing to March 7, 1977. A hearing was held in Chicago on that date. Both sides were represented by counsel. Both sides produced witnesses who were examined and cross-examined, offered exhibits which were received in evidence, made closing arguments, and filed briefs.

Facts

The IRS Chicago District has a Facility on the south side of Chicago known as the South Area Office. The Facility consists principally of revenue officers and revenue agents. A revenue officer is responsible for collecting delinquent accounts and obtaining delinquent returns. A revenue agent verifies the accuracy of returns that are filed. It is uncommon for revenue agents and revenue officers to have conferences with each other on official business.

It is an established practice at the Facility to permit a morning coffee break and an afternoon coffee break. No particular time or duration is prescribed for such breaks. They usually last about ten minutes and it is expected that they will not go beyond fifteen minutes. They are usually taken in an area about fifteen feet square containing a coffee dispensing machine, soft drink and candy vending machines, and tables and chairs. Sometimes an employee may obtain his coffee from the coffee dispenser and take his break elsewhere but that is not the usual practice.

The Facility is located on one floor. Most of the floor is open space containing desks. The revenue agents and revenue officers have desks in the open space. Some supervisors have private offices. There are four or five conference rooms. There is one bank of six private rooms running almost the entire width of the floor; two of them are conference rooms and four are private offices. Conference rooms are used for interviews with taxpayers. They are used also by revenue agents to prepare their reports in better privacy and less commotion than obtain at their desks in the open area. One of them, identified

at the hearing as Conference Room B, is used also as a passageway through the bank of six offices referred to above to avoid walking around the entire bank when going from one open area to another.

Six people were involved in the incident on October 15, 1975 that the Complainant contends culminated in an unfair labor practice prohibited by Section 19(a)(1) of the Executive Order. Four were members of the unit and two were supervisors.

Richard Kaczmarek was a revenue agent who was using the room identified as Conference Room B to write a report. He was also a union steward. Errol A. Anderson was also a revenue agent. He had been a union steward but had relinquished that office on October 10, 1975 because of the pressure of other work. He had unsuccessfully suggested to Stephen Barkauskas that Barkauskas succeed him as a steward. Barkauskas was a revenue officer. A few days after October 15, 1975 Barkauskas did succeed Anderson as a steward. Thomas O'Malley was a revenue agent. During the conversation involved he left and re-entered Conference Room B several times. Thus three of the members of the unit involved in the conversation described below were revenue agents and one, Barkauskas, was a revenue officer.

Richard Lovejoy was a supervisor but not a supervisor of any of the aforementioned employees. His office was adjacent to Conference Room B. The two doors on opposite sides of his office were adjacent to the two doors to Conference Room B, separated from them only by the wall separating the two rooms. Eugene T. Liberty was also a supervisor and the supervisor of Barkauskas. His office was adjacent to Lovejoy's office on the end opposite to Conference Room B.

NTEU Chapter 010 is the recognized representative of a unit of employees of the IRS Chicago District, 1/ which includes the Facility. It is party to a Multi-District Agreement with IRS. The parties agree, and I find, that that Agreement provides that when an employee wishes to speak to a union steward on a union matter during working hours the permission of his supervisor must first be obtained.

On October 15, 1975 Kaczmarek was using Conference Room B to prepare a report. Some time between 9:A.M. and 10:A.M. Anderson went to the coffee machine, obtained a cup of coffee,

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1/ Exh. J 2.

and went to Conference Room B to pass his coffee break with Kaczmarek. O'Malley had either preceded him or followed him into that room by a minute or two. All three were revenue agents. They engaged in usual coffee-break chit-chat for a few minutes. Barkauskas then entered with a cup of coffee and the discussion changed to a union subject. 2/ During the conversation O'Malley left and re-entered the room several times, sometimes closing the door.

Lovejoy, a supervisor, was working in his adjacent office the doors of which are adjacent to the doors of the Conference Room. He noticed what he thought was unusual activity in the conference room, with people entering and leaving and much discussion. He knew that Kaczmarek and Anderson were revenue agents and that Barkauskas was a revenue officer, and that agents and officers seldom have occasion to confer on business matters. He knew also, or thought he knew, that Kaczmarek and Anderson were union stewards. It did not occur to him that they were on a coffee break because breaks were rarely taken in a conference room and it seemed to him the conversation continued far longer than a coffee break. He was not the supervisor of any of the participants but he knew that Liberty, whose office was adjacent to Lovejoy's on the side opposite the conference room, was Barkauskas' supervisor. After what he thought was about twenty-five minutes 3/ he went to Liberty's office and told him that one of his men was having some kind of a meeting with Kaczmarek and Anderson, two union stewards, for the last half hour.

It was what happened in the next two minutes that is contended to have been an unfair labor practice committed by Liberty.

Liberty went to the door of the conference room, which was open, and saw Anderson near the door. He beckoned Anderson over and asked him if they were discussing union business. Anderson told him that he was no longer a steward, and

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2/ The testimony of Barkauskas and the testimony of Anderson differ radically on the union subject that was discussed. It is unnecessary to resolve this conflict. It is necessary to find, as I have, only that it was a union matter. The testimony of Barkauskas and Anderson differ sharply also in other inconsequential respects.

3/ Barkauskas and Anderson both testified that the entire discussion was well under fifteen minutes. It is unnecessary to resolve this conflict. It is necessary to decide, as I have found, only that Lovejoy thought it was about twenty-five minutes.

to ask Kaczmarek. Liberty then beckoned Kaczmarek and asked him whether he was discussing union business with Barkauskas, his supervisee. Kaczmarek's response was to ask Liberty whether he had been eavesdropping. This angered Liberty who said he would speak to the chief steward about such a remark. Kaczmarek said that would be fine. Barkauskas was then asked to step outside the conference room. Liberty asked him whether he was discussing union business with the steward. Barkauskas stated that he was at the tail end of his coffee break. Liberty indicated doubt and said either "if you are discussing union business, you should let me know first" (as quoted in the complaint) or that if he was seeing the stewards on union business he was required to have Liberty's permission (as testified to by Liberty).

Liberty then went back to his office at the suggestion of another supervisor who was passing by. A few minutes later Kaczmarek came to Liberty's office and told him that he had news for Liberty, that what Liberty had just done was an unfair labor practice. A few days later Barkauskas succeeded Anderson as a steward.

Discussion and Conclusions

The Complainant contends that Liberty's conduct violated Section 19(a)(1) in two respects. First, the employees were on coffee break and therefore on their own time, and asking them whether they were engaged in union business clearly implied that conducting union business on break time was unacceptable to management. Second, urges the Complainant, Liberty's statement that if Barkauskas was engaging in union business he should let Liberty know in advance was overly broad because he did not qualify it by stating "during working hours". I find both positions untenable.

The parties agree that their collective agreement requires that an employee obtain permission from his supervisor to discuss a union matter with a steward during working time. The Respondent concedes, for the purpose of this case, that coffee break time is not working time and that an employee need not obtain permission to discuss a union matter with a steward during a coffee break.

Liberty was told by a fellow supervisor, Lovejoy, that Barkauskas, an employee in the unit he supervised, had been in a discussion with two union stewards for the last half hour in Conference Room B. It was not incumbent on Liberty, as the Complainant seems to believe, to conduct an investigation into the accuracy of Lovejoy's statement before asking

the participants, including Barkauskas, whom he supervised, whether they were discussing union business. He reasonably believed that they had been talking in the Conference Room for half an hour, well beyond any permissible coffee break, and in a room where coffee breaks were not usually taken, and that Kaczmarek and Anderson were union stewards. Such inquiry was not a violation of Section 19(a)(1), and if it were it was well within the de minimis doctrine. 4/

Liberty's statement to Barkauskas that if he wanted to speak to stewards on a union matter he should first advise Liberty was simply a statement of fact. In this aspect this case is quite similar to Long Beach Naval Shipyard and Federal Employees Metal Trades Council, A/SLMR No. 352 (1974). The Complainant argues that the statement was unqualified by "during working hours" and therefore, could be understood to mean that an employee needed permission to discuss a union matter with a steward even on his own time. A supervisor is not required to phrase his off-the-cuff observations with the studied niceties of a common-law conveyance. He meant this comment to apply to working time, and I have no doubt Barkauskas so understood it. Cf. Long Beach Naval Shipyard, supra.

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: August 16, 1977
Washington, D.C.

4/ Vandenberg A.F.B., 4392d Aerospace Support Group and Local Union 1001, N.F.F.E., F.L.R.C. No. 74A-77 (1975); U.S. Department of the Treasury, Internal Revenue Service, Chicago District, A/SLMR No. 711, ALJ Recommended Decision.

November 21, 1977

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

ENVIRONMENTAL PROTECTION AGENCY,
WASHINGTON, D.C.; ENVIRONMENTAL
PROTECTION AGENCY, RESEARCH TRIANGLE
PARK, NORTH CAROLINA
A/SLMR No. 943

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 3347 (AFGE) alleging that the Respondent Agency and Respondent Activity violated Section 19(a)(1), (5) and (6) of the Order. In essence, the AFGE alleged that the Respondent Agency violated the Order by delaying and failing to provide the Respondent Activity with the expertise and freedom to negotiate freely and without restraint, causing delays by either withholding or failing to furnish necessary information in a timely manner and by the failure of Respondent Agency's Administrator to make a timely determination under Section 11(c) of the Order. The AFGE also alleged that the Respondent Activity violated the Order by delaying and withholding appropriate documents and instructions, by failing to make timely determinations of negotiability and applicability of Agency orders and directives, and by creating other delays causing contract negotiations to be drawn out over a long period of time. Prior to the hearing, the AFGE withdrew the 19(a)(5) portion of the complaint against both the Respondent Agency and Respondent Activity and the 19(a)(6) portion of the complaint against the Respondent Agency.

The Administrative Law Judge concluded that the Respondent Agency had not violated Section 19(a)(1) of the Order and that the Respondent Activity had not violated Section 19(a)(1) and (6) of the Order. In this regard, the Administrative Law Judge found that the AFGE's withdrawal of the Section 19(a)(6) allegation against the Respondent Agency was equivalent to a withdrawal of that part of the complaint against the Respondent Activity as well since the only basis set forth in the complaint for the violation of Section 19(a)(6) was the asserted failure of the Respondent Agency to make a timely determination on the AFGE's request for a negotiability determination. He also found that Section 11(c) of the Order did not impose a direct time limitation on the Respondent Agency in issuing a negotiability determination. Further, he found that there was no evidence to indicate that either of the Respondents violated Section 19(a)(1) of the Order. In this regard, he concluded that the evidence established that Respondents bargained in good faith, attended all bargaining sessions when called, submitted counter proposals, and promptly answered all of the AFGE's requests for information and documents.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 943

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ENVIRONMENTAL PROTECTION AGENCY,
WASHINGTON, D. C.

Respondent/Agency

and

Case No. 40-7650(CA)

ENVIRONMENTAL PROTECTION AGENCY,
RESEARCH TRIANGLE PARK, NORTH
CAROLINA

Respondent/Activity

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3347

Complainant

DECISION AND ORDER

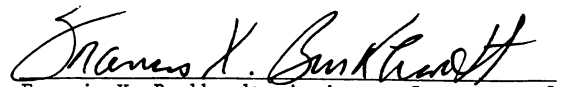
On July 8, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. No exceptions were filed to the Administrative Law Judge's Recommended Decision and Order.

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 Recommended Decision and Order, and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-7650(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
November 21, 1977



Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.
Respondent/Agency

ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NORTH CAROLINA
Respondent/Activity

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3347
Complainant

Case No. 40-7650(CA)

Mr. Houston T. Blair
Chief Steward
Ms. Joanne Freeland
Secretary, AFGE Local 3347
P.O. Box 12112
Research Triangle Park, N.C. 27709
For the Complainant

Mr. Everett L. Quesnell
President, AFGE Local 3347
On Brief for Complainant

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EPA - Research Triangle Park, N.C. 27711
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Office of General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). It was initiated by a charge, filed on September 28, 1976, and, the Complaint filed on November 5, 1976 (Asst. Sec. Exh. 1). In view of the subsequent withdrawal of a portion of the Complaint and Respondent's Motion to Dismiss, it is necessary at the outset to set forth the parties named and the allegations of the Complaint. 1/

Paragraph 1 of the Complaint under name of activity and/or agency reads "Environmental Protection Agency"; under address states "Research Triangle Park, N.C. 27711 and Washington, D.C. 20460"; as person to contact, "John H. DeFord, Acting Director of Administration [Research Triangle Park]; and under subparagraph F, if complaint is made against an activity, names the agency as "Environmental Protection Agency". The Complaint alleged violations of Section 19(a)(1), (5) and (6) of the Order and stated:

> "It is the contention of AFGE Local 3347 that beginning on or about the week beginning November 3, 1975, that EPA Management, under direction of Assistant Administrator Alvin L. Alm, has delayed and withheld appropriate documents and instructions, failed to make timely determinations of negotiability and applicability of EPA Orders and Directives, and in other ways created delays causing contract negotiations to be drawn out from November 17, 1975 to and including the current date.
>
> "It is our contention that in violation of E.O. 11491, EPA Headquarters personnel interferred with contract negotiations being conducted by AFGE Local 3347 by delaying and failing

1/ I am aware of the Council's decision, FLRC No. 76A-37, issued May 4, 1977, in Naval Air Rework Facility, Pensacola, Florida, et al., also discussed infra at n.4; but in view of the withdrawal of the 19(a)(6) allegations against Respondent/Agency, it is assumed that the allegations of 19(a)(6) violation against the Respondent/Agency are no longer present. It is also assumed for the purpose of this decision, but without deciding, that 19(a)(6) allegations against Respondent/Agency would, if true, also constitute a 19(a)(1) violation. This is merely an assumption and does not constitute a determination and is prompted, in part by FLRC No. 76A-37.

to provide local management at Research Triangle Park, North Carolina with the expertise and the freedom to negotiate freely and without constraint. EPA also failed to make timely determinations as required by Section 11 of E.O. 11491. Delays were created by Alvin L. Alm, Edward T. Rhodes, Stanley Williams, and Richard Cocozza, all of whom have the address of Environmental Protection Agency, Washington, D.C. 20460. These delays began in November, 1975, and continued through November 1976. Examples establish that on February 10, 1976, local negotiators sought the view and instructions of EPA Headquarters, and that this information was not furnished in a timely manner and was furnished in bits and pieces of information in April and May, 1976. These delays and others of which we have been advised were apparently contrived to thwart negotiations by Local 3347.

"EPA Administrator Russell Train was requested on July 27, 1976, to make a timely determination required under Section 11(c) of E.O. 11491. That determination was not received by AFGE Local 3347 until September 30, 1976. It is our contention that it should have been furnished within fifteen days.

"We believe the above clearly demonstrates interference in negotiations by the named individuals." (Asst. Sec. Exh. 1).

By letter dated February 3, 1977, the Regional Administrator, Lem R. Bridges, advised the parties, in part, as follows:

"Complainant has requested withdrawal of 19(a)(5) against both Respondent/Agency and Respondent/Activity. Complainant has requested withdrawal of 19(a)(6) against Respondent/Agency. The Area Administrator, under my direction, has approved the withdrawal requests." (Asst. Sec. Exh. 2).

The Notice of Hearing, which issued February 3, 1977 (Asst. Sec. Exh. 3), directed a hearing with reference to alleged violations of Section 19(a)(1) and (6) of the Order but, stated:

"Notice of hearing with respect to 19(a)(1) is herein issued against Respondent/Agency.

Notice of hearing with respect to 19(a)(1)(6) is hereby issued against Respondent/Activity." (Asst. Sec. Exh. 3, n. 1).

The only basis set forth in the Complaint for violation of 19(a)(6) of the Order was the asserted conduct of EPA Headquarters (Agency) personnel. Withdrawal of the 19(a)(6) allegations against the Agency with approval of the Regional Administrator was equivalent to dismissal of that part of the Complaint. Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO, A/SLMR No. 708 (1976). With the portion of the Complaint dismissed which asserted conduct by the Agency, and not by the Activity, (Research Triangle Park) in violation of 19(a)(6), it may well be that there is no basis in the Complaint for a 19(a)(6) violation against the Activity. The fact that American Federation of Government Employees, Local 3347 (hereinafter "Union") was certified for a unit of non-professional, non-supervisory employees at the Activity and for a unit of professional, non-supervisory employees at the Activity; and that the dismissal was solely because there was no bargaining relationship between the Union and the Agency to support a 19(a)(6) violation, does not cure the failure, if there were a failure, of the Complaint to allege a basis for a 19(a)(6) violation against the Activity, nor does the issuance of a Notice of Hearing cure any defect in the Complaint. United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, N.Y., A/SLMR No. 557 (1975).

With respect to the allegation concerning the Agency's failure to make a timely negotiability determination, Complainant's asserted time frame is without direct basis in the Order. Moreover, assuming unreasonable delay by the Agency head, Complainant's remedy clearly was not by unfair labor practice complaint alleging violations of Section 19(a)(6). Section 11(c) provides that if a negotiability issue arises it shall be resolved as specified therein:

"(1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations;

"(2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination;

"(3) An agency head's determination as to the interpretation of the Agency's regulations with respect to a proposal is final.

"(4) A labor organization may appeal to the Council for a decision when --

(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or

(ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order, or are not otherwise applicable to bar negotiations under paragraph (a) of this section."

The Order directly places no time limitations on action pursuant to Section 11(c); but the Regulations of the Council, in this regard, provide, in part, as follows:

"(c) Review of a negotiability issue may be requested by a labor organization under this subpart without a prior determination by the agency head, if the agency head has not made a decision -

"(1) Within 45 days after a party to the negotiations initiates referral of the issue for determination, in writing, through prescribed agency channels; or

"(2) Within 15 days after receipt by the agency head of a written request for such determination following referral through prescribed agency channels, or following direct submission if no agency channels are prescribed." (5 C.F.R. § 2411.24(c)).

In short, Complainant had the right, if the Agency did not issue its determination within the time frame noted, to obtain review of the negotiability issue by the Council. Quite early, the Assistant Secretary ruled,

"It was concluded that the intent of Section 19(a)(6) is to provide a labor organization an opportunity to file a complaint

when it believes that management has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable through the procedures set forth in Section 11(c) of the Order." (Report No. 26 (March 18, 1971), 1 Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations 618).

cf., United States Department of Agriculture and Agricultural Research Service and National Federation of Federal Employees, Local 1552, A/SLMR No. 519 (1975). Accordingly, as the remedy for agency delay in issuing a determination of negotiability and the intent of 19(a)(6) is limited, as to Section 11(c), to matters which have already been determined to be negotiable through the procedures set forth in Section 11(c), such delay, if any, was not a violation of 19(a)(6) of the Order.

Nevertheless, the Complaint alleges sufficient basis for a 19(a)(1) violation by the Agency. Although it can be argued with considerable force that if delay in issuing a negotiability determination does not violate 19(a)(6), the bargaining obligation aside, it cannot constitute an independent 19(a)(1) violation, it is unnecessary to decide that question and, therefore it has not been decided, inasmuch as a) the negotiability determination was issued on September 30, 1976; b) the parties did reach agreement and did execute a new agreement on October 26, 1976 (Jt. Exh. 3-D); and c) the negotiations, as more fully set forth hereinafter have been considered both from the standpoint of the 19(a)(1) allegations as to the Agency, and from the standpoint of the 19(a)(6) allegations at to the Activity and no basis for a violation has been found.

The portion of Respondent's Motion to Dismiss asserting the failure of the Complaint to set forth clearly and concisely facts constituting an unfair labor practice, as required by Section 203.3(a)(3), is particularly applicable to the alleged violation of 19(a)(6) against the Activity. At the commencement of the hearing the sufficiency of the Complaint as to any 19(a)(6) violations in view of Complainant's withdrawal of the allegations as to the Agency was discussed at length. At that time I stated that as the same basis was asserted in support of the 19(a)(1) violation against the Agency as had been alleged in support of the 19(a)(6) violation by the Agency and, on the assumption that the allegations of Paragraph 1 of the Complaint "that EPA management ... has ... created delay causing contract negotiations to be drawn out from November 17, 1975 to and including the current date", were sufficient to constitute a basis

for a 19(a)(6) violation against the Activity, Complainant was permitted to proceed. Under the circumstances, this portion of Respondents' Motion to Dismiss is denied.

The other portion of Respondent's Motion to Dismiss concerned the asserted failure to name the Activity. This portion of the Motion to Dismiss was denied at the hearing and is fully affirmed hereby. As the Complaint shows, the Activity was shown as fully as the form permits or requires. The name of the Agency and the Activity is the same; but separate addresses were shown (Washington, D.C. and Research Triangle Park), the person to contact was Mr. DeFord, at Research Triangle Park; and the Agency was shown in Paragraph 1F. If there were any doubt, and I have none, pursuant to § 206.9 of the Regulations, the Regulations must be construed liberally to effectuate the purpose and provision of the Order, and where a complainant has well and fully complied with the prescribed forms and has supplied all relevant data in an obvious good faith effort to name both an agency and an activity, any doubts must be resolved in favor of the Complainant. Moreover, for reasons more fully set forth in my decision in Department of The Treasury, Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union and NTEU Chapter 009, Case No. 30-612(CA)(1976), if it were necessary and as stated above, in this case, in my view, it is not necessary as Complainant did sufficiently name both the Agency and the Activity against whom the Complaint was directed, I believe that even if only the agency is named in a complaint, unfair labor practices clearly alleged at an activity may be reached and remedied, even though I am fully aware that the Assistant Secretary in the Brookhaven case, A/SLMR No. 814 (1977), stated:

> "In view of the disposition herein, I find it unnecessary to pass upon the Administrative Law Judge's conclusion that is is sufficient to name the Activity in a complaint in order to adjudicate the alleged violation of the Order, even though the conduct alleged as the basis of the complaint was committed by an unnamed subordinate installation of the named Activity."

Pursuant to the Notice of Hearing, which issued February 3, 1977, a hearing was duly held before the undersigned on March 1, 1977, in Research Triangle Park, North Carolina. All parties were represented, were afforded full opportunity to be heard,

to examine and cross-examine witnesses and to introduce evidence bearing on the issues involved and briefs, timely filed, have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendation:

FURTHER PRELIMINARY STATEMENT

Complainant has filed a Motion To Rehear and a Memorandum In Support of Motion To Rehear and Brief Re Merits. Complainant's motion for rehearing is denied for the reasons set forth hereinafter.

1. The assertion that the undersigned had predetermined the case and that the hearing was not conducted in a manner to permit Complainant to present his case in a fair and just manner must, necessarily, be judged on the basis of the record 2/and, more appropriately by appeal from the Recommended Decision to the Assistant Secretary.

2/ The following colloquy occurred:

> "Administrative Law Judge Devaney (hereinafter ALJ): I understand, but leaving that out for a moment, the fact that locally you have negotiated an agreement; does that not render moot the allegation that there has been delay in negotiations?
>
> "Mr. Blair: It does not render moot the question of 19(a)(1), as to whether or not and to what extent EPA Agency Headquarters has been involved in delaying interferring with and restraining my rights, and the rights of the EPA employees in North Carolina in negotiating an agreement free and without restraint.
>
> "(ALJ) I understand what you are saying. As a pure hypothetical, Mr. Blair, it is conceivable that you are right. But in a very practical sense, it seems to me that you are arrogating unto yourself a burden of proof that becomes almost insurmountable. In other words, you are saying that they delayed it and would not negotiate, and then, yet the fact is that they in fact did negotiate and did sign an agreement. It is a little bit of not being able to "have your cake and eat it too." (Tr. 71-72)

2. The parties, by Joint Exhibits 1 through 3, presented extensive documentation of matters leading up to the commencement of negotiations, the negotiations, and completion of negotiations. In addition, seven witnesses testified concerning

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Footnote 2 continued from page 8.

> "[ALJ] I certainly do not rule out the possibility that you can prove your case. I merely point out that I think that it becomes more difficult to prove the Unfair Labor Practice where an agreement has been locally reached and the allegation is really in the nature of delay and interference with those negotiations.
>
> "I certainly do not mean to go beyond that rather narrow comment, that it strictly in terms of what the Complaint has alleged, of the delay, the interference and the drawing out of negotiations, that the ultimate conclusion of the negotiations has increased your burden of proof.
>
> "Without having looked at the Joint Exhibits at all, I am aware from your prior comments that the procedure from the negotiation as I understand it, has gone first to your agreeing on the rules for negotiation; second, the proposals, and my recollection is that they were fairly long in number of Union proposals. Then the meetings and eventually the agreement -- it may very well be that within this framework, you have an absolutely perfect case of their using an iron bar when they ought to have been using the gloved hand. And if that is true, by all means, show me." (Tr. 81).
>
> . . .

With reference to Complainant's request for compensation for negotiators' time asserted to have been excessive the following comment is pertinent.

> "[ALJ] There are areas in which you can award back pay where there has been an unlawful discharge for engaging in activities protected by the Order. That is very clear. But beyond this, I really am not at all certain in my own mind as to the authority. I do not rule it out. I simply say to you quite frankly that I am not aware that I would have the authority to grant such an Order.
>
> "If you can show me that the authority exists, you certainly are entirely free to do so." (Tr. 85).

the negotiations and related matters. From the exhibits and testimony it appears that all issues were adequately, indeed fully, litigated; but if all issues were not fully litigated it can be attributed only to Complainant's failure, as no limitation was imposed on Complainant. Accordingly, Complainant's request for rehearing for the reason that Complainant did not present the full evidence, which assertion is wholly without proffer, identification or other support as to what evidence Complainant contends was not presented, is without merit and is, therefore, denied.

3. At the hearing, it was specifically stated that the Complaint did not encompass any question of Section 15, Approval of agreements; that such issue was not before me; and was not litigated. 3/ Complainant's request for rehearing for the purported reason that subsequent to March 1, 1977, Agency refused to approve the agreement without just cause, is denied. As noted, Section 15 was not asserted in the Complaint. Complainant's present assertion cannot be reached under the Complaint herein. Complainant is free, of course, to file a new charge concerning any conduct asserted to be in violation of the Order not covered by the present Complaint and Notice of Hearing.

FINDINGS

1. The Union was certified as the exclusive representative for a unit of non-professional, non-supervisory employees at the Activity on July 21, 1972, and for a unit of professional non-supervisory employees at the Activity on July 22, 1972. A negotiated agreement covering both units became effective on November 14, 1972; a second negotiated agreement became effective on August 19, 1974; and on June 20, 1975, the Union gave notice of desire to renegotiate the contract.

2. On July 25, 1975, the Union and the Activity entered into a Memorandum of Understanding For the Netotiation of a Collective Bargaining Agreement. This Memorandum of Understanding provided for the exchange of proposals on, or before,

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3/ Joint Exhibit 3N, dated February 24, 1977, states, in part,

> "... we are now in agreement on revised language in each area of dispute ... the parties reached agreement on Article 7, Section 2, and Article 20, Section 8, on February 23, 1977. The remaining disputed areas were resolved on December 13, 1976."

September 15, 1975; negotiations to commence on November 17, 1975; and no earlier than November 3 nor later than November 10, 1975, by mutual agreement, review of proposals for clarification, etc., prior to the beginning of formal negotiations (Jt. Exh. 1-A-5).

3. On September 12, 1975, Activity agreed to extension of the date for exchange of proposals from September 15 to September 17, 1975; and, on the same date, September 12, 1975, Activity confirmed the mutual agreement to extend the current agreement until a new agreement was negotiated.

4. Proposals were exchanged on September 17, 1975, and on the same date, September 17, 1975, the Union submitted a copy of the proposals to Mr. Russell E. Train, Administrator of the Agency and asked for a declaration of "compelling need" if any proposal were deemed in conflict with any Agency regulations, which request was denied by the Agency in November (the date is not legible), 1975, as premature. Agency's reply, stated, in part, as follows:

> "If, during negotiations, the management negotiating team considers that an agency regulation bars negotiation on a particular union proposal and a compromise cannot be reached, the question of compelling need will be presented to the Director of the Personnel Management Division, and a decision will be made at that time. Further, for your information the amendments to Section 11(a) of Executive Order 11491 pertaining to internal agency policies and regulations based on compelling need are not effective until December 23, 1975." (Jt. Exh. 1A-13).

5. The parties met on November 6, 1975, for clarification of proposals; and negotiations began on November 17, 1975. The Union's proposals consisted of 167 pages. At the first meeting, Activity stated that in one or more regards Complainant's proposals were contrary to the Agency's Labor-Management Relations Manual and Complainant asserted that the provisions of the Manual did not apply. Activity made counter-proposals on every union proposal (Article) but after 10 days of negotiations, agreement had been reached on only two of twenty-nine articles. The Union refused to move from their original proposals and had made no counterproposals on the open articles. Accordingly, on December 11, 1975, the Union stated that it had requested that FMCS supply a mediator and the parties, at

Union's initiation, agreed to defer further negotiations until January 5, 1976, when the mediator was scheduled to be present. A mediator was present when negotiations resumed on January 5, 1976, and the mediator was present at negotiating sessions on January 5, 6, 7, 19, and 20, February 23 and 24, 1976 (See, Jt. Exh. 2-C for a complete resume of negotiating meetings held from November 17, 1975, through December 13, 1976 - a total of 41 meetings).

6. On February 6, 1976, the Union's Chief Negotiator and President, Mr. Quesnell, requested a list of the items believed to be non-negotiable. By letter dated February 17, 1976, Activity's Chief Spokesman, Mr. Brothers, responded to Mr. Quesnell and supplied a list which listed each specific item that Activity believes non-negotiable and stated in detail Activity's reasons (Jt. Exh. 1-B-5). Mr. Brothers further stated that this list had been forwarded to Mr. Cocozza, Agency Personnel Management Division for their review and analysis (See, Jt. Exh. 1-B-4). In all, there were 33 items listed involving 15 Articles. Mr. Quesnell stated that Complainant made no attempt to negotiate alternate language, however, negotiations did continue on other open items. By letter dated April 1, 1976, Mr. Williams, Director, Personnel Management Division of Agency, responded to certain portions of Mr. Brothers' letter of February 10, 1976. Mr. Williams stated that Union's proposal, Section 3, Art. 8, was negotiable (Jt. Exh. 1-A-8). Mr. Williams further responded by letters dated April 7 (Jt. Exh. 1-A-8a); April 26, 1976 (Jt. Exh. 1-A-9) and May 8, 1976 (Jt. Exh. 1-A-10), finding in some instances that Union proposals were negotiable and in other instances they were not.

7. Netotiations disposed of most of the "non-negotiable" items, that is, Agency had found the Union proposal negotiable and the parties had negotiated or the Union, because Agency had agreed that Union proposal was non-negotiable had withdrawn the proposal (Mr. Quesnell could not remember although he admitted that they negotiated on something). However, there were some outstanding items considered non-negotiable and by letter dated May 28, 1976, Mr. Quesnell asked Acting Director DeFord for a further list of issues then in Union's proposals considered non-negotiable. Mr. Brothers responded by letter dated June 1, 1976, which listed six items (Art. 19, Sec. 8; Art. 20; Art. 23; Art. 25; Art. 27) (Jt. Exh. 1-A-12).

8. By letter dated July 27, 1976, the Union requested a negotiability determination by the Administrator, Mr. Train (Jt. Exh. 1-A-28) which determination was issued by Administrator Train on September 24, 1975 (Jt. Exh. 1-A-38). Union

took no appeal from the Administrator's determination to the Council.

9. Also on July 27, 1976, the Union wrote Mr. Howard W. Soloman, Executive Secretary, U.S. Federal Service Impasses Panel, and stated, inter alia, that a mediator on June 8, 1976, concluded that the parties were at impasse (Jt. Exh. 1-A-27).

10. On October 20, 1975, Dr. Burton Levy, then Administrator for the Activity, pursuant to the Memorandum of Understanding of July 25, 1975, designated Mr. Brothers as Activity's Chief Negotiator and designated the members of Activity's bargaining team with designated alternates. The record is clear that Mr. Brothers, as Chief Negotiator, and the Activity's bargaining team, had full authority to act for the Activity and that the Activity had full authority to negotiate an agreement with the Union. Neither the presence of Ms. Wanda Thompson at the beginning of negotiations and at the final negotiation, nor the keeping of Agency posted on progress of negotiations demonstrates the slightest limitation on the authority of the Activity to negotiate and certainly fails to demonstrate any interference in negotiations by Agency. The Activity, acting through Mr. Brothers made its own determination as to items it deemed non-negotiable. The Union was advised in the course of negotiations of negotiability issues, as Mr. Quesnell readily conceded, and on February 17, 1976, at the request of the Union, Mr. Brothers gave the Union a complete list of the items the Activity considered non-negotiable and, in detail, the reasons therefor. On February 10, 1976, Mr. Brothers had forwarded the same information to Agency. The Agency thereafter responded, agreeing with the Activity in some instances and disagreeing in other instances.

11. Mr. Quesnell, following the June 8, 1976, meeting, believed that the parties were at impasse and that further meeting with Mr. Brothers would not be productive. The Union sought to by-pass Mr. Brothers and to meet with the Directors. On July 16, 1976, Mr. Quesnell stated in a letter to Mr. Brothers (Jt. Exh. 1-B-24),

> "If you have changed your position since our meeting with the mediator on June 8, 1975, please advise us of the articles where you think we may reach some meaningful agreement and provide us with any suggestion that you may have."

12. On July 28, 1976, Mr. Quesnell was advised by the Directors that:

> "... Mr. Willis Brothers has been designated as the Chief Spokesman for Management and is fully authorized to 'speak for' management during current negotiations. We, the undersigned wish to re-express the fact that Mr. Willis E. Brothers is empowered, with our full support, to act as Chief Spokesman for EPA Management at RTP in the conduct of negotiations with Local 3347." (Jt. Exh. 1-B-29).

13. The Directors declined to meet with the Union and by letter dated August 4, 1976, advised Mr. Quesnell, with respect to his comments about the composition of the management negotiating team,

> "... We can assure you that we have no intention of making any change. The team members were designated to represent us and we feel they have done a commendable job in this endeavor. Our support for the team has been recently echoed by Mr. Rhodes and Mr. Alm, and you may be sure the team will continue to have our full support through the completion of the current contract negotiations.

Activity's position on various unresolved issues was reviewed and the Directors' letter concluded,

> "... Again we would like to emphasize that our management negotiating team is the proper body in dealing with the Union in contract negotiating matters and we are hopeful that the parties will be able to return to the negotiating table and reach a final agreement on the contract." (Jt. Exh. 1-B-30).

Again on September 10, 1976, the Directors stated, in part,

> "... we cannot emphasize too strongly the importance of the negotiating team returning to the bargaining table to pursue what may well be elusive, but not necessarily impossible resolutions to difficult issues ...

> "Perhaps then it is a question of initiative. We are asking our chief spokesman to contact you within the next week to suggest a date and time for returning to the bargaining table. ..." (Jt. Exh. 1-B-32).

14. Mr. Brothers, on behalf of Activity, suggested negotiating on September 20, 1976, but Mr. Quesnell declined, stating,

> "... we do not believe that there has been any significant reason for our continued use of time away from our families unless you, the Directors, are sufficiently involved to warrant our participation. ..." (Jt. Exh. 1-B-36).

15. No bargaining was requested, other than Mr. Quesnell's repeated attempts to by-pass the Activity's designated negotiators and meet with Activity's Directors, and no further negotiations were held until October 13, 1976. With a mediator, Mr. Jerome L. Ross, present on October 13, 14, and 15, the parties reached agreement on October 15, 1976; Union advised the Federal Service Impasses Panel on October 18, 1976, that the parties had reached agreement on the articles at impasse on October 15, 1976 (Jt. Exh. 3-A); the Federal Service Impasses Panel on October 21, 1976, acknowledged the Union's letter withdrawing its request for Panel assistance, granted the request for withdrawal and closed case No. 76 FSIP 47 (Jt. Exh. 3-C); the new agreement was executed on October 26, 1976 (Jt. Exh. 3-D); on November 18, 1976, the Director, Mr. John H. DeFord, advised Mr. Quesnell that beginning December 2, 1976, orientation beiefings would be conducted on the new agreement and invited Mr. Quesnell to speak at each session (Jt. Exh. 3-E); Mr. DeFord advised all supervisors of the orientation, stated that each supervisor was required to participate, and further stated that, "Management officials at all levels of the organization must be fully prepared to implement the agreement when it is approved, properly administering the agreement throughout its terms." (Jt. Exh. 3-F); on November 29, 1976, the agreement was conditionally approved subject to certain changes and/or deletions found not to be in accord with the Order, law or regulations; further negotiations were held on December 13, 1976, and the parties reached agreement on all items not approved on November 29, 1976, on December 13, 1976, except Art. 7, Sec. 2 and Art. 20, Sec. 8 which were resolved by agreement on February 23, 1977 (Jt. Exh. 3-N).

16. Mr. Quesnell, in his testimony, made no mention of documents withheld. The only reference called to my attention, or which I have noted in the voluminous documents constituting the Joint Exhibits is an assertion in an affidavit by Mr. Quesnell submitted in support of the Complaint in which he asserted that FPM Letter 551-10 was "withheld to bolster Management's position of non-negotiability" of Union's proposal requiring adjustments in the basic work week. Such self-serving statement are, at best, entitled to little probative weight; and especially, where, as here, no testimony was offered at the hearing and the statement appears only as part of a composite exhibit of documents filed after the charge herein was filed on September 28, 1976, it is entitled to little, if any probative weight. Moreover, even if it were considered as some evidence that Activity withheld some documents, there is no showing whatever that the document, or information requested, was in any way necessary, or even appropriate, for the purpose of negotiation.

CONCLUSIONS

Complainant would clothe its bargaining demands with an imperious propriety that the failure to accept would constitute bad faith. This is scarcely the essence of collective bargaining which contemplates give and take by both parties to the negotiations. At some point, every negotiator must exercise caution lest pride of authorship, or fondness for particular language, thwart agreement when other words would serve as well, for even the smartest man in the world, as the story goes, may in haste jump from the burning plane with a back pack instead of a parachute.

The record shows that the Activity presented counter proposals to each union proposal and in an effort to reach agreement incorporated much of Union's proposed language; but Union insisted on its proposals, as Mr. Copeland, Vice President of the Union stated and when negotiability issues arose Union continued to insist on its proposals rather than try to arrive at some compromise. When the Union concluded an impass had been reached, it consistently demanded some change of position by Activity as a condition precedent to the resumption of negotiations while maintaining its own uncompromising stance. Union was, of course, free to adopt a hard bargaining position; but the record utterly fails to establish any possible bad faith by Activity. Without doubt Union engaged in hard bargaining and at the most, perhaps, both parties engaged in

hard bargaining. U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York, A/SLMR No. 620 (1976). Certainly the Activity met at reasonable times, made concessions and negotiated in good faith and the Order does not necessarily compel any party to agree or to make concessions. Headquarters, United States Army, Aviation Systems Command, A/SLMR No. 168 (1972).

In the course of negotiations, Activity took the position that certain portions of Union's demands were not negotiable. Activity stated in the course of the negotiations its reasons and on February 17, 1976, more than six months prior to the charge, Section 203.2(a)(2) of the Regulations, Activity set forth in writing its position on each of the negotiability issues as requested by Union. At this point, pursuant to Section 11(c)(2) of the Order, either party could have referred the matter to the head of the Agency for determination; but neither party did, although Activity had, on February 10, 1976, submitted its position to Richard A. Cocozza, Agency's Assistant Director for Training and Policy Development, for whatever action deemed "necessary and for subsequently providing us with an Agency determination concerning negotiability." Mr. Quesnell was advised in Activity's covering letter of February 17, 1976, of the referral to Mr. Cocozza.

Neither the assertion of negotiability by Activity nor its referral of its position to Agency for review would have constituted a violation of 19(a)(6) even if within the 6 month period of the filing of the charge. As the Assistant Secretary has stated,

> "In my view, Section 11(c) of the Order provides the exclusive method for resolving such dispute. ..." Army and Air Force Exchange Service, Keesler Consolidated Exchange, A/SLMR No. 144 (1972)

Thereafter, the parties negotiated around the negotiabilty issues, although on the proposals in dispute Union adhered to its original proposals. Activity had stated its position on negotiability, which was not conditioned on the subsequent review by Agency, so it cannot be said that Activity delayed negotiations while seeking advice of Agency. While it is true that the Agency's Director, Personnel Management Division, responded on April 1, 7, 26 and May 8, 1976 - in bits and pieces as Complainant alleged; nevertheless Activity had not rested its position on the advice of Agency, bargaining had not been deferred, and, certainly, the response by Agency did not interfer with, restrain, or coercean employee in the exercise of the rights

assured by this Order. 4/ To the contrary, Agency did not agree in all respects with Activity's position on negotiability. Activity promptly bargained on these items and the number of negotiability disputes were substantially reduced, in part because the parties bargained on the items Agency advised were negotiable and in part because the Union withdrew some of its demands. There remained some outstanding items considered non-negotiable and, at Union's request, a further list of issues considered non-negotiable was furnished by Activity on June 1, 1976.

Again, Activity's position was clear; but neither party requested a determination by the Agency head pursuant to Section 11(c) of the Order until Complainant did so on July 27, 1976. Section 11(c) imposes no direct time limitation on the Agency in issuing a negotiability determination, but, rather, the Council's Rules and Regulations permit a Union to request review of a negotiability issue by the Council without a prior determination by the agency head if the agency head has not made a decision within 15 days after receipt by the agency head of a written request for such determination. Union's request was

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4/ As noted above, Complainant withdrew, with approval of the Regional Administrator, the 19(a)(6) allegations against Agency. I am aware of the Council's decision in Naval Air Rework Facility, Pensacola, Florida and Secretary of the Navy, Department of the Navy, Washington, D.C. and American Federation of Government Employees, AFL-CIO, Local 1960, FLRC No. 76A-37 (May 4, 1977), in which the Council concluded, in part, as follows:

> "(1) The acts and conduct of agency management at a higher level of an agency's organization may provide the basis for finding a violation of any part of section 19(a) of the Order by 'agency management,' but may not, standing alone, provide the basis for finding a separate violation by 'agency management' at a lower organizational level of the agency where a unit of exclusive recognition exists. ..."

But even if Agency could be found guilty of a 19(a)(6) violation by directing or requiring Activity to refuse to bargain in violation of the Order, there is no basis for such a finding in this case as Agency did nothing to require Activity to fail or to refuse to bargain. To the contrary, Agency advised Activity that on some items it was required to negotiate and Activity promptly did so.

received by Administrator Train on July 30, 1976, and the Administrator did not issue his determination until September 24, 1976; but Complainant did not, as it was authorized by the Council's Rules and Regulations to do, seek the direct review of the dispute by the Council. As the provisions of Section 11(c) are exclusive, Army and Air Force Exchange Service, Keesler Consolidated Exchange, supra, Agency's delay in issuing its negotiability determination was not a violation of the Order.

From June 8, 1976, Union had refused to resume bargaining despite Activity's efforts to return to the bargaining table. Union had no right to interfere with Activity's choice of authorized and appropriate bargaining representatives and the refusal of Activity's Directors to meet with the Union was wholly proper.

Following the Administrator's determination of the negotiability issues on September 24, 1976, the parties did resume bargaining and initially concluded an agreement on October 26, 1976, and reached final agreement on February 23, 1977. 5/

Accordingly, as no basis for any violation of 19(a)(1) and (6) has been shown, it will be recommended that the Complaint be dismissed in its entirety.

RECOMMENDATION

Having found that Respondent Activity and Respondent Agency have not engaged in certain conduct prohibited by Section 19(a)(1) and (6) 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: July 8, 1977
Washington, D.C.

5/ To the extent that Complainant now asserts some violation as the result of Section 15, it is emphasized that no such issue was asserted in the Complaint or Notice of Hearing. Any such asserted violation must be initiated as a new and separate charge.

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,
OGDEN SERVICE CENTER
A/SLMR No. 944

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) and NTEU, Chapter 67 (Complainants) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by forming a committee of bargaining unit employees for the purpose of evaluating the 1975 tax filing season and for soliciting recommendations for improvement for the 1976 tax filing season, including recommendations concerning personnel policies and practices and general working conditions. The Complainants alleged that this action was an improper bypass of NTEU Chapter 67, and deprived it of its rights under the Order as the exclusive representative of the Respondent's employees.

In May 1975, the Respondent's Chief of the Examination Branch decided that a critique by unit employees of the 1975 tax filing season might be helpful in finding ways to "improve the operations" for 1976. He unilaterally formulated critique guidelines, the criteria for selecting members of the critique committee, the critique structure and the types of meetings to be held. Although the Complainant Chapter 67, the exclusive representative of the Respondent's employees, was offered an opportunity to be present when the critique committee met prior to formulating its critique and recommendations and also to be present when the critique committee presented its recommendations, the Complainant rejected the Respondent's plans as it was denied the right to participate in selecting members of the critique committee or to participate in its deliberations.

The Assistant Secretary concluded, contrary to the Administrative Law Judge, that the Respondent's conduct violated Section 19(a)(6) and (1) of the Order. He found that, although the basic purpose of the critique committee was to consider suggestions on how to improve procedures for processing tax returns, the Respondent "anticipated" and, in fact, the critique committee discussed and made recommendations on matters covered by the parties' negotiated agreement as well as related personnel policies and practices and general working conditions of employees in the unit. He noted further that the Respondent rejected the request of Complainant Chapter 67 to participate in the selection of the members of the critique committee and rejected also its participation in the committee's deliberations.

The Assistant Secretary noted that under Section 10(e) of the Executive Order, agency management is obligated to deal solely with its employees' exclusive representative in matters concerning terms and conditions of their employment but that in the instant case the Respondent, in effect, and contrary to the requirements of the Order, bypassed the Complainant and dealt directly with unit employees by soliciting their recommendations on matters covered by the parties' negotiated agreement as well as related personnel policies and practices and general working conditions. He concluded that the Respondent's bypassing of Complainant Chapter 67 was in derogation of its rights as the exclusive representative of the unit employees, and undermined its status as their exclusive representative.

Accordingly, the Assistant Secretary ordered that the Respondent cease and desist from the conduct found violative of Section 19(a)(6) and (1) of the Order and that it take certain affirmative remedial actions.

A/SLMR No. 944

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNAL REVENUE SERVICE,
OGDEN SERVICE CENTER

Respondent

and

Case No. 61-2896(CA)

NATIONAL TREASURY EMPLOYEES
UNION AND NTEU CHAPTER 67

Complainants

DECISON AND ORDER

On June 14, 1977, Administrative Law Judge Milton Kramer issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order 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.

This case arose as a result of a complaint filed by the National Treasury Employees Union and the National Treasury Employees Union, Chapter 67 (Complainants) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by forming a committee of bargaining unit employees for the purpose of evaluating the 1975 tax filing season and for soliciting recommendations for improvement for the 1976 tax filing season, including recommendations concerning personnel policies and practices and general working conditions. The Complainants allege that the Respondent's actions in soliciting the above information improperly bypassed the Complainant Chapter 67, and deprived it of its rights under the Order as the exclusive representative of the Respondent's employees.

Sometime in May 1975, the Respondent's Chief of the Examination Branch, Harvey Eager, concluded that a critique by unit employees of the Respondent's 1975 tax filing season might be helpful in finding ways to "improve the operations" for the 1976 season. Eager unilaterally formulated critique guidelines, the criteria for selecting a cross-section of employees for a critique committee, the critique structure and the types of meetings to be held. He also suggested that each person selected to be on the critique committee solicit suggestions from his or her unit. Supervisors from various units selected one employee, in accordance with the criteria formulated by Eager, to be on the critique committee from his or her unit and then met with that person to explain the program.

Eager revealed his plans to the Complainant's Chapter 67 President, informing her that when the critique committee met prior to formulating its critique and recommendations, the Complainant Chapter 67 would be invited to be present and also would be invited to be present when the committee presented its recommendations, but that neither the Respondent nor the Complainant would be present when the committee met to formulate its critique and recommendations. The Complainant rejected the Respondent's plans inasmuch as they did not allow the Complainant to participate in selecting the members of the critique committee or to participate in its deliberations. The Respondent informed the Complainant that if the recommendations included any matters concerning personnel policies or practices or other matters affecting general working conditions, there would be no implementation of such recommendations without discussing such matters with the Complainant.

The critique committee meeting was held on May 23, 1975. The Complainant rejected the invitation to attend the "opening" and "closing" sessions. The committee's recommendations were received by the Respondent at the closing session and were later typed and a copy forwarded to the Complainant. Some of the recommendations made by the committee involved matters covered by the parties' negotiated agreement, i.e. training, promotion evaluations, and furloughs and recalls of when-actually-employed (WAE) employees. 1/

The Administrative Law Judge found that the Respondent did not violate Sections 19(a)(1) and (6) of the Order by its establishment of, and its activities with respect to, the critique committee. Under the particular circumstances herein, I disagree.

1/ The Administrative Law Judge found that only one minor change was made as a result of the critique committee's recommendations. This involved a new procedure under which the supervisor in the Examination Branch would now meet with Branch employees before inserting changes in their handbook.

The evidence establishes that although the basic purpose of the critique committee was to consider suggestions on how to improve procedures for processing tax returns, the Respondent "anticipated" and, in fact, the committee discussed and made recommendations on matters covered by the parties' negotiated agreement as well as related personnel policies and practices and general working conditions of employees in the unit.

Under Section 10(e) of the Executive Order, agency management is obligated to deal solely with its employees' exclusive representative in matters concerning the terms and conditions of their employment. 2/ Nevertheless, in the instant case, the Respondent rejected the Complainant's request to participate in the selection of the members of the critique committee and rejected also its participation in the committee's deliberations. In effect, and contrary to the requirements of the Order, the Respondent bypassed the Complainant and dealt directly with unit employees, soliciting their recommendations on matters relating to personnel policies and practices and general working conditions, for which the Complainant was the exclusive bargaining representative. 3/ In my view, this bypassing of the Complainant Chapter 67 was in derogation of its rights as the exclusive representative of the unit employees, and tended to undermine its status as their exclusive representative. 4/ Accordingly, I find that the Respondent's conduct was violative of Section 19(a)(6) and (1) of the Order 5/.

2/ See United States Army School/Training Center, Fort McClellan, Alabama, 1 A/SLMR 225, A/SLMR No. 42.

3/ Cf. Veterans Administration, Veterans Administration Hospital, Muskogee, Oaklahoma, 3 A/SLMR 491, A/SLMR No. 301.

4/ It is immaterial whether or not any of the critique committee recommendations were implemented. Thus, the gravamen of the violation herein consists of the solicitation of views and recommendations from unit employees, selected by the Respondent, on matters for which the Complainant under the Order was entitled to be dealt with exclusively.

5/ Contrary to the Administrative Law Judge I do not find the instant case analogous to National Aeronautics and Space Administration (NASA) Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, FLRC No. 74A-95. That case involved the solicitation of factual information by agency headquarters-level management on the effectiveness of an agency-wide program, the Agency's Equal Employment Opportunity program, which existed totally apart from the collective bargaining relationship. However, in the instant case, the Respondent did not represent agency headquarters-level management. Its concern was only with the program operation at the level of exclusive recognition and it did more than receive the critique and recommendations; it actually solicited recommendations from unit employees on matters covered by the parties' negotiated agreement and related personnel policies and practices and general working conditions of unit employees.

ORDER

Pursuant to Section 6 (b) of Executive Order 11491, as amended, and Section 203.26 (b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the United States Department of the Treasury, Internal Revenue Service, Ogden Service Center, shall:

1. Cease and desist from:

(a) Unilaterally soliciting recommendations from employees of a critique committee established by the Ogden Service Center, with respect to matters set forth in the negotiated agreement between the Ogden Service Center and National Treasury Employees Union, Chapter 67, or with respect to personnel policies and practices or other matters affecting general working conditions of employees in the unit, when such employees are represented exclusively by the National Treasury Employees Union, Chapter 67, or any other labor organization.

(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 policies of Executive Order 11491, as amended:

(a) Post at its facility at the United States Department of the Treasury, Internal Revenue Service, Ogden Service Center, 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, Ogden Service 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 said notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
November 23, 1977

Francis X. Burkhardt, 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 unilaterally solicit recommendations from employees of a critique committee established by the Ogden Service Center with respect to matters set forth in the negotiated agreement between the Ogden Service Center and the National Treasury Employees Union, Chapter 67, or with respect to personnel policies and practices or other matters affecting general working conditions of employees in the unit, when such employees are represented exclusively by the National Treasury Employees Union, Chapter 67, or any other labor organization.

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 any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Federal Building, Room 2200, 911 Walnut Street, Kansas City, Missouri, 64106.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of :

INTERNAL REVENUE SERVICE, :
OGDEN SERVICE CENTER
Respondent :

and :

Case No. 61-2896(CA)

NATIONAL TREASURY EMPLOYEES :
UNION and NTEU CHAPTER 67
Complainants :

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For the Respondent

Before: MILTON KRAMER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This case arises under Executive Order 11491 as amended. It was initiated by a complaint dated November 19, 1975 and filed November 26, 1975. The complaint alleged a violation of Sections 19(a)(1) and (6) of the Executive Order. The violation was alleged to consist of a Branch Chief of the Respondent having a committee of employees evaluate the 1975 filing season and make recommendations for improvments for the

1976 filing season; the recommendations included matters concerning personnel policies and practices and this allegedly constituted a bypassing by the Respondent of the exclusive representative.

On August 13, 1976 the Regional Administrator issued a Notice of Hearing to be held in Ogden, Utah on September 21, 1976. Pursuant to Orders Rescheduling Hearing a hearing was held in Ogden on Decmeber 7, 1976. Both sides were represented by counsel. Both sides produced witnesses who were examined and cross-examined, offered exhibits which were received in evidence, made closing arguments, and filed briefs.

Facts

National Treasury Employees Union, Chapter 67 is the certified exclusive representative of Respondent's employees (with the usual exceptions) and has been recognized as the representative since 1965. At all times relevant to this proceeding there was a collective bargaining agreement in effect between the parties. That agreement was a nationally negotiated agreement (denominated the "Multi-Center Agreement") negotiated by the Internal Revenue Service on behalf of nine Service Centers (including the Respondent), one Data Center, and one Computer Center. It was negotiated nationally by the National Treasury Employees Union on behalf of eleven NTEU Chapters that had exclusive recognition at those eleven Centers. The employees involved in this proceeding are all members of the bargaining unit at the Respondent Service Center.

The Multi-Center Agreement ("MCA") in effect at all times relevant was executed April 13, 1973 to become effective (with certain irrelevant exceptions) July 1, 1973. In addition to other provisions, it contained provisions concerning training, evaluation of performance, and furlough and recall of WAE ("when actually employed") employees who are gradually added to the work force as the filing of income tax returns picks up as April 15 approaches and are gradually furloughed as April 15 recedes into the past.

Harvey Eager was in 1975 the Chief of the Examination Branch of the Respondent. Dorothy L. Vest was the President of Chapter 67 and was a Tax Examiner in one of the sections in the Examination Branch. Michael Allen was the Chief of a Division of which the Examination Branch was a part. The Examination Branch is divided into a number of Sections, and the Sections are composed of a number of units. Each unit has about 15 employees.

In May 1975 Eager was completing his first full year as Chief of the Examination Branch. He had observed that many of the procedures and practices in the operation of the Branch had uncritically been carried over from the procedures and practices employed in earlier years and he wanted to see if he could learn if he could improve the operations. For this purpose he decided to have a committee of a cross-section of rank and file employees to make a critique of, to evaluate the operation of the 1975 filing season and make suggestions on how the performance could be improved for the 1976 season. He was especially interested in two of the Sections under him, a Section that dealt with individual tax returns and a Section that handled the individual taxpayer master file. He decided to have the supervisors of some of the units select one employee to be a member of the critique committee, with each supervisor given different criteria in making the selection so that the committee would be a cross-section of the rank and file employees.

Eager spoke to the supervisors of the units in the Sections in which he was particularly interested and gave each of them different criteria for selecting a member of the unit to be on the critique committee so that the entire critique committee would be a cross-section of employees. He suggested that each of them have a meeting of his respective unit and explain the program to them. He also suggested that each person selected to be on the committee solicit suggestions from his or her unit. It was Eager's plan to have a meeting of the individuals selected from the eight units involved plus one from Quality Control (who would also be a member of the critique committe), give his explanation of the purpose, after which the committee would meet and formulate its recommendations, after which they would present them to Eager.

He also spoke to Vest, the Chapter President, about his plan. She expressed her opposition to the entire program as conceived by Eager and took the position that the program should be carried out through the union. It was Eager's plan that when the committee met prior to formulating their critique and recommendations the union would be invited to be present and would also be invited to be present when they presented their recommendations, but that neither management nor the union would be present when the committee met to formulate their critique and recommendations; he wanted them to formulate their own ideas uninfluenced by anyone outside the members of the committee.

Eager discussed the matter also with Allen, the Chief of the Division of the Respondent of which the Branch was a

part. He approved. Allen also spoke to Vest about it on May 22, 1975. She expressed her disapproval and wanted the union to participate in selecting the members of the critique committee and to participate in its deliberations, else, she said, the Respondent would be bypassing the Chapter as the representative of the employees. She also advised Allen that there was to be a meeting that night of the Chapter's officials and stewards. Allen went to the meeting and explained the critique plan. He told them that the Chapter was invited to be present during the opening and closing sessions of the critique committee but not when it was in its deliberations to formulate its critique and recommendations. He told them also that if the recommendations included any matters concerning personnel policies or practices or other matters affecting general working conditions, there would be no implementation of any such recommendation without taking it up first with the Union. Vest declined the invitation for the Union to be present at the opening and closing sessions; she was of the view that the program would constitute an unfair labor practice in violation of Section 19(a) of the Executive Order and that the Chapter's attendance at the sessions might be construed as condoning such conduct.

On May 22 the eight unit supervisors had their unit meetings. Eager told Vest that those meetings were to be held that day and invited the Union to be present at as many as it could; they were all going to be held at about the same time that day. Vest at first declined but changed her mind and sent her deputy who attended three of the unit meetings with Eager.

The next morning, May 23, the critique committee met. The Union had been invited to attend but did not do so. Eager explained the purpose of the committee and that they could make any recommendations and not concern themselves with feasibility and the like but just give whatever ideas they had on any subject. The committee then went into its deliberations which lasted most of the day. The "feedback" or closing session was then held. The Union had been invited but did not attend. Linda McKinstry, a member of the committee, had made a handwritten rough draft of the committee's recommendations. The committee made its recommendations. Eager was present with two of his Section Chiefs to receive them. Allen was not present. McKinstry's draft was given to Eager. The recommendations were received without comment from Eager and were written up later in more formal fashion. A copy was given to the Union. It did not request a meeting concerning it.

Some of the recommendations dealt with matters covered by the collective agreement. Although Vest testified generally that some of the recommended changes were adopted, the only specific change on which there is any evidence is that in Vest's unit, which was not included on the critique committee but is included in the Examination Branch, a variation of one of the recommendations was put into effect, and that is the only change which I find was made as a result of the recommendations of the critique committee. In her unit, prior to the critique committee's recommendations, amendments to the handbook furnished the employees in the Examination Branch were distributed to the employees and simply inserted by them in the handbook. Since then, before inserting the changes in the handbook the employees in Vest's unit have a unit meeting with the unit supervisor to see if they all have the same understanding of the change before they insert it in their copies of the handbook.

Discussion and Conclusions

The exclusivity of a bargaining representative designated under Executive Order 11491 was early expounded by the Assistant Secretary. In United States Army School/Training Center, Fort McClellan, Alabama, A/SLMR No. 42, he said:

> "Once a bargaining representative has been designated ... the obligation ... to deal with such representative ... becomes exclusive and carries with it a correlative duty not to treat with others." 1/

But such exclusivity does not extend to every subject concerning which an agency or activity may be called upon to deal with its employees. It applies only to "personnel policies and practices and other matters affecting working conditions" 2/ and, under certain circumstances, grievances. 3/

1/ Remarkably similar in phraseology to the language of the Supreme Court in Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592 (1937), in which the Supreme Court said with respect to the analogous obligation under the Railway Labor Act: "The obligation ... to treat with the true representative of the employees ... is exclusive. It imposes the affirmative to treat only with the true representative, and hence the negative duty to treat with no other." 300 U.S. at 548, 57 S.Ct. at 600.

2/ Executive Order 11491, Sec. 11(b).

3/ Executive Order 11491, Sec. 10(e).

It expressly does not apply to, among other subjects, "matters with respect to the mission of an agency ... its organization ... the technology of performing its work. ..." 4/ Also, management expressly retains the right "to determine the methods, means, and personnel by which [such] operations are to be conducted." 5/

The purpose of the critique program was to obtain suggestions on how to improve the procedures in processing tax returns from a cross-section of those who did the day-by-day processing. To be sure, as Allen, the Division Chief, recognized, when two or more employees working in the same Branch get together, whether on a committee to discuss operating procedures or over a cup of coffee, personnel policies almost inevitably will come up. But he assured the Union that if the critique committee's recommendations included any change in personnel policy such recommendations would not be implemented without meeting and conferring with the Union about it. There is no evidence that such assurance was not honored. Indeed, there is no such evidence that any personnel policy was changed.

The committee's recommendations included, among other subjects, recommendations concerning three matters that were subjects of the collective bargaining agreement.

One group of recommendations pertained to training. The collective agreement had an article on training. 6/ Section 6 of that article established an Advisory Training Committee composed of six members appointed by the Union. Its function was to advise the Respondent on certain aspects of training. It does not follow that the Respondent was thereby precluded from seeking or accepting advice elsewhere. And if it should ultimately be determined that that Section precludes the Respondent from seeking or accepting advice elsewhere, the contrary is reasonably arguable, and so a breach of that section would be a simple breach of contract not rising to the seriousness of an unfair labor practice. 7/

Another recommendation pertained to the recall of WAE employees. An article of the collective agreement dealt with that subject. 8/

4/ Executive Order 11491, Sec. 11(b)

5/ Executive Order 11491, Sec. 12(b)(5).

6/ Exh. J-1, Article 10.

7/ General Services Administration, Region 5, Public Buildings Service, Chicago Field Office, A/SLMR No. 528, p. 4 of ALJ Decision.

8/ Exh. J-1, Article 26.

Other recommendations pertained to performance reports and evaluations of employees, also subjects of the collective agreement. These were beyond the purpose of the critique committee, but the committee was told by Eager, the Branch Chief, to make suggestions on anything at all. There is no evidence that anything was done about these recommendations.

With respect to these recommendations, indeed with respect to all the recommendations, the evidence is unpersuasive that there was any discussion or "dealing" with them between the committee and management. 9/ Eager and his Section Chiefs simply received the critique and recommendations perhaps with some explanation or amplification and took them under advisement. 10/ The only action taken on any recommendation reflected in the record was a variation of one of the recommendations. In one unit in one Section, a unit which did not have a representative on the committee, when amendments to the handbook were received the employees in the unit met with the unit supervisor and discussed the change before inserting it in their handbooks to see if they all had the same understanding of the amendment, instead of simply immediately inserting it in the handbook. This was hardly a subject on which the Respondent was required to bargain and confer or a bypassing of the Complainant.

The establishment and activities of the critique committee were not substantially different from an employer placing a suggestion box accessible to its employees into which they could drop suggestions. (Here nine employees were directed to make suggestions.) Of course, employees could drop into the box suggestions on every conceivable subject. The fact that some such suggestions might deal with subjects of mandatory bargaining or covered by the collective agreement would not convert the placing of the suggestion box and reading its contents into a bypassing of the Union and a violation of Sections 19(a)(1) and/or (6).

9/ cf. Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 78-80 (October 24, 1975).

10/ The situation here is thus more analogous to National Aeronautics and Space Administration, Washington, D.C. and Lyndon B. Johnson Space Center (NASA), Houston, Texas, FLRC No. 74A-94 (September 26, 1975).

RECOMMENDATION

The complaint should be dismissed.

MILTON KRAMER
Administrative Law Judge

Dated: June 14, 1977
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

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS
A/SLMR No. 945

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 3615 (AFGE) alleging that the Respondent violated Section 19(a)(1) of the Order when its agent, Julian Brownstein, improperly interrogated unit employees about internal AFGE matters. The Respondent denied any violation, contending that Brownstein was not a supervisor or a management official. It further contended that any interrogations conducted by Brownstein were not violative of the Order.

The Administrative Law Judge found that Brownstein was a management official and that his interrogation of four employees about internal AFGE matters was violative of the Order. Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge, citing with respect to Brownstein's status, Department of the Navy, Office of the Secretary, Washington D. C., 4 A/SLMR 341, A/SLMR No. 393 (1974). Under these circumstances, he ordered the Respondent to cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOCIAL SECURITY ADMINISTRATION,
BUREAU OF HEARINGS AND APPEALS

Respondent

and

Case No. 22-7504(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3615

Complainant

DECISION AND ORDER

On August 3, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions 1/ and recommendations.

1/ As indicated by the Administrative Law Judge, during the course of the Respondent's negotiations with the Complainant, Julian H. Brownstein was the chief negotiator for the Respondent. Under these circumstances, I find that he is a representative of management within the meaning of Section 2(f) of the Order. See Department of the Navy, Office of the Secretary, Washington, D. C., 4 A/SLMR 341, 343, A/SLMR No. 393 (1974).

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Social Security Administration, Bureau of Hearings and Appeals, shall:

1. Cease and desist from:

(a) Interrogating its employees as to their membership in, or activities on behalf of, American Federation of Government Employees, AFL-CIO, Local 3615, or any other labor organization.

(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 policies of Executive Order 11491, as amended:

(a) Post at its facility at the Bureau of Hearings and Appeals, Arlington, 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 Bureau of Hearings and Appeals, Social Security Administration, Arlington, Virginia, and shall be posted and maintained by the Director 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 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
November 23, 1977

Francis X. Burkhardt, 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 interrogate our employees as to their membership in, or activities on behalf of, American Federation of Government Employees, AFL-CIO, Local 3615, or any other labor organization.

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 Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor, whose address is: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

SOCIAL SECURITY ADMINISTRATION
BUREAU OF HEARINGS AND APPEALS
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3615
Complainant

Case No. 22-7504(CA)

EDWIN C. SATTER, III, ESQ.
Bureau of Hearings and Appeals
801 N. Randolph Street
Arlington, Virginia 22203

HARVEY V. SINDLER
Labor Relations Specialist
Social Security Administration
6401 Security Boulevard
Room G-2611, West High Rise Bldg.
Baltimore, Maryland 21235
For the Respondent

ALBERT CARROZZO
American Federation of Government
Employees, Local 3615
P.O. Box 147
Arlington, Virginia 22210
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on January 17, 1977 by the Acting Regional Administrator for Labor-Management Services Administrations, U.S. Department of Labor, Philadelphia Region, a hearing was held before the undersigned on March 8, 1977 at Washington, D.C.

This proceeding was initiated under Executive Order 11491, as amended (herein called the Order) by the filing of a complaint on September 16, 1976 by American Federation of Government Employees, Local 3615 (herein called the Complainant) against Social Security Administration, Bureau of Hearings and Appeals (herein called the Respondent). It was alleged therein that Respondent violated Sections 19(a)(1) and (2) of the Order by reason of Julian Brownstein having unlawfully interrogating employees about their union activities, and by Brownstein's withholding information during the investigation of the charge herein. 1/

Respondent denies the commission of any unfair labor practice under the Order. It contends that: (a) Brownstein is not a management official within the meaning of Section 2(f) of the Order; (b) any interrogation conducted by Brownstein was not only non-coercive in nature, but constituted an informal inquiry that cannot be deemed interference under the Order.

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, briefs were filed with the undersigned which have been duly considered.

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

Findings of Fact

1. At all times since about July 1975 Complainant has been, and still is, the recognized collective bargaining representative of an appropriate unit of Respondent's employees.

2. Subsequent to July 1975, the parties herein entered into negotiations for a collective bargaining agreement. An agreement providing for a voluntary dues check off of members of Complainant union was signed on August 5, 1975, effective by its terms on August 19, 1975 with an expiration date of June 5, 1976.

1/ Complainant's request to withdraw the 19(a)(2) allegation was approved on October 4, 1976 by the Area Administrator. The Regional Administrator, on November 23, 1976, dismissed that aspect of the complaint which alleged Respondent impeded an informal resolution of the charge by withholding information during the investigation stage.

3. During the course of continued bargaining for a general agreement the Complainant requested Respondent to extend the dues check off agreement until October 5, 1976. Management refused to continue the dues agreement, and Complainant learned on June 17, 1976 that said agreement would not be renewed.

4. Complainant then held a meeting at 12:15 p.m. on June 30, 1976 to advise the employees of management's decision and discuss possible courses of action as a result thereof.

5. During the course of management's negotiation with Complainant herein, Julian H. Brownstein acted as chief negotiator 2/ for Respondent. Brownstein is classified as, and occupies the position of, supervisory technical advisory specialist. 3/ The functions of the advisory staff is to plan, direct, and coordinate division-wide review and technical assistance programs. Under the job description the purpose of Brownstein's position is to perform an analysis of benefit programs, make recommendations to improve the overall quality of work products and reduce case processing time, and to supervise a staff of professionals employees. 4/ His duties encompass planning and directing a program to evaluate all technical aspects of appellate determination made on benefit claims, including analyses which recommend action concerning decisions of administrative law judges. Brownstein is charged with responsibility, inter alia, of consulting with other Bureau components to assure that management and policy decisions are implemented in accord with the Bureau's needs.

6. On June 30, 1976 at about 12:15 p.m. Brownstein stopped at the desk of Aurelio A. Avelleyra, an analyst with the civilian action branch, who was working in the Disability Appeals Operation Branch on the 3rd floor of Boston Tower II building. Brownstein asked Avelleyra if he attended the special union meeting, and the latter replied he did not attend since he forgot about it. Avelleyra then called to Linda Baehr, another analyst who occupied a desk nearby, and asked her if she went to the meeting.

2/ Brownstein was not engaged in negotiations with the union as chief negotiator on June 30, 1976.

3/ Complainant's Exhibit No. 1.

4/ The record reflects Brownstein was required to supervise two professionals on his staff and one clerical. The professional positions however, were never filled, and at the date of the hearing the clerical postion had been transferred to another location.

Brownstein came over to Baehr's desk, and the latter stated she had not gone to the meeting. Whereupon Brownstein inquired if Baehr knew "how many people were there and what happened." The employee replied she didn't know anything about it. 5/

7. In addition to speaking with the foregoing employees, Brownstein also spoke to James E. Marshall and Milton Kraft on June 30, 1976 re the union meeting held that day.

(a) At about 4:00 p.m. on this date Brownstein approached Marshall, who worked as a disability analyst in the Boston Tower Building II and was assistant chief steward of the union, and asked him several questions. Brownstein inquired as to "how the meeting went", and "how many attended that day." Upon being told that over 100 were present, Brownstein remarked that the turnout was excellent. He then asked Marshall how many employees paid their dues by check, and the union official said it was none of Brownstein's business.

(b) Brownstein asked Kraft 6/ whether he attended the meeting, and he also inquired as to the number in attendance thereat.

8. Subsequent to the union meeting on June 30, 1976 Brownstein spoke to Douglas Kershaw, national representative of AFGE and chief negotiator for Local 3615. Brownstein mentioned that the union was losing many members because of dues cancellation and people not joining nor renewing membership. Kershaw said he had attended the meeting, saw the checks turned in, and did not believe the union had been hurt. Brownstein remarked he had conversation with people who told him of this and that he had spoken to various employees who told him what took place at the meeting.

Conclusions

Respondent takes the position that it has engaged in no conduct violative of Section 19(a)(1). It contends: (1) Julius Brownstein is neither a supervisor nor a management official so as to bind Respondent for his actions; (2) any questioning conducted by Brownstein was isolated in nature, and had no coercive nor restraining effect upon employees.

5/ The versions given by Brownstein and Complainant's witnesses differ as to what transpired during the discussions between Brownstein and each employee. The findings of fact, in each instance, are the credited versions of what occurred.

6/ Kraft died on February 16, 1977. Those facts are taken from a statement signed by him on July 20, 1976 which was received in evidence (C8) by way of stipulation.

(1) While the record reflects that Brownstein was authorized to exercise supervisory authority over two professional employees and one clerical, those positions were vacant and unoccupied. Moreover, it does not appear, from the record, that there was any reasonable expectation they would be filled in the near future. Hence, I am constrained to conclude Brownstein was not, at the material time herein, acting in a supervisory capacity.

Nevertheless, I do not agree that Brownstein was not performing as a management official on June 30, 1976. Respondent asserts that the term "management official" as defined in Department of the Air Force, Arnold Engineering Development Center, et. al, A/SLMR No. 135 does not encompass the duties performed by its technical advisory specialist.

In the cited case the Assistant Secretary found that a civilian safety engineer, who rendered advice and made recommendations re safety problems, acted as an effective influencer who participated in policy determinations and was a management official. This latter term was described as referable to any employee having authority to make, or influence effectively the making of, policy re personnel procedures or programs.

The job description which lists Brownstein's duties and responsibilities, together with his role as chief negotiator for Respondent in labor relations, convinces me that this individual plays a significant role in influencing and affecting personnel policies and programs for management. His evaluations and recommendations involving benefit programs and case processing must necessarily influence policies adopted by the employer. I conclude, therefore, that Julius Brownstein is at least a management official, and that, under the Order, Respondent is responsible for his actions during the course of his employment. 7/

(2) In contending that no unlawful interrogation occurred in the case at bar, Respondent relies heavily upon the fact that no threats were made to employees by Brownstein. Moreover, it is asserted that no intimidatory conduct was shown. The questioning is deemed by Respondent to constitute "curiosity" and far removed from acts proscribed by the Order.

7/ Cf. Department of Transportation, National Highway Safety, A/SLMR No. 193; FAA, Department of Transportation, A/SLMR No. 173. The analysts involved in these cases are, in my opinion, distinguishable from the technical advisory specialist herein. The employees in the cited cases performed duties limited, for the most part, to rendering information after gathering information. Little or no role was played in the decision making process or in policy participation.

I do not agree. While it is true that Brownstein uttered no threats during the interrogations herein, the record reflects that he did approach and question four employees regarding the union meeting held on June 30, 1976. Further, his questions went beyond the framework of a general query concerning the meeting. Thus, he inquired as to the number of people who attended, what occurred thereat, and how many employees paid their dues by check. Such inquiries are not, as urged by Respondent, isolated in nature. Contrariwise, they are akin to systematic interrogation re union affairs which has been deemed unlawful by the National Labor Relations Board, See Blade Tribune Publishing Co. 161 NLRB 1512.

No legitimate reason appears for the questioning by Brownstein of employees regarding the union meeting, nor was any explanation offered to them by the management representative as to why such interrogation was conducted. In such a posture, and without assurances from Respondent that no ill effects would result from such queries, interrogation of a number of employees might well tend to restrain and be coercive. See Vandenberg Air Force Base et. al, A/SLMR No. 383.

On the basis of the record facts I am persuaded that the interrogation by Julius Brownstein of four employees was not merely a "display of the supervisor's curiosity", but constituted an infringement of the employees' rights under the Order. 8/ This persistent questioning, under the circumstances, of employees regarding the union meeting amounted to interference, restraint and coercion under the order and was violative of Section 19(a)(1) thereof.

Recommendation

Having found that Respondent has engaged in certain conduct which is violative of Section 19(a)(1) of the Order, I recommend that the Assistant Secretary adopt the following order designed to effectuate the purposes of Executive Order 11491, as amended.

Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulation, the Assistant Secretary of Labor for Labor-Management Relations

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8/ See also Roses' Stores, Inc. 221 NLRB No. 79 where the NLRB found coercive interrogation when two employees were asked "how did the union meeting go last night."

hereby orders that the Social Security Administration, Bureau of Hearings and Appeals, shall:

1. Cease and desist from:

(a) Interrogating its employees as to their membership in or activities on behalf of American Federation of Government Employees, Local 3615, or any other labor organization.

(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 policies of Executive Order 11491, as amended:

(a) Post at its facility at the Bureau of Hearings and Appeals, Arlington, 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 Bureau 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. Such official shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

WILLIAM NAIMARK
Administrative Law Judge

Dated: 3 AUG 1977
Washington, D.C.

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 interrogate our employees as to their membership in, or activities on behalf of, American Federation of Government Employees, Local 3615, or any other labor organization

WE WILL NOT in any like or related manner interefere 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 of 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: 14120 Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19104.

November 25, 1977

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 FACILITY ENGINEERS,
FORT RICHARDSON, ALASKA
A/SLMR No. 946

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1712, AFL-CIO (AFGE) alleging that the Respondent, one of several directorates located at Fort Richardson, Alaska, violated Section 19(a)(6) of the Order when it changed a past practice regarding retention of certain unit employees during a snow emergency closure of the base without affording the AFGE an opportunity to negotiate.

The evidence disclosed that prior to the alleged incident, it was the unwritten, though observed, policy of the Respondent to allow all nonessential nonemergency personnel to leave work early in the event inclement weather conditions necessitated a closure of the base. On the day in question, the Commanding General declared Fort Richardson closed except for emergency personnel and those residing on the base. The Respondent's Deputy Director, however, made a decision to retain the majority of the Respondent's employees, contrary to the previous policy.

The Administrative Law Judge found that the Respondent had not engaged in conduct violative of the Order, concluding that the decision made by the Respondent's Deputy Director was a one-time exercise of a right reserved to management under Section 11(b) of the Order, and recommended that the complaint be dismissed.

The Assistant Secretary concluded, contrary to the Administrative Law Judge, that the Respondent had engaged in conduct violative of Section 19(a)(6) of the Order. He found that while the decision to close the base is not a subject for negotiations because it is a reserved management right under Section 12(b) of the Order, the Respondent was obligated to afford the exclusive representative the opportunity to meet and confer over the implementing procedures and the impact of the change in the previous policy designating certain employees as essential and requiring them to remain on duty during a snow emergency closure. Accordingly, the Assistant Secretary found that the Respondent violated Section 19(a)(6) of the Order by failing to meet and confer with the AFGE over the impact and procedures of the base closing, including the change in policy.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DIRECTORATE OF FACILITY ENGINEERS,
FORT RICHARDSON, ALASKA

Respondent

and

Case No. 71-4048(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1712, AFL-CIO

Complainant

DECISION AND ORDER

On July 21, 1977, Administrative Law Judge Robert L. Ramsey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent, Directorate of Facility Engineers, Fort Richardson, Alaska, 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 Recommended Decision and 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. Except as modified, 1/ the rulings are hereby affirmed.

1/ In U.S. Department of Air Force, Norton Air Force Base, 3 A/SLMR 175, A/SLMR No. 261, the Assistant Secretary noted that it is improper to admit into evidence offers of settlement. Thus, in order to foster and afford an atmosphere conducive to the settlement of unfair labor practice allegations, it is considered beneficial and necessary to assure to parties involved in settlement discussions that matters raised in connection with their deliberations ultimately will not be admitted into evidence. A contrary policy would, in my view, inhibit the settlement of unfair labor practice allegations and thereby possibly encourage needless litigation. Under these circumstances, in reaching a decision in this matter no consideration has been given to the offers of settlement which the Administrative Law Judge permitted to be introduced into the record.

Upon consideration of the Administrative Law Judge's Recommended Decision and Order 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.

This case arose as a result of a complaint filed by the American Federation of Government Employees, Local 1712, AFL-CIO (Complainant) alleging that the Respondent Directorate violated Section 19(a)(6) of the Order by failing to negotiate with the Complainant before changing a policy affecting unit employees.

The essential facts of the case, set out in detail in the attached Administrative Law Judge's Recommended Decision and Order, are not in dispute. The Respondent Directorate is one of several directorates located at Fort Richardson, Alaska. The Complainant is the exclusive representative of a unit of employees in the Directorate. Prior to March 18, 1976, it was the unwritten, though observed, policy of the Respondent to allow all non-essential personnel to leave work early in the event inclement weather conditions necessitated a closing of the base. From the record, it appears that essential personnel during a snow closure were those persons needed to maintain the health and safety of the base or for snow removal.

On March 18, 1976, the Commanding General declared Fort Richardson closed except for essential emergency personnel and those residing on the base. The Respondent Directorate, through its Deputy Director, Walter Bagley, received official notification of the base closure at approximately 11:00 a.m. At this time, Bagley made a decision to retain the majority of the Respondent's employees except those in car pools with other base employees and those in hardship situations. The employees of the Directorate who remained were required to stay on the job performing their normal duties until approximately 3:00 p.m. All other nonessential base personnel were allowed to leave at approximately noon.

The Administrative Law Judge noted the agreement of the parties that the decision to close the base was a reserved management right. He determined that the decision as to who are essential employees also is a right reserved to management under Section 11(b) of the Order. In this connection, he concluded "that the failure of the Respondent to release all but truly essential employees. . .was not a change in policy, but was a one-time exercise of the reserved management rights contained in section 11(b) of Executive Order 11491, as amended." I disagree.

While management's decision to close the facility in a snow emergency is a reserved management right (under Section 12(b), rather than Section 11(b) as indicated by the Administrative Law Judge), I find that the procedures utilized to implement this decision, including questions related to the identity of essential and nonessential employees, is a matter subject to the obligation to bargain under the Executive Order where, as here, such decision represents a change in past policy. Thus, it is well established that agency management is obligated to bargain concerning the implementing procedures and impact on adversely affected employees of such a management decision even

though the subject matter of the decision is non-negotiable under Section 12(b) of the Order. Cf. Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia, FLRC No. 71A-56, and Bureau of the Mint, U.S. Department of the Treasury, 6 A/SLMR 640, 641, A/SLMR No. 750. Accordingly, in the absence of evidence that bargaining on procedures and impact in this instance would have had the effect of negating the authority reserved to management, I find that the Respondent violated Section 19(a)(6) of the Order by failing to afford the Complainant the opportunity to meet and confer over the procedures utilized to implement its decision to close the facility, including matters relating to a change in policy as to the identity of essential and nonessential employees, and on the impact of its decision on adversely affected employees.

ORDER

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the Directorate of Facility Engineers, Fort Richardson, Alaska, shall:

1. Cease and desist from:

Instituting a change in policy of retaining certain employees represented by the American Federation of Government Employees, Local 1712, AFL-CIO, during a snow emergency closure without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such policy and on the impact of such policy on adversely affected employees.

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

(a) Upon request by the American Federation of Government Employees, Local 1712, AFL-CIO, meet and confer, to the extent consonant with law and regulations, concerning the procedures involved and the impact on adversely affected employees of a change in policy designating certain employees as essential and requiring them to remain on duty during a snow emergency closing.

(b) Post at all Directorate of Facility Engineers, Fort Richardson, Alaska, 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 Director of the Directorate of Facility Engineers, Fort Richardson, Alaska, and they shall be posted at all Directorate of Facility Engineers, Fort Richardson, Alaska, facilities and maintained by the Director 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 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D. C.
November 25, 1977

Francis X. Burkhardt, 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 institute a change in policy of retaining certain employees represented exclusively by the American Federation of Government Employees, Local 1712, AFL-CIO, during a snow emergency closure without affording such representative an opportunity to meet and confer, to the extent consonant with law and regulations, on the procedures which management will observe in effectuating such policy and on the impact of such policy on adversely affected employees.

WE WILL, upon request by the American Federation of Government Employees, Local 1712, AFL-CIO, meet and confer, to the extent consonant with law and regulations, concerning the procedures involved and the impact on adversely affected employees of a change in the previous policy designating certain employees as essential and requiring them to remain on duty during a snow emergency closing.

_____
(Activity or Agency)

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 any employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Administrator, Labor-Management Services Administration, United States Department of Labor, whose address is: Rm. 9061, Federal Office Building, 450 Golden Gate Avenue, San Francisco, California 94102.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 528
San Francisco, California 94105

(202) 653-5092
(415) 556-0555

In the Matter of

DIRECTORATE OF FACILITY ENGINEERS
FORT RICHARDSON, ALASKA
Respondent

and

CASE NO. 71-4048(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1712, AFL-CIO
Complainant

Robert L. Head
American Federation of Government Employees
Local 1712, AFL-CIO
P. O. Box 346
Fort Richardson, Alaska 99505

Burton H. Goldberg
National Representative
American Federation of Government Employees
2133 Dahl Lane
Anchorage, Alaska 99503
For the Complainant

John Patch, Esquire
Office of Staff Judge Advocate
Directorate of Facility Engineers
Headquarters, 172nd Infantry Brigade (Alaska)
APO Seattle, Washington 98749

Edwin L. Stonefelt
Division Personnel Officer
Directorate of Facility Engineers
Headquarters, 172nd Infantry Brigade (Alaska)
APO Seattle, Washington 98749
For the Respondent

Before: ROBERT L. RAMSEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This is a hearing on a complaint filed by the American Federation of Government Employees, Local 1712, AFL-CIO, Fort Richardson, Alaska, hereinafter referred to as the Complainant, against the Directorate of Facility Engineers Headquarters, 172nd Infantry Brigade (Alaska), Department of the Army, Fort Richardson, Alaska, hereinafter referred to as Respondent, charging Respondent with an Unfair Labor Practice in violation of section 19(a)(6) of Executive Order 11491, as amended.

A formal hearing was held on the tenth day of June, 1977 at Anchorage, Alaska, pursuant to notice from the Assistant Secretary for Labor-Management Relations dated the 21st day of March, 1977. All parties were afforded and took full advantage of the right to call witnesses and to examine and cross-examine the same, to produce documentary evidence, and to argue their respective positions. Following the foregoing, the opportunity was given each of the parties to submit a brief; however, the right to submit such brief was waived by each party. Thereupon the record was closed and the matter now stands ready for decision.

Although the formal written complaint herein (Assistant Secretary Exhibit 1(a)) charged violations of section 19(a)(1) and (6) of Executive Order 11491, as amended, the Complainant at the formal hearing stated that no allegation or violation of section 19(a)(1) of Executive Order 11491, as amended, was intended, nor was such an allegation urged by the Complainant. Thus, the sole matter in dispute is whether the action of the Respondent constituted an Unfair Labor Practice under section 19(a)(6) of Executive Order 11491, as amended.

Having heard and considered the testimony of witnesses and having observed their demeanor, and having read and considered the exhibits admitted into evidence, and based on the entire record in this cause, I make the following findings of fact, conclusions of law and recommended decision:

Findings of Fact

The Complainant became the exclusive bargaining unit with respect to the Respondent in approximately 1966 and has been the exclusive bargainning unit since that time.

Prior to March 18, 1976, it was the unwritten, though observed, policy of the Respondent to allow all non-essential personnel to leave work early in the event inclement or adverse weather conditions necessitated a closing of the base. On March 18, 1976, at approximately 10:30 a.m., due to a heavy snow storm, the Commanding General declared Fort Richardson closed except for essential emergency personnel and those residing on the base. At approximately 11:00 a.m. on that date, Respondent, through Mr. Walter Bagley, Deputy Director of the Respondent, received official notification of the base closure. At this time Mr. Bagley made a decision to retain the majority of the Respondent's employees; however, the Respondent's Division Chiefs were instructed to inform their foremen that employees in car pools with other employees on the base that had been excused would be allowed to leave. In addition, the foremen were advised that if an employee lived in a remote area and a hardship would be created by requiring said employee to remain on the job, he too could be excused. Several of the Respondent's employees fell into these categories and were excused from their jobs at approximately 12 o'clock noon. The remainder of Respondent's employees were required to remain on the job until approximately 3:00 p.m., when all were released with the exception of those employees needed to maintain the health and safety of the base. Normal quitting time for the affected employees was approximately 5:00 p.m.

On March 25, 1976, the Complainant's President, Mrs. Dorothy Hefner, met with Mr. Bagley to register a complaint that the Respondent's employees were not released at the same time as the rest of the employees on Fort Richardson. Mrs. Hefner and Mr. Bagley met again with regard to this problem on April 13, 1976, in an attempt to resolve the difficulty. At this time, Mr. Bagley agreed to inform all employees of the Respondent, through their respective foremen, that no change in policy with respect to the release of personnel in the event of base closure had been made or intended by Mr. Bagley's actions on March 18, 1976. On or about April 15, 1976, Mr. Bagley informed his foremen as agreed and directed them to so advise the employees under their supervision. The majority of the employees received such notice; however, some employees who were members of the Complainant Union were not informed as directed by Mr. Bagley. Thereafter, on or about May 25, 1976, Mrs. Hefner and Mr. Bagley met again to discuss the matter, which by then was becoming a controversy. During this meeting, Mr. Bagley informed Mrs. Hefner that he had fulfilled his April 13, 1976, agreement; however, Mrs. Hefner was adamant in her position that he had not.

On or about August 3, 1976, Mrs. Hefner, in a letter (Joint Exhibit J-1), charged the Respondent with an Unfair Labor Practice for failure to negotiate a change in policy with regard to release of employees when the base was ordered closed by the Commanding General. As a resolution, Mrs. Hefner demanded that Mr. Bagley post a notice on all bulletin boards within the Respondent facility admitting that Mr. Bagley committed an Unfair Labor Practice and advising that in the future only employees needed in an emergency would be designated as essential. In response, Mr. Bagley offered (Joint Exhibit J-4, page 5) to post a notice (Joint Exhibit J-4, page 6) explaining that no change in the emergency release policy had been made, but he impliedly refused to admit the commission of an Unfair Labor Practice.

On September 20, 1976, Mr. Smith Box, acting for the Complainant, wrote to Mr. Berry McBride, Labor-Management Relations Specialist at the Civilian Personnel Office, and informed Mr. McBride that Mr. Bagley's offer was unacceptable to the union because: (1) it did not admit nor state that management had committed an Unfair Labor Practice; (2) it did not identify those employees considered "essential" in case of an emergency closure of the base; and (3) it did not state what would happen when the base was next closed on an emergency basis due to weather (Joint Exhibit J-4, page 7).

On October 18, 1976, Mrs. Hefner filed a complaint which is the basis of this proceeding.

It is agreed by all parties that the decision to close the base is not a subject for negotiation between the Respondent and the Complainant inasmuch as such a decision is a reserved management right under section 11(b) of Executive Order 11491, as amended. I likewise find and conclude that the decision as to who are "essential" employees in the event of a base closure due to inclement weather is a reserved management right under the "work project" and or "tour of duty" exception contained in section 11(b) of Executive Order 11491, as amended. Thus, I find and conclude that the failure of the Respondent to release all but truly essential employees on March 19, 1976, after the base had been ordered closed by the Commanding General was not a change in policy, but was a one-time exercise of the reserved management rights contained in section 11(b) of Executive Order 11491, as amended. This finding is, I believe, supported by the offer of Mr. Bagley to post either of two separate notices of "no policy change" (Joint Exhibit J-4, pages 5 and 6, and Joint Exhibit J-5).

It is most unlikely that a repetition of this incident will occur, inasmuch as the Respondent on November 1, 1976, in a document identified as "S.O.P. NO. DFAE 110-176" (Joint Exhibit J-2), identified those employees of the Respondent facility who would be retained in the event of an early dismissal of nonessential personnel under adverse weather conditions.

Based on the above, I make the following conclusions:

Conclusions

1. Prior to March 18, 1976, there existed at Fort Richardson, Alaska, an unwritten, but observed, policy to allow all non-essential personnel to leave work early in the event inclement or adverse weather conditions necessitated a closing of the base.

2. Prior to March 18, 1976, there was no universally recognized listing of those who constituted essential personnel at Fort Richardson.

3. The decision made by the Respondent's Assistant Director, Mr. Walter Bagley, on March 18, 1976, was the exercise of a right reserved to Management under section 11(b) of Executive Order 11491, as amended.

4. The actions of the Respondent's Assistant Director, Mr. Walter Bagley, on March 18, 1976, did not constitute a violation of section 19(a)(6) of Executive Order 11491, as amended.

Recommendation

I recommend that the complaint be dismissed in its entirety.

ROBERT L. RAMSEY
Administrative Law Judge

Dated: July 21, 1977
San Francisco, California

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

RHODE ISLAND NATIONAL GUARD,
PROVIDENCE, RHODE ISLAND
A/SLMR No. 947

This case involved an Application for Decision on Grievability-Arbitrability filed by the Rhode Island Association of Civilian Technicians (Applicant). The Applicant contends that a grievance filed by two unit members concerning the procedures used in the selection of an Aircraft Mechanic Foreman position is grievable and arbitrable under the parties' negotiated agreement. In response, the Rhode Island National Guard, Providence, Rhode Island (Agency) contends that the grievance regarding the selection procedures used for the Aircraft Mechanic Foreman position is not grievable or arbitrable because the aforementioned position is a supervisory one and the selection procedures for filling the position are not subject to the grievance and arbitration procedures of the negotiated agreement.

The Administrative Law Judge found that the issue raised by the grievance was not grievable or arbitrable under the parties' agreement. He found it uncontroverted that the position involved was a first-line supervisory position and as he concluded that the procedures for filling such a position were outside the scope of the negotiated agreement, he found that the grievance was not grievable or arbitrable under the negotiated agreement.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge.

A/SLMR No. 947

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

RHODE ISLAND NATIONAL GUARD,
PROVIDENCE, RHODE ISLAND

Agency

and Case No. 31-09847(AP)

RHODE ISLAND ASSOCIATION OF CIVILIAN
TECHNICIANS

Applicant

DECISION ON GRIEVABILITY-ARBITRABILITY

On August 22, 1977, Administrative Law Judge Rhea M. Burrow issued his Recommended Decision on Grievability in the above-entitled proceeding, finding that the grievance herein was not grievable or arbitrable under the parties' negotiated agreement. No exceptions were filed to the Administrative Law Judge's Recommended Decision on Grievability.

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 Recommended Decision on Grievability and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

FINDING

IT IS HEREBY FOUND that the grievance in Case No. 31-09847(AP) is not subject to the grievance and arbitration procedures set forth in the parties' negotiated agreement.

Dated, Washington, D.C.
November 29, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	
RHODE ISLAND NATIONAL GUARD PROVIDENCE, RHODE ISLAND Agency	Case No. 31-09847(AP)
and	
RHODE ISLAND ASSOCIATION OF CIVILIAN TECHNICIANS Applicant	

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For the Agency

JOHN GIARRUSSO, PRESIDENT
Rhode Island Association of Civilian
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For the Applicant

Before: RHEA M. BURROW
Administrative Law Judge

RECOMMENDED DECISION ON GRIEVABILITY

This proceeding is pursuant to an application for Decision on Arbitrability filed January 20, 1976 and amended April 14, 1976, under Section 13 of Executive Order 11491, as amended, (hereinafter called the Order) by the Rhode Island Association of Civilian Technicians, Incorporated, (hereinafter called RIACT and/or the Union and applicant). The matter concerns the grievability of the Agency's alleged failure to abide by its collective bargaining agreement with the Union in filling a vacant position

(Aircraft Mechanic Foreman); the agency maintains the position is a supervisory one outside the collective bargaining unit. A Notice of Hearing on Application for Decision on Grievability or arbitrability was issued by the Regional Administrator, New York Region on January 13, 1977.

A hearing was held before the undersigned in Providence, Rhode Island on June 7, 1977. All parties were afforded a full opportunity to be heard, to examine and cross examine witnesses and to introduce evidence bearing on the issues involved herein. Subsequent to the close of the hearing both parties filed briefs which have been duly considered. 1/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendation:

Findings of Fact

A. Background Information

1. The Union, at all times material herein, has been the collective bargaining representative of a unit composed of all federally paid technician employees of the Rhode Island Army and Air National Guard except for the following: management officials, supervisors and employees engaged in federal personnel work in other than a purely clerical capacity. 2/

2. The controversial position in issue was established in late 1972 with the official title of Aircraft Mechanic Foreman. The job provides for supervision of several employees assigned to the Allied Shops, services section, and Avionics section of an Army Aviation Support Facility. 3/

1/ The request for extension of time to file briefs is considered to have been timely in the circumstances of this case for the following reasons: (1) I was notified on June 27 by phone that a written request for extension of time was being sent to me on that date, (2) the written request was dated and mailed on that date; (3) the delay in delivery on July 15, 1977 was through no fault of the agency and I had prior notice of the matter; (4) the Union was advised of the request and interposed no objection.

2/ See Agency Exhibit No. 1 (Collective Bargaining Agreement 1973-1976), Article I, Sections 1 and 2.

3/ Agency Exhibit No. 2.

The position by job description and evidence presented at the hearing clearly establishes that it is a supervisory one with specified education and qualification requirements and supervisory duties and responsibilities. There was no controversy offered by the Union that the job was other than a supervisory one and evidence was presented that it has been so recognized since it was established. 4/

There are two different types of Aircraft Mechanic Foremen; there is one foreman that controls aircraft maintenance and another that controls the allied shop. The latter is the one involved in this proceeding. While both have the same title, their duties are somewhat different. The maintenance foreman controls general aircraft maintenance and the other, (allied shop foreman), control the allied shop, avionics and the different shops in the facility. At the time of the hearing nine men were reported to be under the supervision of the allied shop foreman. The Aircraft Mechanic Foreman position had been established and was operative at the time the collective bargaining agreement was entered into on July 10, 1973.

3. After establishment of the position Aircraft Mechanic Foreman (allied shop) Sergeant Francis Patrick Cook and Jack Jessey were selected to fill the position. They were followed by Zane Sherman and Bruce Wilcox, the latter being the present incumbent on the job. When Sherman was selected in 1974 a rating panel was held and it certified the names of several persons from a list of nine as being qualified for the position to the selecting official. The names certified included Zane Sherman, Eugene J. Sabetta, John C. Caffeso and Joseph Bouchard. In June 1975, Bouchard, Wilcox, Caffeso and Sabetta were the persons referred to the Technician Personnel Officer as fully qualified for the position. There was no additional Panel rating made and when Wilcox was subsequently selected Caffeso and Sabetta initiated grievances when they learned that the names forwarded to the selecting official were not again ranked or evaluated as specified in Article XII, Section 11 of the Agreement. 5/ Article XII of the negoti-

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4/ The duties of the Aircraft Mechanic Foreman (allied shops) are reported in detail on pp 62, 63, 64 and 65 of the transcript by testimony of Russell J. Johnson, Facilities Support Commander, Rhode Island National Guard.

5/ In the Statement of Facts leading to the Grievance it was also stated: "The Grievants felt that the Technical Personnel Officer violated their rights under the agreement by not allowing an evaluation (rating) Panel to properly evaluate and rank the applicants as to whether they were qualified or unqualified as required in the agreement."

ated agreement relates to Merit Promotion and Sections 6 and 11 are as follows: "Section 6, Promotions shall be made on the basis of qualifications, merit and fitness. The selecting supervisor of the activity or unit concerned shall select candiates on the basis of their inclusion on lists of best qualified, in accordance with the spirit and intent of governing regulations, consideration will be given to personnel in the minimum areas of consideration when it is determined that the minimum area of consideration will yield a sufficient number of qualified candiates. Exceptions are voluntary applicants, currently members of the National Guard, who will be referred to the selecting authority in accordance with applicable regulations, if the merit inclusion on lists of best qualified." "Section 11, Candiates will be evaluated and ranked in accordance with the scoring of the Evaluation Board into one of the categories below: a. Best Qualified, b. Highly Qualified, c. Qualified, d. Unqualified."

While there was no new rating panel ranking and evaluation of the candidates made when Wilcox was selected in June 1975, the selection was made from names considered, evaluated by the panel in 1974 when a previous selection from qualified candidates had been made. Sabetta and Caffeso, the parties who filed grievances regarding selection of the successful candidate were among the four referred for selection as being fully qualified both in 1974 and 1975.

B. Merit Promotion Programs.

1. The State Plan. The policy and procedures for the merit promotion and internal placement of technicians employed by the Rhode Island Army and Air National Guard are contained in a letter from the Office of the Adjutant General dated January 15, 1970, Subject: Technician Letter 70-A. 6/ Section 5(e) of the State Merit Promotion Plan sets forth that evaluation of candidates knowledge, skills, abilities and personal characteristics will be performed by an evaluation panel or panels appointed by the Adjutant General; Section 6(a) provides that the candidates will be ranked by the panel in the following categories: (1) Best qualified; (2) Highly qualified; and, (3) Qualified. Section 6(b) states that three to five of the best qualified candidates will be certified to the selecting official.

6/ Attachment to Asst. Secretary's Exhibit 1-E.

2. The Negotiated Agreement Provisions. 7/ Article I, Section 2 of the negotiated agreement states: "The unit to which this AGREEMENT is applicable is composed of all federally paid technician employees' of the Rhode Island Army and Air National Guard except for the following: management officials, supervisors and employees' engaged in Federal personnel work in other than a purely clerical capacity."

Article X, relating to Grievance Procedure, Sections (b) and (c) state: "(b) Grievances initiated by an employee or group of employees in the unit on matters other than the interpretation or application of the existing agreement and/or not subject to appeal procedures contained in Executive Orders or Regulations may be presented under the procedure published by the Adjutant General, State of Rhode Island."

"(c) Questions arising pertaining to the interpretation of published agency policies or regulations of appropriate authorities outside of the Agency shall not be subject to the negotiated grievance procedure regardless of whether such policies, laws, or regulations are quoted, cited, or otherwise incorporated or referenced in this agreement."

Article XII of the negotiated agreement relating to "Merit Promotion" Sections 2 and 3 provide: "Section 2. Selections for filling positions within the unit covered by this agreement will be made from the best of the qualified without discrimination for any non-merited reasons such as age, race, sex, color, religion, national origin, lawful political affiliation marital status, or labor organization membership."

"Section 3. The employer shall have posted on designated official bulletin boards within the unit, notices of all promotional opportunities and vacancies for positions within the units...."

7/ Agency Exhibit No. 1.

Position of the Parties

The Applicant through Counsel states in its brief that through oral and documentary evidence presented at the hearing the Agency Violated Article XII of the negotiated agreement and Technician Letter 70-A, Section 5(e), in that no rating panel was held for the position in issue. It recommends a decision issue holding that the case is grievable under the negotiated procedure and that it be allowed to proceed to step 4 and invoke arbitration in accordance with Article XIX so that a third and final decision may be made.

The position of the Agency as expressed by Counsel in his brief is that the position of Aircraft Mechanic Foreman (allied shop) is a supervisory one and is not subject to grievance and arbitration procedure under the negotiated agreement. It is not denied that a grievance was presented but it is urged that it must be processed under other instructions published by the Agency which are available for settling disputes of this nature.

Discussion and Conclusions

The Agency selected Bruce Wilcox for the position of Aircraft Mechanic Foreman (allied shop) in June 1975 from four candidates that had been evaluated by a panel when a previous vacancy occurred in 1974 and all were certified as being full qualified for the position. Aircraft Mechanic Foreman is a first-line supervisory position, has been so recognized since it was established in 1972 and this was not controverted at the hearing.

There is no obligation under the Executive Order to bargain over procedures for filling vacancies outside the bargaining unit. However, there is no prohibition against doing so and if an agreement on the subject is reached, it is a valid agreement. 8/

It must be concluded from the oral and documentary evidence presented that the position of Aircraft Mechanic Foreman (WS-8852-10) is a supervisory position and, hence, excluded from the exclusive unit under the Order.

8/ Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74- A-71; Community Services Administration and National Council of CSA Locals, AFGE, AFL-CIO, A/SLMR No. 749.

Having found that the position in issue is a supervisory one, the intent of the parties with respect to the scope of Article XII of the negotiated Agreement and whether the Agency Merit Promotion Plan had been incorporated by reference or otherwise into the Agreement must be considered. Certainly, the oral testimony presented at the hearing did not show or indicate any intent on the part of the Agency to include the State Merit Promotion Plan as applicable to supervisory positions in the negotiated agreement. In fact its inclusion was contra to being applicable in the negotiated agreement. In this connection the Applicant offered no testimony other than one adverse Agency witness, Rocco DeAngelis, who was the Technician Personnel Officer who handled the promotion in question; his testimony was not supportive of a supervisory position being one included or intended to be included in the unit under the negotiated agreement.

The negotiated agreement between the parties in Article 1, Section 1, provides in substance that the Employees recognizes that the Association is the exclusive representative of all the employees in this unit excluding management officials, supervisors and employees engaged in Federal personnel work in other than a purely clerical capacity; and, Section 2 provides that the unit to which this agreement is applicable is composed of all federally paid technician employees' of the Rhode Island Army and Air National Guard except for management officials, supervisors and employees' engaged in Federal personnel work in other than a purely clerical capacity.

Looking further, Article XII, Section 2 of the negotiated agreement which the Applicant claims the Agency Violated, states: "Selection for filling positions within the unit covered by this agreement will be made from the best of the qualified, without discrimination for any non-merited reasons such as age, race, sex, color, religion, national origin, lawful political affiliation, maritial status or labor organizational membership." (Underscoring supplied). Section 3 states: "The Employer shall have posted on designated official bulletin boards within the unit, notices of all promotional opportunities and vacancies for positions within the unit..." (Underscoring supplied).

Pursuant to the Executive Order, it is obligatory to determine whether, Applicant's grievance is subject to the negotiated grievance procedure. As the Federal Labor

Relations Council has stated:

> "Section 6(a)(5) of the Order provides in pertinent part that the Assistant Secretary shall:
>
> (5) decide questions as to whether a grievance is subject to a negotiated grievance procedure... as provided in Section 13(d) of the Order
>
> "Section 13(d) provides that 'questions that cannot be resolved by the parties as to whether or not a grievance is a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision. Section 13(d) further permits a party to refer to the Assistant Secretary questions '...as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement...'
>
> "It is clear from the express language in these provisions that in resolving a grievability dispute, if as here, an issue is presented concerning the applicability of a statutory appeal procedure, the Assistant Secretary must decide that question. Further, in any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedures... In making such a determination, the Assistant Secretary must consider relevant provisions of the Order...and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. Further the Assistant Secretary must also consider '...existing laws and regulations of appropriate authorities...."
> Department of the Navy, Naval Ammunition Depot, Crane, Indiana, and Local 1415, American Federation of Government Employees, AFL-CIO, FLRC No. 74 A-19, Report No. 63 (1975).

See, also, Department of the Navy, Naval Ammunition Depot, Crane, Indiana, A/SLMR 684 (1976); NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma, FLRC No. 74 A 38, Report No. 79, 1975.

One of the same issues is apparent in this case as was evident in Texas ANG Council of Locals, AFGE and State of Texas National Guard FLRC No. 74A - 71. That is, that the merit promotion procedures negotiated for the filling of positions within the bargaining unit must be the merit promotion procedures which management must use to fill supervisory positions, outside the bargaining unit. It was found... "that the union's proposal is outside the bargaining obligation established by Section 11(a) of the Order. That is, the agency may, at its option, bargain on the proposal, but is is not obligated to do so under the Order."

Further, the decision stated: "To avoid any possible misunderstanding we must emphasize that our decision herein does not, of course, mean that all proposals in any way related to the filling of supervisory positions would be outside the obligation to bargain under Section 11(a)-- for example, proposals dealing with notification of unit employees eligible for consideration under agency regulations. However, the instant proposal goes beyond assurance of notification by seeking to prescribe the procedures, themselves, which must be used by management in filling supervisory position outside the bargaining unit."

Also, for resolution is the question of whether the procedures used in the filling of threshold supervisory position for which unit employees are eligible is subject to the negotiated grievance procedure? As applied to this case, the Agency utilized the candidates certified by the panel as being fully qualified in late 1974 when it made its selection of Bruce Wilcox in June 1975 and the certified list included Grievant's Sabetta and Cafesso. There was no question raised as to procedure by grievants in 1974 and they were on the same list of candidates that had been certified as fully qualified when selection was made in June 1975. At least, by inference, the Applicant urges that a rating panel be convened every time a promotion is made to rank the same candidates previously evaluated. Such involves a proposal that must be used by management in filling a supervisory position outside of the bargaining unit and not shown to be comprehended within the negotiated agreement. I make no determination

as to whether a grievance was presented that is subject to be processed under Agency procedure and instructions.

Recommendation

On the basis of the foregoing, I recommend to the Assistant Secretary of Labor Management Relations that he find the grievance was not grievable on a matter subject to the parties negotiated grievance procedure and arbitration may not be invoked.

RHEA M. BURROW
Administrative Law Judge

Dated: 22 AUG 1977
Washington, D.C.

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

GENERAL SERVICES ADMINISTRATION,
REGION 3, FEDERAL PROTECTIVE
SERVICE DIVISION
A/SLMR No. 948

This case involved a petition for clarification of unit (CU) and amendment of recognition (AC) filed by the American Federation of Government Employees, Local 1733, AFL-CIO (AFGE) seeking to amend and clarify the unit for which it was granted exclusive recognition on August 18, 1966, to reflect changes brought about by a reorganization. The AFGE sought to amend the description of its exclusively recognized unit by changing the designation "Central Protection Force" to "Federal Protective Service Division" and adding the designation "Federal Protective Officers." It also sought to clarify its unit by including certain job classifications created subsequent to the reorganization and by including employees classified as "Supervisory Federal Protective Officer, GS-083-07," (Sergeant), arguing that such employees are not supervisors within the meaning of Section 2(c) of the Order.

The Intervenor, National Federation of Federal Employees, Local 1800, Independent (NFFE) argued, and the Activity agreed, that the employees in the newly created job classifications sought by AFGE should be included in the NFFE's bargaining unit, and the Activity also took the view that the Sergeants are supervisors within the meaning of the Order and, thus, should be excluded from the AFGE's unit.

The Assistant Secretary found that the employees classified as Supervisory Federal Protective Officer, GS-083-07, (Sergeant) are supervisors within the meaning of Section 2(c) of the Order as they have the authority to adjust grievances, transfer, discipline or reward employees or to effectively recommend such action utilizing independent judgment. Accordingly, he excluded employees classified as Supervisory Federal Protective Officer, GS-083-07, (Sergeant) from the AFGE's unit.

The Assistant Secretary further found that the employees in the job classifications of Contract Specialist, Protection Specialist, Equipment Specialist (electronic), Training Instructor (law enforcement), Training Instructor (firearms), General Communications Operator, and Federal Protection Inspector are functionally and administratively integrated with the Federal Protective Officers and Guards and have a clear and identifiable community of interest with the employees in the unit represented by AFGE. He also found that the AFGE's unit, with the inclusion of the disputed classifications, continues to be appropriate for the purpose of exclusive recognition under the Order as in addition to composing a functionally cohesive grouping of employees sharing a clear and

identifiable community of interest separate and distinct from other GSA employees, the unit will continue to promote effective dealings and efficiency of agency operations. Accordingly, the Assistant Secretary amended the AFGE's recognition and clarified its unit to include the employees in the disputed job classifications.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

GENERAL SERVICES ADMINISTRATION,
REGION 3, FEDERAL PROTECTIVE
SERVICE DIVISION

Activity

and

Case No. 22-7636(AC/CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1733, AFL-CIO

Petitioner

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1800, INDEPENDENT

Intervenor

DECISION AND ORDER AMENDING RECOGNITION AND CLARIFYING UNIT

Upon a petition duly filed under Section 6 of Executive Order 11491, as amended, a hearing was held before Hearing Officer Brigitte Sisson. 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, American Federation of Government Employees, Local 1733, AFL-CIO, hereinafter called AFGE, and the Intervenor, National Federation of Federal Employees, Local 1800, Independent, hereinafter called NFFE, the Assistant Secretary finds:

In this proceeding, the AFGE seeks to amend and clarify the unit for which it was granted exclusive recognition 1/ to reflect changes brought about by a reorganization occurring on or about January 11, 1971. In essence, the AFGE seeks to amend the description of its exclusively recognized unit by changing the designation "Central Protection Force" to "Federal Protective Service Division" and adding "Federal Protective Officers," and including certain specific job classifications created subsequent to the January 1971, reorganization. In addition, the

1/ On August 18, 1966, the AFGE was granted recognition as the exclusive representative of a unit described as: "All nonsupervisory Guards (U.S. Special Police) in classification grades below that of the rank of Lieutenant in the Central Protection Force, Public Buildings Service, Region 3, GSA. This unit does not include Guards (U.S. Special Police) in classification grades of the rank of Lieutenant and above."

AFGE seeks to clarify its unit by including employees classified as "Supervisory Federal Protective Officer, GS-083-07" (Sergeant) arguing that such employees are not supervisors within the meaning of Section 2(c) of the Order. Thus, the AFGE seeks to amend and clarify the unit description to read, in essence,

> All Guards, Federal Protective Officers, Training Instructors, Contract and Protection Specialists, General Communication Operators, and Federal Protection Inspectors assigned to the Federal Protective Service Division, Public Buildings Service, Region 3, General Services Administration, in the Washington Metropolitan Area, excluding professional employees, management officials, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined by the Order.

The NFFE opposes that portion of the AFGE's petition which seeks to include within the AFGE's unit the job classifications which were created subsequent to the reorganization. In this connection, the NFFE argues that such employees should be included in the bargaining unit it represents exclusively. 2/ The NFFE contends that these employees do not share a community of interest with guards and Federal Protective Officers, but, rather, because of their classifications, job functions and location in the Activity's organization, they share a community of interest with the employees in its unit.

In agreement with the NFFE, the Activity contends that the disputed employee classifications more properly belong in the NFFE's unit rather than in the AFGE's unit. It further takes the position that the Sergeants are supervisors within the meaning of the Order and should be excluded from the AFGE's unit.

Region 3, headquartered in Washington, D.C., is one of 10 regional offices of the General Services Administration (GSA). Under the direction of a Regional Administrator, Region 3 is responsible for the achievement of the GSA's multiple missions within the geographical area of the states of Pennsylvania, Virginia, West Virginia, Maryland and Delaware, and the District of Columbia. To accomplish its mission, Region 3 is composed of five program services: the Automated Data and Telecommunications Service; the Office of Operating Programs; the Federal Supply Service; the National Archives and Records Service; and the Public Buildings Service (PBS).

2/ On October 28, 1971, the NFFE was certified as the exclusive representative of a unit of the Activity's employees described as: All nonsupervisory GS employees in GSA Region 3, Washington Metropolitan Area not covered under exclusive recognition, excluding all supervisors, managerial officials, employees engaged in Federal personnel work in other than a purely clerical capacity, WB employees, guards and professionals.

The Activity is one of the several divisions of the PBS, and is responsible for the protection of personnel and property under the control or jurisdiction of the GSA within Region 3. Under the command of its Director, the Activity is composed of seven branches: the Training Branch; the Federal Protection Branch; the Inspection Branch; the Records and Communications Branch; the Enforcement Branch; the Planning and Development Branch; and the Technical Services Branch.

Prior to the 1971 reorganization, all employees engaged in Federal protection activities in the Washington Metropolitan Area were assigned to the Central Protection Force, which was an organizational component of the PBS. The employees engaged in duties directly related to furnishing protection services were classified as Guards (U.S. Special Police). Subsequent to the reorganization, the Central Protection Force was redesignated as the Federal Protection Service Division (Activity) and employees classified as Guards (U.S. Special Police) were reclassified as Federal Protective Officers (FPO). 3/ In addition, subsequent to the reorganization, the classification of Supervisory Federal Protective Officer, GS-083-07 (Sergeant) was created, and certain employees classified as FPO's who performed specialized duties were reclassified as Contract Specialists, GS-1102-07; Protection Specialists, GS-301-07, 09, or 11; Equipment Specialists (electronic), GS-1670-09, or 11; 4/ Training Instructors (law enforcement), GS-1712-05, 07, or 09; Training Instructors (firearms), GS-1712-07; General Communications Operators, GS-392-05, or 06; or Federal Protection Inspectors, GS-083-11. The eligibility of employees in the foregoing classifications is the subject of the AFGE's petition to clarify its exclusively recognized unit.

There are approximately 1275 FPO's and guards assigned to duty within the Washington Metropolitan Area. These employees are assigned to the Activity's Enforcement Branch and are posted among the various buildings in the Metropolitan Area under GSA control. They wear special uniforms and, if qualified, carry firearms in the performance of their duties, which include patrolling, assuring the security of personnel and property, responding to emergency situations, and investigating bomb threats and other crimes occurring in buildings under GSA control. Among these employees are the approximately 130 employees classified as "Sergeants." The other seven disputed classifications include approximately 51 employees who are assigned throughout the other six branches of the Activity.

3/ In this connection, it appears that the classification of guard is still utilized and held by certain employees. The distinction between guards and FPO's is that guards have not completed an eight week academy training course, which is required of FPO's. In other respects, guards have similar duties and responsibilities and are subject to the same supervision as FPO's.

4/ Although this position was not included in the AFGE's petition as one of the disputed positions sought to be clarified, the eligibility of employees classified in this position was fully litigated at the hearing by all parties and, therefore, I will rule upon the eligibility of such employees to be included in either of the exclusively represented bargaining units.

The record reveals that the Director of the Activity has been delegated full authority to direct the day-to-day operations of his Division, including the authority to handle labor relations and personnel matters affecting the Activity. Overall personnel and labor relations services affecting employees in the Washington Metropolitan Area are provided by a central GSA Personnel Office. The area of consideration for reduction-in-force procedures is confined to the Washington Metropolitan Area.

Based on the foregoing, and noting the absence of an objection by any party herein, I shall amend the recognition accorded to the American Federation of Government Employees, Local 1733, AFL-CIO, in August 1966, by changing the unit description from "Central Protection Force" to "Federal Protective Service Division," and by adding the classification "Federal Protective Officers."

Eligibility Issues

Supervisory Federal Protective Officers, GS-083-07 (Sergeants)

As noted above, the Activity contends that employees in the subject classification are supervisors within the meaning of Section 2(c) of the Order, and should be excluded from the AFGE's unit. The AFGE disputes this contention by the Activity, and contends that such employees should be included in its unit.

The record reveals that employees in the subject classification are in charge of squads of approximately 25 FPO's and guards, and, in this regard, responsibly assign and direct the work of employees in their respective squads. In addition, they have been delegated the authority to grant leave and to adjust the grievances of employees under their supervision. The record also discloses that employees in the subject classification have made effective recommendations with respect to disciplinary actions, transfers, incentive awards and commendations affecting employees under their supervision.

Under these circumstances, I find that employees in the subject classification are supervisors within the meaning of Section 2(c) of the Order as they have the authority to adjust grievances and to transfer, discipline or reward employees, or to effectively recommend such actions utilizing independent judgment. Accordingly, I shall clarify the unit for which the American Federation of Government Employees, Local 1733, AFL-CIO is recognized as the exclusive representative, by excluding from such unit employees classified as Supervisory Federal Protective Officer, GS-083-07 (Sergeant).

Contract Specialist, GS-1102-07

The incumbents in this job classification are responsible for handling the contracting out of security services. They draft specifications for particular buildings involved and handle the necessary

paper work sent in by the contractor. They also are responsible for assuring that the contractors are providing the appropriate services. This job classification was established in 1974 because of the large number of contract buildings which were being utilized by the U.S. Government in the Washington Metropolitan Area. Contract Specialists are assigned to the Technical Services Branch and work out of the Regional Office. There are eight incumbents in this job classification and the record reveals that the majority of them were at one time either FPO's or guards.

Protection Specialist, GS-301-07, 09, 11; Equipment Specialist (electronic), GS-1670-09, 11

The incumbents in these job classifications are responsible for making surveys of newly constructed or newly leased buildings to determine the security measures needed to adequately protect the building, the contents, and its personnel. They also periodically check the buildings to see if there are breaches of security. The equipment specialist handles special problems involving special types of alarm systems and other security equipment. The incumbents are assigned to the Technical Services Branch and work out of the Regional Office. There are currently seven Protection Specialists and four Equipment Specialists, the majority of whom were at one time either FPO's or guards.

Training Instructor (law enforcement), GS-1712-05, 07, 09; Training Instructor (firearms), GS-1712-07

The incumbents in these job classifications are involved in the actual training of FPO's and guards as well as a development of training methods and materials for use in their training. The incumbents are assigned to the Training Branch, which is located at the Navy Yard. There currently are two Training Instructors (law enforcement) and five Training Instructors (firearms), all of whom were at one time either FPO's or guards.

General Communications Operator, GS-392-05, 06

The incumbents are responsible for handling of the security communications network covering the FPO's and guards within the Washington Metropolitan Area. They also monitor the various security alarms systems found in U.S. Government buildings throughout the Washington Metropolitan Area. The general communications operators are assigned to the Enforcement Branch and work shifts covering the 24-hour day. This function, which at one time was handled by FPO's, was converted in 1973 into a civilian function. The majority of the nine General Communications Operators were at one time either FPO's or guards.

Federal Protection Inspector, GS-083-11

The incumbents are responsible for the inspection of security personnel and security systems at the U.S. Government buildings as well as the contract buildings. Federal Protection Inspectors are assigned

to the Inspection Branch and work out of the Regional Office. The 16 incumbents were at one time either FPO's or guards.

Under all the foregoing circumstances, I find that the employees in the above classifications do not have a clear and identifiable community of interest separate and distinct from the FPO's and guards employed by the Activity in that they are functionally and administratively integrated with the FPO's and guards. 5/ Thus, the disputed employees and the FPO's and guards enjoy a common mission, common overall supervision, uniform personnel policies and practices, and a high degree of integrated operations. In addition, a substantial degree of transfer of personnel from the classification of FPO or guard to the disputed classifications has occurred. Indeed, as noted above, it would appear that the movement of personnel to the disputed classifications is tantamount to a career progression or "ladder" for employees classified as FPO's or guards.

In addition, I find that the AFGE's unit, with the inclusion of the disputed classifications, continues to be appropriate for the purpose of exclusive recognition under the Order. 6/ Thus, in addition to comprising a functionally cohesive grouping of employees sharing a clear and identifiable community of interest separate and distinct from other GSA employees, I find that the unit will continue to promote effective dealings and efficiency of agency operations. In this regard, I note that the Activity's Director has been delegated authority for personnel and labor relations matters, as well as for all operational matters.

Accordingly, I shall clarify the unit for which the American Federation of Government Employees, Local 1733, AFL-CIO has been recognized as the exclusive representative by including in such unit employees classified Contract Specialist, GS-1102-07; Protection Specialist, GS-301-07, 09, 11; Equipment Specialist (electronic), GS-1670-09, 11; Training Instructor (firearms), GS-1712-07; General Communications Operator, GS-392-05, 06; and Federal Protection Inspector, GS-083-11.

ORDER

IT IS HEREBY ORDERED that exclusive recognition granted on August 18, 1966, to American Federation of Government Employees, Local 1733, AFL-CIO, be, and it hereby is, amended by adding the designation "Federal Protective Officers," and by substituting the designation "Federal Protective Service Division, Public Buildings Service, Region 3, General Services Administration, in the Washington-Metropolitan Area" for the designation "Central Protection Force, Public Buildings Service, Region 3, GSA."

5/ Cf. General Services Administration, Federal Supply Service, 6 A/SLMR 452, A/SLMR No. 699 (1976).

6/ Cf. Department of the Army, Fort McPherson, Georgia, FLRC No. 76A-82.

IT IS FURTHER ORDERED that the unit exclusively represented by American Federation of Government Employees, Local 1733, AFL-CIO, be, and it hereby is, clarified by including in the said unit employees classified as Contract Specialist, GS-1102-07; Protection Specialist, GS-301-07, 09, 11; Equipment Specialist (electronic), GS-1670-09, 11; Training Instuctor (law enforcement), GS-1712-05, 07, 09; Training Instructor (firearms), GS-1712-07; General Communications Operator, GS-392-05, 06; and Federal Protection Inspector, GS-083-11, assigned to the Federal Protective Service Division, Public Buildings Service, Region 3, General Services Administration, and by excluding from said unit employees classified as Supervisory Federal Protective Officer, GS-083-07 (Sergeant).

The unit description, as clarified, is as follows:

> All Federal Protective Officers, Guards, Contract Specialists, Protection Specialists, Equipment Specialists (electronic), Training Instructors (law enforcement and firearms), General Communications Operator and Federal Protection Inspectors assigned to the Federal Protective Service Division, Public Buildings Service, Region 3, General Services Administration, in the Washington-Metropolitan Area, excluding management officials, professional employees, employees engaged in Federal personnel work in other than a purely clerical capacity, and supervisors as defined in the Order.

Dated, Washington, D.C.
November 29, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

November 30, 1977

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,
U.S. CUSTOMS SERVICE, REGION I,
BOSTON, MASSACHUSETTS
A/SLMR No. 949

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union and National Treasury Employees Union Chapter 181 (NTEU) alleging that the Respondent violated Sections 19(a)(1), (2) and (6) of the Order by refusing, contrary to past practice, to extend the assignment of certain named employees in the Toronto, Canada, Office, and/or grant requests from other named employees for transfers to specific locations in Region I, because the employees involved were active members of the Union.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. With respect to the alleged Section 19(a)(6) violation, he found insufficient evidence to establish the existence of a past practice of automatically granting extensions of assignment. Rather, he found that requests for extensions had been considered only when accompanied by a favorable recommendation from the employee's supervisor. The Administrative Law Judge further noted that, while it was true that in the past most requests for extensions had been granted, the employees in the past had been highly experienced and had been specially selected for assignment to the office, while the employees involved herein were newly hired and inexperienced employees.

With respect to the Section 19(a)(2) allegations, the Administrative Law Judge found that the evidence established that the decisions to extend the assignment or transfer the named employees were made prior to their union activity. Moreover, a comparison of the employees who were allowed to extend their assignments with the employees whose requests to extend were denied revealed no disparity attributable to union activity.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions and recommendations.

A/SLMR No. 949

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE, REGION I,
BOSTON, MASSACHUSETTS

Respondent

and

Case No. 31-10021(CA)

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER NO. 181

Complainant

DECISION AND ORDER

On July 15, 1977, Administrative Law Judge Burton S. Sternburg issued his Recommended Decision and Order 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, and the Respondent filed an answering brief, with respect 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and brief and the Respondent's answering brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-10021(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 30, 1977

Francis X. Burkhardt, Assistant Secretary of Labor For Labor-Management Relations

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	
DEPARTMENT OF THE TREASURY U.S. CUSTOMS SERVICE, REGION I BOSTON, MASSACHUSETTS	:	
Respondent	:	Case No. 31-10021(CA)
and	:	
NATIONAL TREASURY EMPLOYEES UNION and NTEU CHAPTER No. 181	:	
Complainant	:	

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Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed on June 16, 1976, under Executive Order 11491, as amended, by National Treasury Employees Union and NTEU Chapter 181, (hereinafter

called the Union or NTEU), against the U.S. Customs Service, (hereinafter called the Respondent or Activity), a Notice of Hearing on Complaint was issued by the Regional Administrator for the New York, New York Region on January 26, 1977.

The complaint alleges that the Respondent violated Sections 19(a)(1), (2) and (6) of the Executive Order by virtue of its actions in refusing, contrary to past practice, to extend the tours of duty of certain named employees in Toronto, Canada, and/or grant requests from other named employees for transfers to specific locations in Region I, because the employees involved were active members of the Union. 1/

A hearing was held in the captioned matter on February 22, 23, and March 3, 1977, in Boston, Massachusetts. 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 findings of fact, conclusions and recommendations.

Findings of Fact

Respondent, United States Customs Service, operates a preclearance station in Toronto, Canada, wherein it inspect travelers to the United States prior to the travelers boarding United States bound planes. The Toronto preclearance branch, at the time of the events underlying the instant complaint, had a total staff of 51, which included 44 inspectors, 6 supervisory inspectors and 1 branch chief.

Bureau of Customs Headquarters' Circular PER-5-PER, dated June 18, 1965, which is applicable to the Toronto pre-clearance operation, established a basic two-year tour of duty for all U.S. citizens employed by the Customs

1/ The employees involved are Donald Sokolowski, Marilyn Cohen, Charles Sorces, Martin Brucker, Robert Barnes, Robert Nardini, Robert Bigelow, Kevin Feely, William McGuire, Robert Wallace, Paul McCarty and William Broderick. Paul McCarty and William Broderick were not granted their first choice of ports. The remaining 10 named employees were denied their requests for two year extensions at Toronto.

Service and stationed in a foreign territory. The circular further provides that the basic two year tour of duty may be extended for an additional period of two years if the extension is determined to be in the best interest of the Bureau. The aforementioned policy is reiterated in the Personnel Form 50 of each inspector assigned to the Toronto pre-clearance center. According to a vacancy announcement dated 8/2/74 for the Toronto preclearance branch, "Assignments will be for a 2 year period, and may be extended for 1 additional period of 2 years. At expiration of tour, selectee will be reassigned within Region I."

Prior to 1974, due to the quasi-diplomatic nature of the customs inspectors working foreign soil, the Respondent attempted to, and in fact did, man the preclearance station in Toronto with experienced GS-9 inspectors. Due to the fact that the inspectors were tightly screened prior to selection and possessed experience in the inspection field most if not all inspectors had their requests for two year extensions of duty granted. The extensions were not automatic, however, and were granted only after a request by the inspector and a recommendation submitted to the Regional Office by the branch chief.

In early 1974 the staffs of the Canadian preclearance stations under the Respondent's jurisdiction were increased. Thus, the Montreal and Toronto preclearance branches were increased by 17 and 31 inspectors, respectively. Filling the aforementioned 48 newly created positions as well as those other positions in the preclearance centers which became vacant due to periodic rotation created a problem for Respondent since there were not enough inspectors then available in customs. Accordingly, Respondent was forced to abandon its policy of sending only experienced inspectors to Toronto and Montreal and resort to hiring inexperienced individuals from the Civil Service Commission Register. In late 1975 and early 1976 the initial two year tours of duty of the above mentioned newly hired inspectors were due to expire. Additionally, other seasoned inspectors who had already served two tours of duty in Toronto were up for reassignment to other ports within Region I. It is these reassignments and the refusal to extend the tours of duty of the various named employees in the Toronto preclearance center which is the basis of the instant complaint.

In late 1975 and early 1976 when the two year tours of duty of the aforementioned inspectors were about to expire the inspectors in the Toronto preclearance branch were instructed to submit their respective preferences as to extensions and reassignments to branch chief Casey. Mr. Casey would then forward the requests along with his recommendations concerning same to the Regional Personnel Office in Boston. Mr. Casey in making his recommendations regarding extensions and transfers relied upon the evaluations of each employee made by his supervisory staff.

Thus, the record reveals that on September 5, 1975, the six supervisors employed in the Toronto preclearance center held one of their usual monthly meetings wherein they generally discussed each inspector in the Toronto Region. At this time in anticipation of a scheduled visit from Regional Commissioner Griffin, they decided to, and did, evaluate each inspector from the standpoint recommending either an extension of duty at Toronto or a transfer to another duty station within Region I. The supervisors evaluated each inspector, reached agreement on whether or not the inspector should be recommended for a second tour in Toronto and conveyed their general consensus thereon to Mr. Casey later the same day. Subsequently, Mr. Casey, who agreed with all the recommendations, conveyed the information to Regional Commissioner Griffin in the first week of October 1975. In those instances where it was recommended that a particular inspector be transferred, the decision on where to transfer was left up to Mrs. Ramsey, Chief Personnel Staffing Specialist, who in turn followed the priorities established in weekly meetings in the Region, contact with District Directors and Mrs. Ramsey's own personal knowledge of the situation in the various offices in Region I.

Prior to September 1975 there was no union activity conducted in the Toronto preclearance station. Sometime in September 1975, Paul McCarty, William Broderick, Frank Mazzoni and Robert Barnes circulated a petition among the employees for purposes of forming a chapter of the National Treasury Employees Union. The petition was circulated on only one day. Upwards of 40 of the 44 inspectors in the Toronto preclearance center signed the petition establishing Chapter 181, NTEU.

On September 17, 1975, four inspectors, McCarty, Mazzoni, Dray and Broderick approached branch chief Casey and informed him that they had chartered Chapter 181

of the National Treasury Employees Union and that they were President, Vice-President, Secretary and Treasurer, respectively. There was no other significant union activity between September 17, 1975 and Regional Commissioner Griffins visit to the Toronto preclearance station in October 1975. In fact the only significant activity on behalf of the Union between September 1975 and January - February 1976, when the inspectors were beginning to receive word of their next assignments, amounted to discussions with management and grievances concerning the assignment of GS-5 and GS-7 inspectors to the pool of employees available for overtime assignments. 2/

During the course of the hearing Respondent presented a statistical analysis of the Toronto transfers and extensions during the period October 1975 through August 1976. This analysis which was introduced and accepted into evidence with no significant contest, revealed the following:

1. 39 inspectors were eligible for a second tour of duty.

2. 32 of the 39 inspectors requested a second tour of duty in Toronto.

3. 22 of the 32 inspectors requesting extensions were granted extensions of at least one year in Toronto.

4. 18 inspectors were reassigned.

5. 7 of the 18 inspectors requested reassignment, 10 of the 18 inspectors were reassigned after their request to extend had been denied, and 1 inspector, Mr. McCarty was not eligible for extension since he had already spent two tours in Toronto.

6. 7 of the 18 transferees were granted short term extensions of one to four months.

7. 5 of the 7 short term extensions were granted to

2/ Although it was alleged by Complainant that the assignment of GS-5 and GS-7 inspectors to the overtime pool would result in less overtime being worked by supervisory inspectors and a resultant diminution in wages, the record testimony failed to support such a conclusion. In fact the record indicates that the addition of GS-5 and GS-7 inspectors to the overtime pool would have no effect on the supervisors wages.

inspectors involved in the instant case.

8. 10 of the 18 transferees were transferred to their first or second choices within Region I.

With respect to the Union activity of the 12 alleged discriminatees, the record reveals that Mr. Sokolowski's only union activity consisted of signing the original petition in early September.

Charles Sorce's union activity consisted of joining the NTEU, attending union meetings and discussing the equalization of overtime with his fellow inspectors.

Ms. Cohen's union activity consisted of signing the organizing petition, signing another petition along with about forty other employees which authorized the Union to inspect their overtime records, and filing a number of grievances. 3/

Robert Bigelow, Kevin Feely, William McGuire and Robert Wallace's union activity appears to have consisted solely of joining the union.

William Broderick along with inspectors McCarty, Mazzoni and Dray became an officer of Chapter 181, NTEU shortly after its formation. In addition to aiding in the circulation of the original petition among the employees of the Respondent he participated in discussions with management concerning the allocation of overtime. Mr. Broderick also participated in the filing and processing of number of grievances between February and April 1976, subsequent to the time when most if not all employees had been notified of their transfers and reassignments. Mr. Mazzoni and Ms. Dray were granted second tours of duty in Toronto. Mr. McCarty who had already served two tours of duty in Toronto also was denied an extension and was subsequently transferred. Mr. Mazzoni on occasion participated in the processing or discussion of grievances with the Respondent.

3/ Although Ms. Cohen's request to extend in Toronto was subsequently refused, the record indicates that such refusal was unrelated to Mr. Casey's recommendation. Mr. Casey recommended that Ms. Cohen be extended. However, personnel officer Ramsey, following an interview with Ms. Cohen, overruled Mr. Casey's recommendation on the ground that she did not display the proper attitude. There was no probative evidence indicating that Ms. Ramsey was aware of Ms. Cohen's union affiliation.

The record is silent as to the Union status of Robert Nardini. In fact the only evidence indicating any relationship between Mr. Nardini and the Union evolves around a conversation between Mr. Broderick, Mr. McCarty and Mr. Casey concerning an overtime assignment involving Mr. Nardini. The record is not clear as to whether Mr. McCarty and Mr. Broderick were representing Mr. Nardini as union officers or just as friends. In any event, Mr. Casey's uncontroverted testimony indicates that when he later discussed the matter with Mr. Nardini, Mr. Nardini made it clear that he was not interested in union representation.

Martin Brucker was a member of Chapter 181, NTEU, contributed to its development and solicited the membership and participation of his fellow employees. Additionally Mr. Brucker filed several grievances and on at least one occasion attempted to review the Respondent's records for purposes of checking overtime assignments. One grievance involved an altercation with his supervisor and the other or remaining grievances concerned the participation of supervisors in overtime work.

Robert Barnes was a member of Chapter 181, NTEU, filed several grievances on his own behalf and on behalf of other employees, and served as Secretary of the Union during the latter part of his assignment in Toronto. According to Mr. Barnes, he spoke to management on several occasions concerning the overtime distribution policy at Toronto. Additionally, Mr. Barnes alleged that various supervisors had commented to him that his participation in union activities would affect his career with the U.S. Customs service. The supervisors involved credibly denied making any such remarks.

Paul McCarty was one of the initial supporters of Chapter 181, NTEU, and participated in the circulation of the August 1975 petition, and subsequently became president of Chapter 181 NTEU. Additionally, Mr. McCarty filed grievances on behalf of various employees in the unit. Mr. McCarty, at the time of the events involved herein was completing his second tour of duty in Toronto. Although Mr. McCarty had made it known that his first preference for a new assignment was Boston, he was eventually reassigned to Buffalo, New York. According to the credited testimony of Mary Ramsey, Chief of Personnel the reassignment was based solely on the priority needs of Respondent's respective districts.

With respect to the reassigment of the employees who were either denied an extension in Toronto or were not

otherwise eligible for extension due to the fact that they had already served two terms, Regional Commissioner Griffin and Mary Ramsey, Chief of the Personnel Staffing Branch, both testified without contest that the reassignments were at all times based upon priorities established at weekly meetings of the District Directors and other supervisory personnel. While Respondent attempted to reassign employees in accordance with their listed preferences, Respondent was guided primarily by Regional priorities established weekly. The fact that a certain employee was not assigned to a particular preferential location instead of another employee was dependent solely upon the date of the assignment and the particular priority established for that week.

Discussion and Conclusions

Section 203.15 of the Regulations imposes upon the Complainant the burden of proving the allegations of the complaint by a preponderance of the evidence. The Complainant has failed in this endeavor.

With respect to the 19(a)(6) aspect of the complaint concerning the alleged unilateral change in a past practice of automatically granting a second two year extension of duty in Toronto, the evidence falls considerably short of establishing the existence of such past practice. In fact the testimony of the witnesses for both the Respondent and the Complainant indicate that extensions of duty at the Toronto preclearance center were at all times predicated upon a request for extension by the affected employee and a favorable recommendation from the branch chief. While it is true that in the past most, if not all requests for extensions in Toronto were granted, it must be noted in this regard that the employee complement in the past was always composed of experienced inspectors who had been thoroughly screened on the basis of past performance etc., prior to their initial assignments to Toronto. Accordingly, in these circumstances, barring some unforeseen event, it would be expected that a request to extend would be favorably considered by the branch chief. However, this was not the case in the latter part of 1975 and early 1976 when the newly hired inexperienced Toronto employees were completing their first and only tours of duty with the Customs Service.

With respect to the 19(a)(2) aspect of the complaint concerning the alleged refusal to extend and/or grant requests for transfers to specific locations because of the affected employees union activity, the record as a

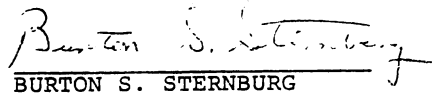
whole fails to support such a conclusion. Thus, the record establishes that the decisions and/or recommendations to extend or transfer the individual employees were made prior to the circulation of the petition which led to the establishment of the Union. Additionally, a comparison of the union activity of those employees who were allowed to extend with the union activity of those employees whose request to extend were denied reveals very little or no significant difference. Thus with respect to the Union officers, whose affiliation and activity were definitely known to management, two out of the three who were eligible for extension were allowed to extend. The fourth officer, Mr. McCarty was subsequently transferred to Buffalo. Although Mr. McCarty had expressed a preference for transfer to Boston, the record indicates that Boston was not a priority location at the time Mr. McCarty's tour of duty in Toronto was at an end.

As to a number of the other alleged discriminatees the record fails to disclose any significant union activity on their part which would cause the Respondent to single them out for transfer. This is particularly true in the case of inspectors Sorce, Bigelow, Feely, McGuire, Wallace and Cohen, whose activity consisted solely of joining the union like upwards of forty of the forty-four employees then employed in the Toronto preclearance center.

Accordingly, based upon the record as a whole, including the above mentioned considerations, I find insufficient evidence to sustain the allegations of the complaint.

Recommendation

It is hereby recommended that the complaint herein be dismissed in its entirety.



BURTON S. STERNBURG
Administrative Law Judge

Dated: July 15, 1977
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 AGRICULTURE,
OFFICE OF AUTOMATED DATA SYSTEMS,
NEW ORLEANS COMPUTER CENTER
A/SLMR No. 950

This case involved an RA petition filed by the U.S. Department of Agriculture, Office of Automated Data Systems, New Orleans Computer Center (Activity) seeking a determination whether, subsequent to a reorganization of March 30, 1972, a bargaining unit represented exclusively by Local 2341, American Federation of Government Employees, AFL-CIO (AFGE) remained appropriate for the purpose of exclusive recognition under the Order.

The Assistant Secretary found that as a consequence of the reorganization the character and scope of the certified unit had been substantially and materially altered, rendering it no longer appropriate for the purpose of exclusive recognition under the Order. In this regard, the Assistant Secretary noted that, subsequent to the reorganization, the employees involved were transferred to the Office of Automated Data Systems (ADS), a new organizational entity, and that, thereafter, they were charged with a different mission, and were subject to new overall supervision, personnel policies and practices, and were functionally integrated with the new organizational entity. Further, the Assistant Secretary noted that in an earlier case involving essentially the same circumstances, petitioned for units of employees of individual computer centers of ADS were found inappropriate for the purpose of exclusive recognition, as such units did not encompass employees who share a community of interest separate and distinct from other employees of the ADS, and could not reasonably be expected to promote effective dealings or efficiency of agency operations.

Accordingly, the Assistant Secretary ordered that the subject petition be dismissed.

A/SLMR No. 950

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. DEPARTMENT OF AGRICULTURE,
OFFICE OF AUTOMATED DATA SYSTEMS,
NEW ORLEANS COMPUTER CENTER

Activity/Petitioner

and

Case No. 64-3090(RA)

LOCAL 2341, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Intervenor

DECISION AND ORDER

This matter is before the Assistant Secretary pursuant to Regional Administrator for Labor-Management Services Cullen P. Keough's Order Transferring Case to the Assistant Secretary, dated June 2, 1977, in accordance with Section 206.5(a) of the Assistant Secretary's Regulations.

Upon consideration of the entire record in the subject case, including the stipulation of facts and accompanying exhibits, the Assistant Secretary finds:

On July 8, 1971, Local 2341, American Federation of Government Employees, AFL-CIO, herein called AFGE, was certified as the exclusive representative for a unit of all employees assigned to the New Orleans Data Processing Center, herein called NODPC, and the New Orleans Commodity Office, herein called NOCO. 1/ On December 22, 1971, the parties executed a dues withholding agreement and, although the agreement was not renewed after it expired on December 22, 1972, dues withholding continued and is still in effect. 2/

The Activity filed the instant petition seeking, in essence, a determination by the Assistant Secretary whether, subsequent to a reorganization, the unit represented exclusively by the AFGE remained appropriate for the purpose of exclusive recognition under the Order. Prior to March 30, 1972, the NODPC and the NOCO were organizational components of the Agricultural Stablization and Conservation Service, herein called ASCS. In this regard, the NOCO was responsible for the administration of the price support program for cotton, and the NODPC was responsible for all automated data processing services for the ASCS.

1/ At the time of certification there were 147 eligible employees in the unit.

2/ The parties never consummated a negotiated agreement for this unit.

Pursuant to a reorganization on March 30, 1972, the Office of Information Systems, herein called OIS, was established to provide a more efficient data processing system within the Department of Agriculture to meet management's information needs. To meet this objective, the data processing facilities at various Department of Agriculture offices throughout the country were consolidated into an integrated computer network under the direction of the newly created OIS. This consolidation involved the computer centers located at Washington, D.C.; New Orleans, Louisiana; Fort Collins, Colorado; and Kansas City, Missouri. 3/ All of the computer centers are tied into an integrated computer network which allows for an even distribution of work among the centers and assures sufficient back-up support in cases where an individual center may not be able to handle a project, or in the event of an equipment failure at any one of the centers.

On April 30, 1973, all automated data processing functions, personnel and property assigned to the NODPC were transferred to the OIS and the NODPC was redesignated as the New Orleans Computer Center, herein called NOCC. On September 30, 1973, the NOCO was abolished and its function was assumed by the commodity office at Kansas City, Missouri. In this latter connection, all of the 138 NOCO employees were separated from the rolls of the NOCO either through transfer or through retirement, and, of this number, approximately 55 were transferred to the NOCC. On March 3, 1974, the OIS was redesignated as the Office of Automated Data Systems, herein called ADS.

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 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 directly responsible for the coordination of the 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 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 final authority for promotions and the hiring of employees 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 3 branches: The Agency Liaison Branch, the Computer Resources Branch, and the System Engineering Branch. The work, skills, training and education of the ADS

3/ Computer Centers in Minneapolis, Minnesota, and St. Louis, Missouri, were abolished.

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 center could perform similar work at any other 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 be sent to another center for the purpose of specialized training in either new equipment and methods, or to correct a deficiency in the operations of the other center. Further, the ADS utilizes a "special teams" concept which involves employees from different centers being brought together to solve a particular problem. These projects may last from one week to several months in duration. 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.

The ADS has its own Personnel Office which provides all personnel services for the computer centers in Washington, D.C. and Fort Collins. The personnel services for the Kansas City and New Orleans 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 these centers, the record reveals that they do so under guidelines established by the ADS Office of Personnel, which retains final authority in the area of labor relations, formal grievances and promotions, and hiring above the GS-11 level. All employees are subject to ADS-wide merit promotion, reduction-in-force and Equal Employment Opportunity plans, and they enjoy 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 ADS-wide basis.

Based on all the foregoing circumstances, I find that, as a result of the reorganization of March 30, 1972, the character and scope of the bargaining unit represented exclusively by the AFGE has been substantially and materially altered, rendering it no longer appropriate for the purpose of exclusive recognition under Section 10 of the Order, as the unit no longer encompasses employees who share a clear and identifiable community of interest separate and distinct from other ADS employees, nor continues to promote effective dealings and efficiency of agency operations. 4/ Thus, as noted above, as a consequence of the reorganization, the NOCO was abolished and its functions transferred to the commodity office in Kansas City, Missouri, and the NODPC, redesignated as the NOCC, was transferred, with its functions, personnel and equipment, to a new organizational entity, the ADS. As a component of the ADS, the NOCC was charged with a different mission, became subject

4/ Cf. Department of the Army, Fort McPherson, Georgia, FLRC No. 76A-82 (1977).

to new overall supervision and new personnel policies and practices, and was functionally integrated with the new organizational entity. Moreover, in an earlier case involving essentially similar circumstances, 5/ the Assistant Secretary held that petitioned for units composed of employees of individual computer centers were not appropriate for the purpose of exclusive recognition under the Order, finding that such units did not include employees who share a clear and identifiable community of interest separate and distinct from other employees of the ADS, and that such units could not reasonably be expected to promote effective dealings or efficiency of agency operations.

Accordingly, based on the above noted circumstances, and for the reasons set forth in Department of Agriculture, Office of Automated Data Systems, St. Louis, Missouri and Kansas City, Missouri, cited above, I find that, as a consequence of the 1972 reorganization, the subject bargaining unit no longer remains appropriate for the purpose of exclusive recognition under the Order, and I shall dismiss the instant petition.

ORDER

IT IS HEREBY ORDERED that the petition in Case No. 64-3090(RA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 2, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

5/ Department of Agriculture, Office of Automated Data Systems, St. Louis, Missouri, and Kansas City, Missouri, 4 A/SLMR 811, A/SLMR No. 458 (1974); petition for review denied, 3 FLRC 371, FLRC No. 74A-96 (1975).

December 6, 1977

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,
U.S. CUSTOMS SERVICE, REGION I,
BOSTON, MASSACHUSETTS
A/SLMR No. 951

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by failing to timely notify the NTEU of its intention to curtail annual leave at the Montreal Preclearance Station during the period of the 1976 Olympics, and thereby failing to afford the NTEU an opportunity to request bargaining on the impact of the decision on unit employees.

The Administrative Law Judge found that on September 17, 1975, a meeting was held between the Respondent and the NTEU's regional representatives at which time the Respondent indicated that curtailment of annual leave in its border districts, which included the Montreal Preclearance Station, was definite. Additionally, the Administrative Law Judge found that the local NTEU president was notified of the change on a date subsequent to this meeting, and, further, that there was no request made, nor evidence shown to indicate that the Respondent refused to bargain on the impact of the change. Accordingly, the Administrative Law Judge recommended dismissal of the complaint.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendation of the Administrative Law Judge, and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 951

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
REGION I,
BOSTON, MASSACHUSETTS

Respondent

and Case No. 31-10008(CA)

NATIONAL TREASURY EMPLOYEES UNION

Complainant

DECISION AND ORDER

On August 25, 1977, Administrative Law Judge William B. Devaney issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, conclusions, 1/ and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 31-10008(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 6, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ On page 10 of his Recommended Decision and Order, the Administrative Law Judge inadvertently cited U.S. Department of Air Force, Norton Air Force Base, 3 A/SLMR 175, A/SLMR No. 261 (1973), as Boston Air Force Base, A/SLMR No. 261. This inadvertence is hereby corrected.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

in the Matter of	:	
DEPARTMENT OF THE TREASURY, UNITED STATES CUSTOMS SERVICE, REGION I, BOSTON, MASSACHUSETTS Respondent	:	
and	:	Case No. 31-10008(CA)
NATIONAL TREASURY EMPLOYEES UNION Complainant	:	

MR. JOHN McELENEY
National Field Representative
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20006
For the Complainant

CHRISTOPHER DOHERTY, ESQUIRE
Assistant Regional Counsel
MR. DAVID EMMONS
Labor Relations Specialist
United States Customs Service
100 Summer Street
Boston, Massachusetts 02110
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case arises under Executive Order 11491, as amended (hereinafter also referred to as the "Order"). It was initiated by a charge filed on, or about, March 15, 1976, and a complaint which was filed on June 1, 1976 (Asst. Sec. Exh. 1), which alleged violations of Sections 19(a)(1) and (6) of the Order as

as the result of exclusion of annual leave for the period of July 11, 1976, through August 21, 1976, during which period the summer Olympics were to be held in Montreal, for Customs employees at the Montreal Preclearance Branch, Durval International Airport, Montreal Canada, without prior notice to Complainant, National Treasury Employees Union (hereinafter also referred to as "NTEU"). A Notice of Hearing issued February 9, 1977 (Asst. Sec. Exh. 2), pursuant to which a hearing was duly held before the undersigned on March 22, 1977, in Boston, Massachusetts.

All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. At the close of the hearing May 6, 1977, was fixed, at the request of the parties, as the date for the filing of briefs and April 5, 1977, was fixed as the date for submission by Respondent of leave application forms for calendar year 1976 as used in three ports within the Ogdensburg, New York District of Customs. On April 4, 1977, Respondent, as requested, filed and served the leave chart used in the Port of Massena, New York, in 1976, which counsel advised was the same form used by the Ports of Champlain and Rouses Point, New York; however, counsel advised that the Port Director had been unable to locate the actual forms used at the Ports of Champlain and Rouses Point in 1976. A copy of the form used in calendar year 1977, which, except for the change of date, was identical to the form used at the Ports of Champlain and Rouses Point in 1976, was also submitted. I hereby incorporate as part of the record counsel's letter dated April 4, 1977, which I have marked for identification as Asst. Sec. Exh. 4, together with Attachments A and B.

On April 26, 1977, at the joint request of the parties and for good cause shown the time for filing of briefs was extended to June 6, 1977, and extremely helpful briefs, timely filed, have been received from both parties and have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommendation:

PRELIMINARY MATTER

In its brief, Respondent asserts that there was no obligation to notify the Complainant "since there was no evidence produced at the hearing indicating that the Complainant was the exclusive representative of the Respondent's employees." (Res. Brief, p. 6, ¶ II).

There is no question, as Respondent states, that the obligation imposed by Section 11(a) of the Order attaches only when a labor organization has been accorded exclusive recognition and that the burden of proof rests with the Complainant, 29 C.F.R. § 203.15; but the record does not support Respondent's assertion that there was no evidence produced at the hearing indicating that NTEU was the exclusive representative of Respondent's employees.

Mr. Thomas A. Gleason, Chief of the Labor and Employees Relations Branch, Boston Region, United States Customs Service testified,

> "Q. Why were you going to notify the union at this point? [September 8, 1975]
>
> "A. We were well aware of our obligations under the Executive Order to give the exclusive representative changes in policies, plans, the like.
>
> "Q. Under the Executive Order, what is the level of recognition under the U.S. Customs Service?
>
> "A. In the U.S. Customs Service the level of recognition is at the Regional level, the Boston Region.
>
> "Q. Did you indicate Mr. Montpelier was a Regional Officer?
>
> "A. Mr. Montpelier was the Regional Officer. Thus, he was the, you might say, proper representative for the Union at that point." (Tr. 1-57) 1/

By letter dated September 9, 1975, Mr. William J. Lawless, Director, Personnel Management, wrote Mr. Melvin Monpelier, Jr., Vice President, Region 1, National Customs Services Association, in part, as follows:

> "This will confirm your telephone conversation with Mr. T.A. Gleason on September 8, 1975. In accordance with Article VII of the Basic Agreement between the Regional Commissioner and the National Customs Service Association, it is proposed that a meeting between the parties take place at 1 p.m. on September 17, 1975 ...
>
> "The following agenda items are proposed by the Regional Commissioner for discussion at that time:
>
> 1. Olympics
>
> * * * *" (Res. Exh. 1)

Mr. Montpelier responded by letter dated September 11, 1975, on the letterhead of the National Customs Service Association which under the printed letterhead had the typed statement "AFFILIATED WITH THE NATIONAL TREASURY EMPLOYEES UNION" and Mr. Montpelier after agreeing to the proposed meeting and agendum and stating that "In accordance with Article VII of the Basic Agreement, it is expected that two representatives in addition to myself will be in attendance for the union at subject meeting" and signed as "National Vice President, NCSA/NTEU, Region I" (Res. Exh. 2). See, also, Mr. Montpelier's letter dated November 23, 1975 (Res. Exh. 3). The summary of the meeting of September 17, 1975, prepared by Respondent, is titled,

> "SUMMARY OF MEETING BETWEEN NATIONAL CUSTOMS SERVICE ASSOCIATION (AFFILIATED WITH NTEU) AND THE REGIONAL COMMISSIONER, REGION I, U.S. CUSTOMS SERVICE ON SEPTEMBER 17, 1975" (Comp. Exh. 1)

The first paragraph of the Summary provided, in part,

> "... The agenda items had been proposed by Management in correspondence ... in accordance with Article VII of the current agreement between Region I and NCSA."

Mr. Leo Grachow, an employee of Respondent and stationed at the Montreal Preclearance Branch since 1974, testified that he was elected President of the Montreal Chapter of National Customs Service Association (NCSA) in April, 1974; that in August, 1975, NCSA merged with the National Treasury Employees Union (NTEU); and that he continued to serve as Chapter President of NTEU until his term expired on January 25, 1977. The record shows correspondence from Mr. Grachow as President of NTEU Chapter 148 to Mr. William L. Thornton, District Director (Comp. Exhs. 2 and 3) and is replete with repeated instances of meetings, notices, etc.

1/ The reporter does not indicate any reason for the unorthodox method of numbering the pages of the transcript with the number "1" preceding the actual page number and there is a single transcript volume.

involving first NCSA and later NTEU and Respondent's Branch Chief of the Montreal Preclearance operation and Respondent's District Director for the Vermont (St. Albans) District. Contrary to Respondent's assertion, the record is clear that NCSA was accorded exclusive recognition by Respondent; that there was a collective bargaining agreement between NCSA and Respondent; that NCSA merged with NTEU; that Respondent was aware of the affiliation of NCSA with NTEU; and that Respondent recognized and dealt with NTEU as the exclusive bargaining representative pursuant to the Order. Moreover, Respondent did not challenge or dispute Complainant's status as exclusive bargaining representative at the hearing and, as the record clearly and affirmatively shows that NCSA merged with NTEU and that NTEU was accepted by Respondent as the successor representative and was accorded recognition as the exclusive bargaining representative, Respondent's assertion is rejected and I find that NTEU is the recognized exclusive bargaining representative for Region I.

FINDINGS

1. On September 8, 1975, Mr. Gleason called Mr. Montpelier with regard to several agenda items and in particular voiced the Regional Commissioner's concern about the planning surrounding the Olympics and the impact it was going to have on operations and personnel to handle the anticipated heavy volume of traffic. Mr. Lawless confirmed Mr. Gleason's conversation by his letter of September 9, 1975, to Mr. Montpelier which set forth the agenda items proposed by the Regional Commissioner, Mr. Griffin, as follows:

"1. Olympics
"2. Non-Reimbursable Overtime" (Res. Exh. 1)

Mr. Montpelier agreed to the agendum by his letter dated September 11, 1975 (Res. Exh. 2); the meeting was held, as scheduled, on September 17, 1975, with Messrs. Montpelier and Sutin (Chairman of Complainant's Wage & Hour Committee) in attendance for NTEU and Messrs. William J. Griffin, Regional Commissioner, John DeRomoet, Regional Counsel, Lawless and Gleason in attendance for Respondent.

2. Following the meeting of September 17, 1975, Mr. Gleason prepared a Summary (Comp. Exh. 1) which was mailed to Mr. Montpelier. By letter dated November 23, 1975, Mr. Montpelier advised Mr. Lawless that Complainant was "in basic accord with the draft of the summary" (Res. Exh. 3) and requested that Complainant, as the Exclusive Representative, be furnished with four copies of the summary for dissemination within the Region.

3. On their return from the Boston meeting, Messrs. Montpelier and Sutin reviewed the meeting with Mr. Grachow in Montreal. Mr. Grachow testified that he was told by Messrs. Montpelier and Sutin that annual leave for Montreal had been touched on at the meeting; that they reported that Mr. Griffin had stated that he had not received any budgetary indications from Washington as to how he would be staffing for the Olympics; that Mr. Griffin had stated there was a possibility that leave might have to be curtailed; but when they knew more definitely the Union would be consulted. Mr. Grachow testified that he received a copy of the minutes (summary) (Comp. Exh. 1) approximately at the end of October and that the minutes reflected what he had been told by Messrs. Montpelier and Sutin.

4. The Summary stated, in part, as follows:

> "ITEM 1. Summer Olympics, Montreal, 1976, and attendant personnel considerations.
>
> "The Regional Commissioner announced that it may be necessary to curtail Annual Leave for all Regional personnel during the five week period in July and August of 1976 because of increased operational commitments in connection with the Summer Olympics in Montreal. Implementation of such a plan for the border Districts is quite definite. Mr. Griffin added, however, that Customs planning and funding in connection with the Olympics had not been finalized. Once firm guidance has been formulated, management will request another meeting with the exclusive representative to discuss definitive plans. Management acknowledged the desirability of an early decision regarding the use of Annual Leave in 1976. ..." (Comp. Exh. 1).

5. Mr. Hubert Papelian, Branch Chief of the Montreal Preclearance Operation, Montreal, Canada, which is located in the Vermont District for which Mr. William Thornton is District Director, and which is part of Region 1, testified that he had had meetings with Regional and District officials; that there was no decision on augmentation of manpower; and that, in the absence of augmentation, he would have to go with existing manpower. Mr. Papelian further testified that the normal procedure in Montreal is to distribute leave applications the first week in December; that on November 25, 1975, he had a supervisory

staff meeting and, as no information relative to additional funds or manpower had been received, an administrative decision was made not to schedule leave for the weeks of July 11 through August 21; that the following day, November 26, 1975, Mr. Grachow came to the office on another matter and that he stated to Mr. Grachow,

> "Leo, I want to tell you we are not going to schedule leave during the Olympic period until such time as we know what our manpower situation will be. At that time we will open it up for scheduling."
>
> "Q. What was his reaction?
>
> "A. Mr. Grachow concurred that this was an excellent idea because there was no sense of scheduling and having to cancel it.
>
> "Q. Did he offer objection to your non-scheduling of leave?
>
> "A. None whatsoever. As I stated earlier, he thought it was an excellent idea. I also told him at the same time, I notified him that we were doing this, that there would be a general staff meeting when all inspectors would be informed as to what our plans were currently relative to leave." (Tr. 1-110)

6. Mr. Grachow testified that he did not recall a meeting with Mr. Papelian on November 26, 1975; and stated that the first indication he had that leave would not be scheduled during the Olympics was when he received the memorandum of December 2, 1975.

7. Mr. Papelian issued a memorandum on December 2, 1975, addressed to all Inspectors (Res. Exh. 4) with an attached Application for Annual Leave for 1976 on which the weeks July 11 through August 21 were blocked out with the notation "no leave will be scheduled" (Res. Exh. 5).

8. Also on December 2, 1975, Mr. Papelian issued a further memorandum to all Inspectors announcing a general staff meeting to be held on December 4 and 5 to discuss, inter alia "4. Annual Leave". Mr. Grachow was scheduled to attend the session on December 4, 1975 (Res. Exh. 6).

9. Mr. Grachow testified that he did not recall any discussion of the non-scheduling of leave during the Olympics at any staff meeting in December.

10. Mr. Grachow testified that after he received his leave schedule and people came to him and asked about it he approached Mr. Papelian who told him that he was the officer in charge and could institute any policy change he wished and he (Grachow) could go to the District Director, Mr. Thornton, if he wished to challenge his action. Mr. Papelian categorically denied having made any such statement and stated that he had no discussion with Mr. Grachow after November 26, 1975, about the non-scheduling of annual leave until 1977 when advised by the Regional Office that this matter was scheduled for hearing; that, being under the impression the matter had been withdrawn when leave had been scheduled during the July-August period, he contacted Mr. Grachow, who, he stated, shared the same impression, but Mr. Grachow commented, "maybe the Union wants to pursue it further because you did not meet and confer" whereupon Mr. Papelian testified that he reminded Mr. Grachow that "I had told him I was going to block out this leave until such time as I heard what my manpower situation would be", to which Mr. Grachow responded, "Do you think this constituted meeting and conferring""; that he (Papelian) stated "I do" and, with that, Mr. Grachow walked away.

11. Mr. Grachow testified that he had asked Mr. Papelian in December, 1975, if this was final, "if this was to be the final rendering of our annual leave decision for the year"; that he had called the District Director, Mr. Thornton, in late December, 1975, and had asked to sit down and discuss why this was done, what our alternatives were, and whether it was a definite policy; that Mr. Thornton stated that because of the Christman holiday he was extremely busy but would get back to Mr. Grachow in January. Mr. Grachow stated that Mr. Thornton did not get back to him in January; but in his letter dated February 6, 1976, to Mr. Thornton, Mr. Grachow refers to an informal discussion with Mr. Thornton in late January, 1976 (Comp. Exh. 2).

12. Mr. Grachow, and other representatives of NTEU, met with District Director Thornton and Mr. Papelian on February 5, 1976, and on April 15, 1976. As to the April 15, 1976, meeting, Mr. Grachow stated:

> "As to your question as to whether this was resolved or not, all that was resolved was that I was now meeting with the District Director to negotiate a plan that he had put into effect. But it was not the finalized

definitive plans that Mr. Griffin had stated would be forthcoming concerning the Olympics." (Tr. 1-34)

Mr. Grachow stated that neither in the January discussion or February 5, 1976, meeting with Mr. Thornton did he discuss annual leave.

13. Mr. Papelian testified that at the February 5, 1976, meeting Mr. Grachow asked Mr. Thornton if he had received any word relative to additional manpower during the Olympic period and that Mr. Thornton told him he had received no additional information. Mr. Papelian further stated that the same inquiry was made by Mr. Grachow, or by another NTEU representative, at the April 15, 1976, meeting and that Mr. Thornton had given the same response.

14. The Ogdensburg District (Ports of Champlain, Rouses Point and Massena) did not restrict the scheduling of annual leave during the weeks of July and August 1976.

15. In the first part of June, 1976, Mr. Papelian was advised that he would have additional personnel and he, in turn, informed Mr. Grachow that leave would be allowed during the July-August period and would be awarded, in accordance with established practice, on the basis of seniority. There is no dispute that leave was, in fact, scheduled during the July-August period.

CONCLUSIONS

There is no dispute that the decision not to schedule annual leave during the Olympic period was a reserved right of management under the Order, Department of The Navy, Marine Corps Supply Center, Barstow, California, A/SLMR No. 692 (1976); indeed, both at the hearing and in its Brief, Complainant made it clear that it "... does not contend that the agency must negotiate its decision not to schedule annual leave during the Olympic period of 1976 ... Sections 11(b) and 12(b) shields Customs from the duty to negotiate such decision." (Complainant's Brief, p. 9). Nor is there any dispute that "... even if a particular decision to change working conditions is not negotiable under the Order, agencies remain obligated to inform the union prior to a change in working conditions, and negotiate in good faith if requested, regarding the impact of the decision on adversely affected employees. Army and Air Force Exchange Service, A/SLMR No. 454 (1974); Pennsylvania Army National Guard,

A/SLMR No. 475 (1975); Boston Air Force Base, A/SLMR No. 261 (1973); National Labor Relations Board, A/SLMR No. 246 (1973)." (Complainant's Brief, p. 9); and Respondent fully concurs (Respondent's Brief, p. 6).

The sole question is whether Respondent gave notice to NTEU prior to implementation of its decision and whether it afforded NTEU an opportunity to negotiate, upon request, regarding the impact and implementation of that decision. For reasons set forth below, I conclude that Respondent did give NTEU notice prior to implementation of its decision not to schedule leave during the Olympic period at its Montreal Preclearance Branch and that Respondent did not fail or refuse to bargain with regard to impact or implementation of that decision.

Regional Commissioner Griffin on September 17, 1975, gave notice to Complainant that,

> "... it may be necessary to curtail Annual Leave for all Regional personnel during a five week period in July and August of 1976 because of ... the Summer Olympics in Montreal. Implementation of such a plan for the border Districts is quite definite. . . " (Comp. Exh. 1) Emphasis supplied.)

At this point, September 17, 1975, there was no question that Respondent had given adequate notice to NTEU of its definite intention to implement the curtailment of Annual Leave in the border Districts, notwithstanding that Commissioner Griffin made it clear that application of such curtailment of Annual Leave to other Regional personnel was not definite; that Customs planning and funding in connection with the Olympics had not been finalized; and that once firm guidance has been formulated, Respondent would meet further with Complainant to discuss definitive plans.

Complainant emphasized the portion "it may be necessary to curtail Annual Leave for all Regional personnel"; "planning and funding ... had not been finalized"; and "Once firm guidance has been formulated, management will request another meeting ... to discuss definitive plans" and ignored the statement of Commissioner Griffin that "Implementation of such a plan for the border Districts is quite definite." While Commissioner Griffin gave notice on September 17, 1975, that implementation of the curtailment of Annual Leave for the border District was quite definite, in point of fact, the plan was not implemented for the border Districts which gave credence to Complainant's assertion that the September 17, 1975, notice was merely notice of a possible action.

Assuming that the notice given by Respondent on September 17, 1975, was, or became, simply notice of possible action, nevertheless, the notification given by Mr. Papelian to Mr. Grachow on November 26, 1975, that,

> "... we are not going to schedule leave during the Olympic period until such time as we know what our manpower situation will be. At that time we will open it up for scheduling."

was a clear, direct and unequivocal notice by Respondent's Branch Chief, Mr. Papelian, to the President of Complainant's Montreal Chapter, Mr. Grachow, that annual leave would not then be scheduled during the Olympic period. The fact that this decision was made by the Branch Chief of the Montreal Preclearance Operation did not make the decision any less a reserved right of management. Whatever the impact of the Olympics on operations elsewhere, there could be no doubt that the summer Olympics would directly increase the operational commitments of Respondent in Montreal. Accordingly, Mr. Papelian, faced with the necessity of determining the personnel by which such operations were to be conducted, notified Complainant that leave would not be scheduled for employees at the Montreal Preclearance Operations until such time as it was known what their manpower situation would be. I fully credit Mr. Papelian's testimony that he did give notice to Mr. Grachow on November 26, 1975, of this decision. Not only was Mr. Papelian a convincing and credible witness but his testimony was wholly consistent with all other testimony and evidence. By contrast, Mr. Grachow's testimony on this and immediately related matters was not convincing. Indeed, Mr. Grachow's denial of his acquiescence to, if not agreement with, Mr. Papelian's notification on November 26, 1975, is belied by his failure on December 2, 1975, when he received the memorandum with the attached application for annual leave; on the same date when he received the memorandum with respect to the General Staff meeting; or on December 4, 1975, when he attended the General Staff Meeting, to mention the subject. I do not, therefore, credit Mr. Grachow's testimony and find, as credibly testified by Mr. Papelian, that notice of the decision to curtail annual leave at the Montreal Preclearance Operation was given to Complainant on November 26, 1975.

Nor do I credit Mr. Grachow's testimony that after he received his leave schedule he approached Mr. Papelian who told him, in effect, that he could institute any policy changes he liked and if Mr. Grachow didn't like it he could go to the District Director. First, Mr. Papelian categorically denied having made any such statement. Second, Mr. Grachow stated, at

one point, that he told fellow Inspectors that this was "solely a management implementation policy" which strongly suggests that Mr. Grachow accepted this action as implementation of the policy announced by Commissioner Griffin on September 17, 1975. Third, while Mr. Grachow stated that he told District Director Thornton in a telephone conversation during the Christmas holiday period that he wanted to discuss why this (curtailment of annual leave) had been done, Mr. Grachow insisted that he did not discuss the matter with Mr. Thornton in their informal discussion in January, 1976, or at the February 5, 1976, meeting. Fourth, the asserted response by Mr. Papelian is wholly at odds with Mr. Grachow's description of negotiations with Mr. Papelian on other matters. Accordingly, I fully credit Mr. Papelian's denial.

From all of the testimony and evidence I conclude that Mr. Grachow was given notice of the curtailment of annual leave on November 26, 1975; that with knowledge of the proposed implementation Mr. Grachow did not request bargaining on impact of the decision not to schedule leave during the Olympic period until such time as the manpower situation was known; and that at the February 5, and April 15, 1976, meeting Mr. Grachow, or another representative of NTEU, asked Mr. Thornton if he had received any word relative to additional manpower and when informed by Mr. Thornton that he had received no additional information the matter was dropped. I further conclude that Mr. Grachow's only expressed concern was to insure Complainant's right to participate in discussion of definitive plans. Thus, Mr. Grachow stated,

> "So when I wrote Mr. Thornton after our annual leave had been curtailed, it was apparent to me that either there were definitive plans or there were not definitive plans. If there were definitive plans, there definitely should have been a meeting ..." (Tr. 1-33)

* * * *

> "As to your question as to whether this was resolved or not, all that was resolved was that I was now meeting with the District Director to negotiate a plan that he had put into effect. But it was not the finalized definitive plans that Mr. Griffin had stated would be forthcoming concerning the Olympics." (Tr. 1-34)

Consistent with this concern, at least at the February 5 and April 15, meetings, inquiry was made of Mr. Thornton as to whether he had received any word relative to additional manpower and when Mr. Thornton stated that he had not, the matter was dropped. Certainly the record is devoid of any credible evidence or testimony that Respondent ever refused to negotiate with regard to the impact of the curtailment of annual leave. Moreover, when Mr. Papelian was advised in the first part of June, 1976, that he would have additional personnel, he informed Mr. Grachow that leave would be allowed during the July-August period and would be awarded, in accordance with established practice, on the basis of seniority.

For all of the foregoing reasons, I find that Respondent did not violate its bargaining obligations under the Order and shall recommend that the Complaint be dismissed in its entirety. Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, A/SLMR No. 771 (1976); Alabama National Guard, A/SLMR No. 660 (1976); Department of Air Force, Vandenberg Air Force Base, A/SLMR No. 350 (1974); Department of Air Force, Norton Air Force Base, A/SLMR No. 261 (1975).

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.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 25, 1977
Washington, D.C.

WBD/mml

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,
SHERIDAN, WYOMING
A/SLMR No. 952

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, Local 1219, AFL-CIO (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) when it refused to bargain about the establishment of a new tour of duty in the nursing service. The AFGE contended, in this regard, that the establishment of the new tour was essentially a change of work hours over which the Respondent had an obligation to bargain. The Respondent, on the other hand, considered the establishment of the new tour to be within the ambit of Section 11(b) of the Order. The Respondent noted its obligations to bargain concerning the impact and implementation of the new tour of duty, but contended that it had met its obligations in this regard by giving adequate notice to the AFGE regarding the establishment of the tour.

The Administrative Law Judge noted first that the establishment of the new tour of duty herein was required by the mission of the Respondent within the meaning of Section 11(b) of the Order. While he found that some changes in tours of duty must be negotiated, the Administrative Law Judge cited AFGE Local 1940 and Plum Island Animal Disease Laboratory, Department of Agriculture, Greenport, N.Y., 1 FLRC 101, FLRC No. 71A-11, as holding that there was no requirement to negotiate with respect to the number or duration of work shifts that constitute an essential and integral part of staffing patterns necessary to perform the work of the agency. Therefore, he concluded that as the mission of the Respondent dictated the establishment of the additional tour of duty, the determination with respect to the tour of duty was integrally related to and determinative of the staffing pattern required and, thus, was a management right within the meaning of Section 11(b) of the Order.

The Administrative Law Judge also agreed with the Respondent that it had afforded the AFGE a reasonable opportunity to meet and confer concerning the impact and implementation of its decision to establish the tour. Therefore, he concluded that the Respondent did not violate the Executive Order in this regard.

The Assistant Secretary, noting specifically that the establishment of the new shift was integrally related to and determinative of the Respondent's staffing pattern, adopted the Administrative Law Judge's findings, conclusions, and recommendation. Accordingly, he ordered that the complaint be dismissed in its entirety.

A/SLMR No. 952

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

VETERANS ADMINISTRATION HOSPITAL,
SHERIDAN, WYOMING

Respondent

and

Case No. 61-3226(CA)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1219, AFL-CIO

Complainant

DECISION AND ORDER

On July 18, 1977, Administrative Law Judge Randolph D. Mason issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation.

Under the particular circumstances of this case, I agree with the Administrative Law Judge's conclusion that the establishment of a new tour of duty herein, which was dictated by the mission of the Respondent, was integrally related to and determinative of the Respondent's staffing pattern and, therefore, was a matter exempted from the obligation to bargain under Section 11(b) of the Order. 1/

1/ Compare Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, 6 A/SLMR 237, A/SLMR No. 656 (1976), affirmed FLRC No. 76A-85, in which it was found that the unilateral change of work hours of a specific group of employees within a specific tour of duty was a negotiable matter within the ambit of Section 11(a) of the Executive Order.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 61-3226(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 6, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

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In the Matter of

VETERANS ADMINISTRATION HOSPITAL
SHERIDAN, WYOMING
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1219, AFL-CIO
Complainant

CASE NO. 61-3226(CA)

Daniel T. McCarthy, Esquire
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Veterans Administration
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Phoenix, Arizona 85012
For the Respondent

Kenneth Bull
National Representative
American Federation of Government Employees
5001 South Washington Street
Englewood, Colorado 80110
For the Complainant

Before: RANDOLPH D. MASON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Preliminary Statement

This proceeding was heard in Sheridan, Wyoming, on May 24, 1977, and arises under Executive Order 11491, as amended. Pursuant to the Regulations of the Assistant Secretary of Labor for Labor-Management Relations (hereinafter called the Assistant Secretary), a Notice of Hearing on Complaint was issued on April 8, 1977, with reference to alleged violations of sections 19(a)(1) and (6) of the Order.

This case was initiated by a complaint filed on August 23, 1976, by the American Federation of Government Employees, AFL-CIO, Local 1219 (hereinafter the "Union"). The complaint alleged that the Veterans Administration Hospital (hereinafter the "respondent") engaged in violations of sections 19(a)(1) and (6) of the Order. The issues presented for decision are as follows:

(1) Was respondent required to negotiate with the Union regarding the establishment of an additional tour of duty from 9:30 a.m. to 6:00 p.m. for Nursing Service employees?

(2) Did the respondent violate the Order by failing to meet and confer with the Union regarding the impact and implementation of the decision to establish the additional tour of duty?

(3) Was the complaint filed within nine months of the occurrence of the alleged unfair labor practice as required by section 203.2(b)(3) of the Regulations of the Assistant Secretary?

At the hearing, all parties were represented and were afforded full opportunity to be heard, adduce evidence, examine and cross-examine witnesses, and argue orally. Thereafter, both parties filed briefs which have been duly considered. 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

At all times relevant to this proceeding, the Union was the exclusive representative of various nonprofessional

Nursing Service employees at the Veterans Administration Hospital, Sheridan, Wyoming. The negotiated agreement between the Union and the respondent pertaining to the period in question is dated February 14, 1974.

During 1976, Hugh A. McGeowan was the chief of the respondent's Nursing Service. As such, he was responsible for all nursing care of the patients in the hospital. One of his duties was to ensure that all wards were adequately covered by Nursing Service personnel in order to properly care for the patients. During the spring of 1976, the following tours of duty (shifts) were in effect for all Nursing Service personnel:

12:00 p.m. to 8:00 a.m.
6:00 a.m. to 2:30 p.m.
7:30 a.m. to 4:00 p.m.
1:30 p.m. to 10:00 p.m.
3:30 p.m. to 12:00 p.m.

During this period of time, it became clear to McGeowan that the wards would be more adequately covered by the addition of a 9:30 a.m. to 6:00 p.m. shift. Although he testified that there were many reasons for establishing this new tour of duty, he primarily wanted to increase the number of employees working between the hours of 4:00 p.m. and 6:00 p.m., and thereby improve nursing assistance to hospitalized veterans prior to and during the evening meal. The need for more employees during these hours for this purpose was brought to McGeowan's attention by a head nurse who was responsible for a large number of patients who were unable to feed or dress themselves.

On May 4, 1976, McGeowan wrote a memorandum to Floyd E. Burrows, president of the local Union, stating that he intended to ask the Hospital Director for approval to establish a new 9:30 a.m. to 6:00 p.m. tour of duty. He explained that the new shift would provide better dinner coverage for the hospitalized veterans and would enable the nurses in the outpatient department to see veterans whose jobs necessitate appointments between the hours of 4:00 p.m. and 6:00 p.m. He asked Burrows for comments by May 19, 1976, and stated that he would like to institute the new tour as soon as possible after that date.

Burrows responded in a memorandum dated May 6, 1976, that he had no objection to the new tour as long as it did not affect the bargaining unit employees. He also stated, in part, that the employees were already

dissatisfied with the hospital's practice of reassigning them to different established shifts (and implied that the establishment of an additional tour of duty would aggravate this problem). He admitted, however, that the underlying cause for the hospital's problems was an insufficient number of employees to adequately cover the wards.

By memorandum dated May 10, 1976, McGeowan told Burrows that the determination of tours of duty is a management right under the Executive Order. However, he asked Burrows to provide him with "further clarification" of the impact that a new tour of duty would have on the members of the bargaining unit.

Representatives from the Union and the respondent met on June 8, 1976, to discuss the proposed 9:30 a.m. to 6:00 p.m. tour of duty. The Union was represented by Burrows and the chief steward; McGeowan and a personnel officer attended the meeting on behalf of the respondent. McGeowan explained to the Union why the new tour of duty was needed. The Union simply objected to the new tour and would not discuss its impact on the employees or its implementation. On June 11, 1976, Burrows stated that "since management wants to initiate this change in an established tour of duty, we feel it the hospital's obligation to ask for reopening of the Contract." He further stated that if the respondent made a unilateral decision, the Union would consider filing an unfair labor practice complaint.

On June 18, 1976, McGeowan wrote a memorandum to Burrows in which he stated that he was planning to submit a memorandum to the Hospital Director requesting his approval for the establishment of the new 9:30 a.m. to 6:00 p.m. tour of duty for Nursing Service. He stated that he would appreciate receiving any comments Burrows may have on the impact this change might have on members of his units by July 6, 1976, and that he would like to institute the change as soon as possible after that date. The Union responded by memorandum dated June 28, 1976, that its position had not changed.

On July 19, 1976, McGeowan officially requested and received approval from the Hospital Director for the establishment of the new 9:30 a.m. to 6:00 p.m. tour of duty for all Nursing Service personnel. A copy of the memorandum of approval was sent to the Union. On July 21, 1976, McGeowan informed the Union by memorandum that the new tour of duty would be established effective August 15,

1976. The subject of the memorandum was "Establishment of an additional Tour of Duty." It stated as follows:

> 1. I have carefully considered your views on the porposed (sic) change in Tour of Duty as requested in my memorandum dated June 18, 1976, to you. Although you objected to the establishment of this tour of duty (9:30 a.m. [to] 6:00 p.m.), you did not make any comments regarding its impact or method of implementation. We maintain that the contract does not need to be re-opened (sic) in order to establish this additional tour of duty and have no intention to request reopening of the contract.
>
> 2. This Tour of Duty is being established to carry out the mission of this hospital and to provide more effective patient care.
>
> 3. This additional Tour of Duty will be established effective August 15, 1976. As stated previously to you, I am still willing to discuss the impact of this additional Tour of Duty with you.

The Union did not respond to this memorandum. McGeowan's decision to establish the new shift effective August 15, 1976, constituted a final decision which was never revoked. On August 13, 1976, however, he informed the Union that he was still willing to meet with respect to the impact and method of implementation.

The Union filed its complaint against the respondent on August 23, 1976. The complaint stated, in part, that "no further meetings have been set with management since we have their final rejection based on their contention that we may only negotiate on the impact of their decision."

The names of the first employees to be assigned to the 9:30 a.m. to 6:00 p.m. shift were posted in the hospital in the early part of September, 1976. Although it appears that only two employees were assigned to this shift during 1976, the new shift was more frequently used by the respondent during 1977 up to the time of the hearing on May 24, 1977.

Conclusions of Law

1. The first issue for consideration is whether the respondent violated sections 19(a)(1) and (6) of the

Executive Order by refusing to negotiate with the complainant Union with respect to the establishing of an additional tour of duty (shift) from 9:30 a.m. to 6:00 p.m. Respondent contends that it had the right to establish the new shift without being required to negotiate pursuant to section 11(b) of the Order. Section 11(b), in pertinent part, provides:

> However, the obligation to meet and confer does not include matters with respect to the mission of an agency; ... and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty ....

Respondent's decision to establish an additional tour of duty effective August 15, 1976, directly concerned the mission of the agency within the meaning of section 11(b). Although some changes in tours of duty must be negotiated,1/ an agency is not required to negotiate with respect to the number of work shifts, and the duration of shifts, when they constitute an essential and integral part of the "staffing patterns" necessary to perform the work of the agency. AFGE Local 1940 and Plum Island Animal Disease Laboratory, Dept. of Agriculture, Greenport, N.Y., FLRC No. 71A-11 (1971). In another case,2/ the Federal Labor Relations Council stated:

> ... [A] proposal relating to the basic workweek and hours of duty of employees is not excepted from an agency's bargaining obligation under section 11(b) unless, based on the special circumstances of a particular case ..., the proposal is integrally related to and consequently determinative of the staffing patterns of the agency, i.e., the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty of the agency.

1/ Southeast Exchange Region of the Army and Air Force Exchange Service, Rosewood Warehouse, Columbia, South Carolina, A/SLMR No. 656.

2/ American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (Supplemental Decision, 1975) (Report No. 73).

In the present case, the mission of the agency dictated the necessity of establishing the additional tour of duty. Some of the wards had experienced difficulty in providing adequate patient care due to an insufficient number of employees, particularly between the hours of 4:00 p.m. and 6:00 p.m. The new 9:30 a.m. to 6:00 p.m. shift was established, in part, to alleviate this problem. Therefore, I must conclude that the determination with respect to the additional tour of duty was integrally related to and determinative of the staffing pattern required, that is, the numbers, types, and grades of positions or employees assigned to the organizational unit, work project, or tour of duty of the agency. Accordingly, the decision to establish the additional shift was a management right within the meaning of section 11(b).

2. It is clear that respondent gave the exclusive representative a reasonable opportunity to meet and confer concerning the impact and implementation of its decision to establish the 9:30 a.m. to 6:00 p.m. tour of duty, but complainant did not request consultation or bargaining on these matters. Since there was ample opportunity for complainant to request such bargaining or consultation prior to implementation of the decision, and complainant never requested such bargaining or consultation, I conclude that respondent did not refuse to consult, confer, or negotiate with respect to the impact of its decision. Department of Air Force, 4392 Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 350 (1974); United States Air Force Electronics Systems Division (AFSC), Hanscom Air Force Base and Local 975, National Federation of Federal Employees, A/SLMR No. 571 (1975).

3. Although it is clear from the foregoing conclusions that the complaint should be dismissed in its entirety, a brief comment should be made with respect to an additional argument raised by the respondent for the first time at the hearing. Respondent made a motion that the complaint be dismissed as untimely under section 203.2(b)(3) of the Regulations of the Assistant Secretary. That section requires that a complaint be filed within nine months of the occurrence of the alleged unfair labor practice. Respondent argues that the complaint filed on August 23, 1976, was premature because no employee was actually assigned to the 9:30 a.m. to 6:00 p.m. tour of duty until September of 1976. I have concluded, however, that prior to the filing of the complaint a final decision was made to establish the new tour of duty, and that this

shift became effective on August 15, 1976. Since the new shift was established prior to August 23, 1976, I must conclude that the complaint was not premature and deny respondent's motion to dismiss on this ground.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.

Randolph D. Mason
RANDOLPH D. MASON
Administrative Law Judge

Dated: July 18, 1977
San Francisco, California

3/ Furthermore, assuming arguendo that the complaint was premature, it should be noted that respondent did not raise this objection until the day of the hearing. In a letter (which has not been considered as evidence in this case) written by respondent's counsel to the Area Administrator dated September 17, 1976, respondent took the contrary position that the new shift was "implemented" on August 15, 1976. Since the complaint could easily have been amended if the alleged procedural deficiency had been raised earlier, it would be patently unfair to dismiss the complaint on this ground.

December 7, 1977

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,
INTERNAL REVENUE SERVICE,
JACKSONVILLE DISTRICT
A/SLMR No. 953

This case involved an unfair labor practice complaint filed by the National Treasury Employees Union (NTEU) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally implementing furloughs of "when actually employed" (WAE) taxpayer service representatives (TSR's) without notifying the NTEU and affording it an opportunity to bargain over the impact and implementation of the furlough procedure. The Respondent contended that the decision to furlough WAE's fell within those rights reserved to management under Section 12(b)(3) and (5) of the Order and that its action represented a continuation of a previously existing policy.

The Administrative Law Judge found that the Respondent violated Section 19(a)(1) and (6) of the Order by unilaterally implementing a new furlough procedure during the 1976 filing season without notifying the NTEU and affording it an opportunity to bargain over the impact and implementation of the new procedure. In this regard, he noted that during previous filing seasons WAE's were not furloughed before temporary TSR's were laid off.

The Assistant Secretary adopted the Administrative Law Judge's findings, conclusions, and recommendations. He noted that although there was no obligation under the Order to meet and confer on the decision to reduce the work force to meet budgetary needs, there was an obligation to bargain on matters relating to the implementation and impact of such decision on unit employees. Thus, he found that the Respondent was obligated to provide the Complainant with an opportunity to meet and confer on the procedures to be utilized in reducing the work force and/or the impact of such decision on adversely affected unit employees. Accordingly, he ordered that the Respondent cease and desist from the conduct found violative of the Order and that it take certain affirmative actions.

A/SLMR No. 953

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
JACKSONVILLE DISTRICT

Respondent

and

Case No. 42-3552(CA)

NATIONAL TREASURY EMPLOYEES
UNION

Complainant

DECISION AND ORDER

On June 23, 1977, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order and the Complainant filed an answering brief with respect to the Respondent'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 Recommended Decision and Order and the entire record in this case, including the exceptions and supporting brief filed by the Respondent and the answering brief filed by the Complainant, I hereby adopt the Administrative Law Judge's findings, 1/ conclusions and recommendations.

The Administrative Law Judge concluded that the Respondent violated

1/ The Administrative Law Judge found that the Complainant and the Internal Revenue Service were engaged in agency-wide negotiations in late Fall 1975 and early 1976 concerning, among other other things, furlough and recall procedures for temporary and "when actually employed" (WAE) taxpayer service representatives. The parties agree, and the record indicates, however, that those negotiations were concerned solely with WAE employees.

Section 19 (a)(1) and (6) of the Order by unilaterally instituting a new furlough policy for WAE employees without giving the Complainant an opportunity to meet and confer on the impact and implementation thereof. I agree. Although there was no obligation under the Order to meet and confer on a decision to reduce the work force to meet budgetary needs, in my view there was an obligation to bargain on matters relating to the implementation and impact of such a decision on unit employees. Thus, when the Respondent herein failed to provide the Complainant with an opportunity to meet and confer on the procedures to be utilized in reducing the work force, and/or the impact of such decision on adversely affected unit employees, I find that it was in violation of Section 19 (a)(1) and (6) of the Order. See United States Department of the Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, 3 A/SLMR 375, A/SLMR No. 289 (1973).

ORDER 2/

Pursuant to Section 6 (b) of Executive Order 11491, as amended, and Section 203.26(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that Department of the Treasury, Internal Revenue Service, Jacksonville District, shall:

1. Cease and desist from:

(a) Unilaterally implementing a new furlough policy for "when actually employed" taxpayer service representatives represented exclusively by the Florida Joint Council of the National Treasury Employees Union without first affording such representative an opportunity to meet and confer concerning the implementation and impact of such policy.

(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 policies of the Order.

(a) Upon request by the Florida Joint Council of the National Treasury Employees Union, meet and confer, to the extent consonant with

2/ In his Recommended Order, the Administrative Law Judge provided that the WAE employees furloughed in January, February and March 1976, be reimbursed for wages lost during the period of the furlough. However, the Federal Labor Relations Council has noted that in order to make a valid award of backpay, it is necessary not only to find that an employee has been adversely affected by an activity's improper action, but also that "but for" the improper action the employee would not have suffered a loss or reduction in pay, allowances, or differentials. See Mare Island Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO, FLRC No. 74A-64. As the record does not show whether or not any or all of WAE employees would have been furloughed "but for" the Respondent's improper conduct herein, I shall modify the remedial order accordingly.

law and regulations, concerning the impact of its 1976 furlough policy on adversely affected unit employees.

(b) If, following negotiations with the Florida Joint Council of the National Treasury Employees Union in accordance with paragraph 2 (a) above, it is determined that any employee was adversely affected by the failure to meet and confer concerning the implementation and impact of the 1976 furlough policy, such employee shall be made whole, including reimbursement for any loss of monies occasioned by such failure to meet and confer, consistent with applicable laws, regulations, and decisions of the Comptroller General.

(c) Post at its Jacksonville, Florida, 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 of the District 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.

(d) Pursuant to Section 203.27 of the Regulations, notify the Assistant Secretary, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Dated, Washington, D.C.
December 7, 1977

Francis X. Burkhardt, 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 unilaterally implement a new furlough policy for "when actually employed" taxpayer service representatives represented exclusively by the Florida Joint Council of the National Treasury Employees Union without first affording such representative the opportunity to meet and confer concerning the implementation and impact of such policy.

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 by the Florida Joint Council of the National Treasury Employees Union, meet and confer, to the extent consonant with law and regulations, concerning the impact of our 1976 furlough policy on adversely affected unit employees.

WE WILL, following negotiations with the Florida Joint Council of the National Treasury Employees Union as set forth above, make whole any employee who was determined to have been adversely affected by our failure to meet and confer concerning the impact and implementation of the new furlough policy of 1976, including reimbursement for any loss of monies occasioned by such failure, consistent with applicable laws, regulations, and decisions of the Comptroller General.

_____
(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 any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Federal Building, Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
JACKSONVILLE DISTRICT

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 42-3552(CA)

DIANE S. GREENBERG, Esquire
Assistant Counsel
National Treasury Employees Union
1730 K Street, N.W. - Suite 1101
Washington, D.C. 20006
For Complainant,

JACK D. YARBROUGH, Esquire
Regional Counsel

ROBERT A. REMES, Esquire
Staff Assistant to the Regional Counsel

HARRY G. MASON, Esquire
Attorney, P.O. Box 1074
Atlanta, Georgia 30301
For Respondent

Before: PETER McC. GIESEY
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding brought under Executive Order 11491, as amended, (hereafter, "the Order") by National Treasury Employees Union (hereafter, "the Union") against Jacksonville District, Internal Revenue Service (hereafter, "Jacksonville IRS"). The Union asserts that Jacksonville IRS violated sections 19(a)(1) and 19(a)(6) of the Order by unilaterally implementing furloughs of when-actually-employed employees (WAE's) without notifying the Union and affording it an opportunity to confer concerning the implementation and impact of this assertedly new procedure.

A hearing was held in Jacksonville, Florida on November 30, 1976. Briefly, the record shows the following circumstances.

Statement of the Case

The following facts are undisputed unless otherwise indicated.

The Florida Joint Council of the Union is the exclusive bargaining agent of employees in an appropriate unit of the Jacksonville IRS.

During late 1975 and early 1976, the Union and IRS were engaged in agency-wide negotiations concerning, among other things, furlough and recall procedures for temporary (limited to 700 hours) and WAE (when actually employed) TSR's (taxpayer service representatives) employed during the "filing season"-January to April.

Without notifying the Union, Jacksonville IRS, early in 1976, began a rotating furlough policy for twelve WAE TSR's. Temporary employees continued to work during January, February and March while eight WAE TSR's were furloughed for three weeks and four WAE TSR's were furloughed for two weeks.

The Chief of Taxpayers' Service Division of the Jacksonville District testified that during the week of 19 January, 1976, management's decision to furlough WAE TSR's was made because it was found that the District had "slightly overspent in the latter part of December ...[and] that if we kept this...number of employees on the rolls...we would have been out of funds by March 31st...."

Although temporary TSR's had been separated from employment before WAE TSR's were furloughed during previous filing seasons, WAE's had been furloughed on a rotating basis following the 1975 filing season.

An employee testified that he had been a temporary TSR in 1974 and "took the position as a WAE [in 1975] because in the previous season...I was laid off before the WAE's were furloughed...."

Findings of Fact and Conclusions of Law

The facts are as set forth, supra.

IRS takes the position that it was under no obligation to notify or meet and confer with the Union concerning the furloughing of WAE TSR's in 1976, because the action represented a continuation of a previously existing policy and procedure, that the decision to furlough is a reserved management right under section 12(b) of the Order and that, in any case, an "overriding exigency," i.e. a budgetary limitation, existed which would justify unilateral change in terms and conditions of employment.

I disagree, not because the Agency has misstated the legal principles, but because it has misinterpreted the facts.

First, as pointed out by counsel for the Union in its reply brief, WAE's were not furloughed before temporary employees during previous filing seasons. That they were furloughed in rotation after the filing season establishes nothing since the WAE classification was established to allow agencys to vary the workforce to accomodate seasonal or non-recurring needs. Second, while I agree that section 12(b)(3) of the order reserves to management the right "to relieve employees from duties because of lack of work or for other legitimate reasons," it does not relieve management from the obligation to notify the exclusive bargaining agent and to meet and confer on request concerning the impact and implementation of that management decision. E.g., Army and Air Force Exchange Service, Pacific Exchange System, Hawaii Regional Exchange, A/SLMR No. 454 (1974); U.S. Department of Transportation, Federal Highway Administration, Office of Federal Highway Projects, Vancouver Washington,

A/SLMR No. 612 (1976). Third, the "overriding exigency" could have been met by laying off temporary employees as the agency had done during past filing seasons. In any case, notice could have been given. Nor does the record support the unstated argument that, because only short notice could be given to the exclusive bargaining agent, none need be given. Failure to give notice plainly violates sections 19(a)(1) and (6) of the Act. United States Army Corps of Engineers, Philadelphia District, A/SLMR No. 673 (1976), p.3 1/

Because the violation of section 19(a)(1) and (6) of the Order involved events during the 1976 filing season only and because the record shows that, following the unilateral action, agreement was reached between the parties, it would be inappropriate to order IRS to meet and confer with the Union. Although the parties resolved these matters in multi-unit negotiations, the events violating the Order occurred in and affected only the Jacksonville District to which the recommended order is limited.

Finally, IRS asserts that any determination concerning the particular WAE TSR's who would not have lost time but for the unilateral implementation of the furlough policy would have to be based upon"mere speculation." For that reason, it asserts that the backpay remedy is inappropriate.

The argument cannot prevail, for it ignores the larger truth that the assumption that the same employees would have lost the same amount of time had no violation of the Order occurred must also be based upon "mere speculation." To base the remedy upon resolving all doubts in favor of the wrongdoer requires that important principles of administrative

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1/ This decision of the Assistant Secretary is cited by the agency as the sole precedent for its assertion that "the existence of [an 'overriding exigency'] would allow an agency to implement a unilateral change...." In fact, the Assistant Secretary remarked in that opinion only that the Order does not require an agency to maintain the status quo after notice and negotiation to impasse "in the absence of an overriding exigency." id. at p. 4.

fairness be ignored. Accordingly, in light of the violation of 19(a)(1) and (6) of the Order, it is proper that the employees furloughed in consequence of the violation be reimbursed for wages lost, less amounts earned, if any, during those periods. Small Business Administration, Richmond, Virginia, District Office A/SLMR No. 674 (1976)

Recommendation

Having found that Jacksonville IRS engaged in conduct in violation of section 19(a)(1) and (6) of the Order by unilaterally instituting a furlough policy without giving the Union notice and opportunity to confer concerning the impact and implementation thereof, I recommend that the Assistant Secretary adopt the following order:

Recommended Order

Pursuant to Section 6(b) of Executive Order 11491, as amended, and Section 203.36(b) of the Regulations, the Assistant Secretary for Labor-Management Relations hereby orders that Department of the Treasury Internal Revenue Service, Jacksonville District, shall:

1. Cease and desist from:

(a) Unilaterally implementing a new furlough policy for WAE taxpayers' Service Representatives without first notifying the Florida Joint Council of the National Treasury Employees Union and affording it opportunity to confer concerning the impact and implementation of such policy.

(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 policies of the Order.

(a) Reimburse the following persons for wages lost during the periods appearing opposite their names, less wages earned, if any, during those periods.

L. Bockus	January 23, 1976 to February 17, 1976
G. Hanas	January 23, 1976 to February 17, 1976
J. Nestel	January 23, 1976 to February 17, 1976
C. Tamargo	January 23, 1976 to February 17, 1976
S. Perron	February 13, 1976 to March 1, 1976
B. Thomas	February 13, 1976 to March 1, 1976
R. Gomez	February 13, 1976 to March 8, 1976
M. Steinberg	February 13, 1976 to March 8, 1976
M. Moxon	January 23, 1976 to February 17, 1976
M. Schneeweis	January 23, 1976 to February 17, 1976
P. Hughes	February 13, 1976 to March 1, 1976
J. Lobel	February 13, 1976 to March 1, 1976

(b) Post at its Jacksonville, Florida, 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 of the District 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.

Peter McC. Giesey
Administrative Law Judge

Dated: June 23, 1977
Washington, D.C.

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 implement changes in existing furlough policies and practices, or other matters affecting the working condition of employees in the unit without affording the Florida Joint Council of the National Treasury Employees Union prior notification of such changes.

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.

WE WILL reimburse those WAE taxpayer service representatives furloughed in January, February and March, 1976, for wages lost because of such furloughs.

Department of the Treasury
Internal Revenue Service
Jacksonville, District

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 any of its provisions, they may communicate directly with the Regional Administrator for Labor-Management Services, Labor-Management Services Administration, United States Department of Labor whose address is: Federal Building, Room 300, 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

December 7, 1977

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

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 2301
A/SLMR No. 954

This case involved an unfair labor practice complaint filed by Ora Mauk, a member of the International Brotherhood of Electrical Workers, Local 2301 (IBEW) alleging that the IBEW violated Section 19(b)(1) of the Order by disciplining him, and taking other action against him which was designed to prevent him from exercising rights guaranteed by Section 18(a)(1) of the Order. Moreover, he alleged that continued dues deductions during the period of his suspension, which was part of the discipline, was in violation of Section 21(a)(2) of the Order, and that, based on his suspension, he was denied membership in violation of Section 19(c) of the Order.

The Administrative Law Judge noted that the Complainant appealed to the International with respect to the discipline imposed on him and such discipline, including the suspension, was voided because an improper board had been constituted by the Respondent Local to try him. Therefore, the Administrative Law Judge concluded that the Complainant's arguments regarding his suspension were moot. The Administrative Law Judge concluded further that as the suspension was, in fact, voided dues deductions were not continued improperly. Finally, with respect to the Complainant's arguments concerning alleged undemocratic and improper internal union procedures taken against him, the Administrative Law Judge concluded that the record did not support such allegations.

The Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge. He noted, however, that allegations of violations of the Standards of Conduct for labor organizations as set forth in Section 18 of the Order, such as those which were alleged in this matter, are more appropriately raised under the procedures set forth in Section 204 of the Assistant Secretary's Regulations, rather than under the unfair labor practice procedures.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 2301

Respondent

and Case No. 40-7628(CO)

ORA MAUK

Complainant

DECISION AND ORDER

On August 15, 1977, Administrative Law Judge Peter McC. Giesey issued his Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 40-7628(CO) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 7, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ In my view, allegations such as those which are involved herein, alleging essentially violations of the Standards of Conduct for labor organizations as set forth in Section 18 of the Order, are more appropriately raised under the procedures set forth in Section 204 of the Assistant Secretary's Regulations, rather than under the unfair labor practice procedures.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:	
ORA MAUK, Complainant,	
v.	Case No. 40-7628(CO)
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2301, Respondent.	

Ora Mauk
207 Mikel Drive
Summerville, South Carolina 29483
Pro Se,

Stan Jaskiewicz, Jr., Esquire
1525 Highway 7
Charleston, South Carolina 29407,
For the Respondent

Before: PETER McC. GIESEY
Administrative Law Judge

Recommended Decision and Order

This is a proceeding brought under Executive Order 11491, as amended (hereafter,"the Order") by Ora Mauk against Local 2301, I.B.E.W. Mr. Mauk complains that Local 2301 violated section 19(b)(1) of the Order 1/ by suspending him from

---

1/ A labor union shall not -
Interfere with, restrain, or coerce an employee in the exercise of his rights assured by this Order;

membership in the Union for three years because he exercised his right to vote in an election of officers of the Federal Employees Metal Trades Council of Charleston. He asserts that this action was taken in order to coerce and intimidate him in an effort to prevent him from exercising rights guaranteed by the provisions of section 18(1) of the Order. 2/ He also complains that the Union,after taking the action set forth above, continued to accept dues deductions as a further "punishment and reprisal" and in violation of the terms of section 21(a)(2) of the Order. 3/ Further, he asserts that the Union, by suspending his membership, denied him membership in violation of section 19(c) of the Order. 4/

A hearing was held in Charleston, South Carolina, on February 24, 1977. Briefly, the record shows the following circumstances.

2/ Standards of Conduct for Labor organizations. (a) An agency shall accord recognition only to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles.

The maintenance of democratic procedures and practices, including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participation in the affairs of the organization, to fair and equal treatment under the governing rules of the organization, and to fair process in disciplinary proceedings;

3/ 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 the 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 provision for the employee to revoke his authorization at stated six-month intervals. Such an allotment terminates when * * * the employee has been suspended or expelled from the labor organization.

4/ Unfair labor practices. (c) A labor organization which is accorded exclusive recognition shall not deny membership to any employee in the appropriate unit except for 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. This paragraph does not preclude a labor organization from enforcing discipline in accordance with procedures under its constitution or by-laws which conform to the requirements of this Order.

Statement of the Case

The following facts are undisputed.

On November 17, 1975, there was a regular meeting of Local 2301. At the meeting, it was moved and seconded that the president be directed to cast Local 2301's one and one half votes at the coming meeting of the Federal Employees' Metal Trades Council of Charleston, an "intermediate body" composed of delegates from a number of locals of different unions representing employees in Charleston.

At the time that the membership delegated sole responsibility for the casting of council votes, Ora Mauk, having earlier been elected by the membership of the Local as a delegate to the Council, was a trustee of that body and was, together with five other delegates, entitled to cast Local 2301's one and one half votes.

On December 8, 1975, the Council met for the purpose of electing officers. Local 2301's president cast one and one quarter votes and cast the remaining one quarter vote as directed by Mr. Mauk.

On January 13, 1976, the local president, in his dual capacity as business manager, removed Mr. Mauk from his position as a shop steward. On January 19, 1976, a member of the Union filed charges against Mr. Mauk, asserting that he had refused to cast his vote at the Council meeting in accordance with the stated desires of the membership. On that day, a meeting of the Local was held for the purpose of electing delegates to the Council. Mr. Mauk was not among those elected.

Later, the executive board of Local 2301 met as a trial board, found the charge against Mr. Mauk to be true, suspended his membership in the Local for three years commencing March 1, 1976, and levied a fine against him. Upon review by a vice-president of the International Union, the Board which took action against Mr. Mauk was found to have been improperly constituted and the local was ordered in June, 1976, to refund monies collected from Mr. Mauk and remove the suspension imposed.

Findings of Fact and Conclusions of Law

Having considered the entire record, including the testimony, exhibits and briefs 5/ of the parties and having observed the demeanor of the witnesses, I make the following findings of fact, conclusions of law and recommended decision and order based thereon.

The facts are as set forth in the statement of the case.

The events and actions which are alleged to violate the Order are, to a great degree, intertwined and dependent one upon the other. Nevertheless, in order to consider them in an orderly fashion, each must be separately considered.

Thus, the suspension and fine, now rescinded 6/ and refunded, may be regarded as moot. I so regard them since it is a policy under the Order to encourage the adjustment of such matters within the organization. 7/ In any case, where a violation to be found, the remedy would be no more than that already received. Moreover, the International vice-president indicated that, in reversing the action of the Local's executive board, he regarded the orginal action as void ab initio because of the improper composition of the trial board. It follows that dues deductions during the "suspension" were proper because there was never an effective suspension and Mr. Mauk was continuously a member of the Union.

5/ Mr. Mauk protested the untimely filing of respondent's brief. I have elected to accept it, in part because an extension of time was requested and granted over the telephone. In any case, the brief is intended to assist the trier of fact and to limn the applicable law and in no way prejudices the rights of the opposing party.

6/ At the hearing, the Union president indicated that, because Mr. Mauk received the letter of the International vice-president and accepted the repayment of the fine, no other action by the Local was required. Nevertheless, counsel for the Local stated that a formal notice of the removal of the suspension would be provided Mr. Mauk.

7/ Any member of a labor organization whose rights under the provisions of §204.2 or §204.37 are alleged to have been infringed or violated may file a complaint in accordance with §204.55: Provided, however, that such member may be required to exhaust reasonable hearing procedures...within such organization. 29 C.F.R. 204.54.

I need not decide at this time whether, if Mr. Mauk were subjected to another trial on the same matters and subjected to discipline upheld by the International, he might then have a viable case or controversy forming a basis for proceedings under the terms of the Order and Regulations.

Complainant asserts that the Regulation requiring that labor organizations "shall conduct periodic elections of officers in a fair and democratic manner [and]...be governed by the standards prescribed in sections 401(a),(b),(c),(d), (e),(f) and (g) of the LMRDA..." (29 C.F.R. 204.29) is violated by the local president's occupation of the office of business agent although not elected to that post. He supports this position by further reference to the regulations promulgated under the Labor-Management Reporting and Disclosure Act (29 U.S.C. 401, et seq.) which provide, in pertinent part that;

* * *

> ... a directing business representative or a business manager usually exercises such a degree of executive authority as to be considered an officer and therefore, must be elected. * * *

29 C.F.R. 452.19

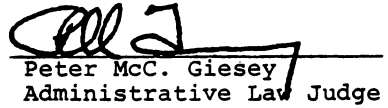
The short answer to this assertion is that the Local's president is elected and the members are aware that the Local's constitution and bylaws provide that the president shall also be the business agent. Thus, the purpose of the election requirement of the LMRDA - "... to assure that persons in positions of control in labor organizations will be responsive to the desires of the members" (29 C.F.R. 452.20(b)) appears to be well served by the election of the president to a dual office. If the membership desires to change this feature of the internal affairs of the organization, it is not beyond their power to do so. In any case, it does not offend the Order.

Similarly, the membership's decision in November, 1975, in no way conflicts with section 18(a)(1) of the Order's requirement that "democratic procedures and practices" be maintained. Since it was the membership's right to elect delegates to the Council, it is axiomatic that it is their right to instruct those delegates in carrying out duties on behalf of the membership. Although it is arguable that, in the instant case, the action may have been taken in such a

way as to produce a result inconsistent with the bylaws of the Council, that is a thicket I need not enter. 8/ It involves the purely internal affairs of the Local and the Council and, on its face, represents a democratic, if irregular, procedure and practice.

Finally, Mr. Mauk has asserted, and it is undisputed, that the Local's president removed him from his position as shop steward. Much of the record is devoted to the president's reasons for doing so. However, Mr. Mauk does not dispute the president's unreviewable authority to name and remove stewards. In light of this, it is plain that the president may remove a steward for a good reason, a bad reason or no reason so long as it is not a reason which violates the Order. The latter is not claimed nor is there any evidence on this record which would support such a claim.

Accordingly, I recommend that the Assistant Secretary dismiss the complaint in its entirety.



Peter McC. Giesey
Administrative Law Judge

Dated: August 15, 1977
Washington, D.C.

8/ I.e., although the delegates, including Mauk, were elected by secret ballot and their names certified to the Council, the record is silent concerning whether the president, who cast one and one quarter of the local's votes, was properly certified to the Council and, if he was not, whether he was required to be.

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 NAVY,
UNITED STATES NAVAL AIR STATION,
ALAMEDA, CALIFORNIA
A/SLMR No. 955

This case involved an unfair labor practice complaint filed by the International Association of Machinists and Aerospace Workers, AFL-CIO (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order when a payroll supervisor made certain remarks to a union member and a union steward during the course of discussions concerning the union member's dual pay status.

Based on credited testimony, the Administrative Law Judge found that the Respondent's conduct was not violative of Section 19(a)(1) of the Order. She concluded that, under the circumstances, there was no evidence that the actions of the payroll supervisor interfered with, restrained, or coerced the union member and steward herein, or any other employees.

Noting particularly the absence of exceptions, 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

DEPARTMENT OF NAVY,
UNITED STATES NAVAL AIR STATION,
ALAMEDA, CALIFORNIA,

Respondent

and

Case No. 70-5555(CA)

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO,

Complainant

DECISION AND ORDER

On September 9, 1977, Administrative Law Judge Joan Wieder issued her Recommended Decision and Order 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 Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendation.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 70-5555(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 7, 1977

Francis X. Burkhardt, Assistant Secretary of
Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 528
San Francisco, California 94105

(202) 653-5092
(415) 556-0555

In the Matter of

DEPARTMENT OF NAVY,
UNITED STATES NAVAL AIR STATION,
ALAMEDA, CALIFORNIA,
Respondent

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO,
Complainant

CASE NO. 70-5555(CA)

A. S. Calcagno, Esquire
Labor Relations Advisor
Western Field Division
Office of Civilian Personnel
Department of the Navy
760 Market Street
San Francisco, California 94102
For the Respondent

Leo C. Sammon
Grand Lodge Representative
26010 Eden Landing Road, Suite 1
Hayward, California 94545
For the Complainant

Before: JOAN WIEDER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

This case, heard in San Francisco, California, on June 30, 1977, arises under section 19 of Executive Order 11491, as amended.

This proceeding was initiated by the Grand Lodge Representative of the International Association of Machinists and Aerospace Workers, AFL-CIO, (hereinafter referred to as Complainant), filing an unfair labor practice complaint on December 7, 1976, as amended March 28, 1977, against the Department of the Navy, U.S. Naval Air Station, Alameda, California (hereinafter referred to as the Respondent). Pursuant to the Regulation of the Assistant Secretary of Labor for Labor-Management Relations, a Notice of Hearing on Complaint was issued on May 9, 1977. The hearing was postponed until July 5, 1977, pursuant to a request by Respondent, concurred in by Claimant's representative.

The amended complaint alleged that the Activity violated section 19(a)(1) of the Order when a payroll supervisor made certain remarks to a union member and steward.

At the hearing both parties were afforded full opportunity to be heard, to adduce evidence, to examine and cross-examine witnesses and to make oral argument. A post-hearing brief was received from Respondent only. Claimant has failed to file a brief after being afforded ample opportunity to prepare and file the document.1/

Findings of Fact

The International Association of Machinists, Lodge No. 739 has been and is the certified representative for approximately 3,200 employees of the Naval Air Repair Facility at the United States Navy Air Station, Alameda, California. The parties have had a comprehensive written agreement since October 15, 1975.

1/ The Office of Administrative Law Judges, United States Department of Labor, telephonically contacted the office of Complainant's representative on August 15, 1977, to ascertain if their brief had been mailed. That office informed the Office of Administrative Law Judges that no brief was mailed and, to their knowledge, none was prepared.

The alleged violation of section 19(a)(1) of the Order involved an incident in which a unit supervisor, Ms. Pat Foster, reportedly made threats to have a security guard remove Shop Steward, Ethan Gums, Jr., and employee J. A. Salter from the building and refused to provide requested information.

John A. Salter, an aircraft instrument mechanic, which is a wage-grade position at the Naval Air Rework Facility, Alameda, was deemed by Respondent to be in a dual payroll status. It appears that the dual status resulted from his receiving advanced paid sick leave plus compensation he elected to receive from the Department of Labor, resulting in the receipt of double payments for the same leave period. Respondents requested repayment, and apparently Mr. Salter received a letter from the Department of Labor indicating to him that he had to pay the money back to both entities. Mr. Salter did not understand the admitted intricacies of his payroll problems. After several attempts to personally resolve the problem of six to seven months duration in which he personally met with several clerks of the payroll office, on September 29, 1976, he requested the assistance of a union steward, Mr. Gums. Mr. Gums immediately called the payroll office and contacted Ms. Joy Gay. Ms. Gay informed Mr. Gums that it would be best to meet in person, and an appointment was arranged for the following day, September 30, 1976. Both Messrs. Salter and Gums went to the payroll office for the appointment. At this time and all other relevant times Mr. Gums was wearing a Union Steward's Badge. Ms. Gay was late returning from lunch when Messrs. Gums and Salter arrived, but a clerk offered her assistance. The clerk got Mr. Salter's payroll record but was unable to resolve the problem. A few minutes thereafter Ms. Gay returned and invited Messrs. Salter and Gums to her desk. After approximately five to ten minutes of discussion without being able to resolve the problem to Mr. Salter's satisfaction, Ms. Foster, the unit supervisor, entered into the discussion and what she said is conflicting and is the keystone of the complaint. Therefore, this testimony will be set forth in detail.

Mr. Salter testified:

> ... [W]e went back to her desk [Ms. Gay's] and we [Messrs. Salter and Gums and Ms. Gay] began to go over one of the leave records and--let's see--there was Mrs. Gay present and another clerk but I don't know her name, you know, but there was another clerk present at that time too. As we

> were going over the records, this lady came up and put a piece of paper down in front of me and told me that if I would pay this or take care of this that the whole problem would be resolved, which I questioned her because, you know, I did not understand what she had placed in front of me nor did I know who she was. So, we got nowhere from this. All right, in between, you know, exactly at what point I don't remember, she made the statement as to, "What are trying to do, cause trouble?" and you know, looking at Mr. Gums she said, "I can see by your badge that you are a union representative." She asked me what did I need with the union rep and and I told her that I had been over this several times trying to get this problem resolved and I had just been going around and around in circles. This was Mrs. Foster who made all of these remarks, that is who [sic] we found out who it was later on, and then there was communication but it wasn't pertaining to the subject in which I had gone over to payroll about. It was between myself and Mrs. Foster because when Mrs. Foster spoke, Mrs. Gay just--she was no longer in the conversation and after she and I--like I say, we were not getting anywhere so she turned to Mr. Gums and told him that if he would come with her she would explain it to him. At this time, I interrupted and asked that she not just explain it to him but show the both of us, since it was my problem. She left, she told me that she did not have to explain anything to me and left for a few minutes and I guess she went over to her desk and then came back and said that she did not appreciate--well, it was more of, as I take it, some kind of reprimand and in conclusion, to get out of her [sic]--get out of the office or she would call security. Well, I could not believe that she would say something like this and I just sat there for a little while and whether anything was said at that point, I don't know but I know Mr. Gums told me to just cool off and come on and we left the office and this is about the best of my knowledge that I can remember concerning this. (Tr. pp. 28-29)

Mr. Gums testified as follows:

> While Mrs. Joy [Gay] was trying to figure out what the problem was with the record, using the machine to try and determine where they had run into a problem, John [Salter] and I were sitting there talking with another lady. At that time I did not know who she was, it turned out to be Mrs. Foster. She came to the desk with a sheet of paper in her hand and she placed the sheet of paper on the desk and turned to John and said, "If you would just pay this, this would just pay this then this would solve all of your problems.", looking at me and still talking to John, she said, "What did you bring him for, are you trying to start some trouble?" and at that time John said, no, he said something to the effect that he is here to help me out-- (Tr. p. 18)

Mr. Gums further testified:

> Ignoring her statements, [regarding causing trouble and union affiliation] I asked her if he paid that bill how would that clarify him with the compensation office in San Francisco and in our discussion of this, she said, "If you will come to my desk, I will show you how this works." At that time, John interrupted the conversation and said, "Don't show him, I am involved, show us." and that is when he and Mrs. Gay got into a discussion of his problem and why-- what he wanted to know about the compensation record. Mrs. Gay [Foster] ended up saying to the effect, "I don't have to show you anything," and she walked away from us and went back to her desk which was across the room. John and I then turned and started to talk to Mrs. Foster [Ms. Gay] again, because we still had not come to any conclusions as to-- (Tr. p. 19)

Mr. Gums also testified that Ms. Foster failed to sign the pass.

Ms. Foster testified that she was familiar with the case and that Ms. Gay called her over to her desk to help her out because she wasn't familiar with the matter. Ms. Gay's desk is situated approximately two feet from Ms. Foster's. She further testified:

> I went over and we had all of his records there and I was explaining to him, the advanced sick leave, that he would have to pay this back. First of all, he had gotten a letter from the Bureau of Compensation asking him to make the payment that they had paid him for the same time that we had paid him for leave ... This was the question that he was asking, how he could work this out so I went through his leave record with him and for that one-week period of time that he was charged and I figured out how much money he would owe for that, for those hours and compared with what he owed the compensation, it was less. I told him that it would probably be better if he had paid the station the money as far as the amount goes. I continued explaining to him about the dual-pay status because two agencies had paid him for that same week so I tried very hard to tell him to explain to him and he did not seem to understand so I asked Mr. Gums to come over in back of Joy's (Ms. Gay) desk, not to my desk, and explain to him and if he could help me explain to Mr. Salter. (Tr. pp. 43-44)

Ms. Foster stated that she attempted to explain to Mr. Gums alone for she felt, once he fully understood the matter, he could assist in explaining the intricacies to Mr. Salter. Ms. Foster described Mr. Salter's attitude as not being too happy "it was just his mannerisms and his voice tones." (Tr. p. 46) When she attempted to explain to Mr. Gums the manner in which the dual-payroll status arose, Mr. Salter stated to her "You should have children of your own." (Tr. p. 46) At this point Ms. Foster testified she asked them to please leave the office and make another appointment. She described the manner of making that statement as a very bad attitude that "I did not know what he meant by it and I did not feel that we needed to carry the conversation on any more." (Tr. pp. 46-47) She further testified his voice was raised a little. Ms. Foster does not remember making any statement about calling in for security.

Ms. Foster normally deals with employees and their union representatives, and there is no evidence of record indicating any other incidents involving her.

Ms. Foster often deals with the union representatives, recognizing them by the badges they wear. She considers the union representatives as a representative of the employee. On page 50 of the transcript Ms. Foster testified that she asked Messrs. Gums and Salter to leave "[b]ecause I got upset when he told me that I should have children of my own and I did not feel that we needed to carry on our conversation."

> Q. At that time that you asked them to leave, did you feel if they had stayed that you could have done anymore to successfully explain the situation to Mr. Salter?
>
> A. No.
>
> Q. Do you feel that you have exhausted your attempts to explain it.
>
> A. Yes.

Later in her testimony, on page 53 of the transcript, Ms. Foster testified that she was not aware that Messrs. Gums and Salter were coming over to see Ms. Gay and in answer to the question of how she came by the paper that Messrs. Salter and Gums testified she brought over to the desk, she stated she did not recall bringing over a paper to the desk but, rather, went over to help Ms. Gay explain to Mr. Salter his dual-pay status. (Tr. p. 54)

On page 55 of the transcript Ms. Foster testified that she remembers Mr. Gums giving his pass releasing him and sending him back to work and she remembers signing the pass.

On page 58 of the transcript Ms. Foster stated that when being called by the Safety Office for a new appointment for Messrs. Salter and Gums she made the appointment for the week following on approximately Wednesday. At the time of the subsequent meeting she did not know that an unfair labor practice charge had been filed. Both Messrs. Salter and Gums testified that there was a great change in Ms. Foster's behavior at the subsequent meeting.

Ms. Joy Gay testified (Tr. p. 60) that she was unfamiliar with Mr. Salter's account and that when she looked at that file and noted her lack of familiarity she looked for Ms. Foster to come to her aide and

explain the situtation. Ms. Gay knew that Ms. Foster was familiar with the problem. While Ms. Foster was attempting to explain the situation to Messrs. Salter and Gums, a Ms. Peggy Crabtree was waiting to talk to Ms. Gay about one of her own accounts and was standing beside the desk. On page 62 of the transcript, Ms. Gay states that when Ms. Foster came over to the desk after she attempted to explain and understand the problem for about five minutes, Ms. Foster engaged in a conversation with both gentlemen attempting to resolve the problem. Ms. Gay does not remember any derogatory references made about the union. She specifically does not remember Ms. Foster making any references to call security. (Tr. p. 63)

Ms. Gay's testimony was very vague and indicated she did not have a clear memory of what had transpired. This lack of accuracy is pointed up in the disparity in her testimony and her statement, Complainant's Exhibit No. 6, wherein Ms. Gay stated that Ms. Foster passed by the desk and asked what the problem was. Yet Ms. Gay testified that Ms. Foster might have come over because she looked at Ms. Foster in a perplexed manner, thereby inducing her to come to her assistance and, as indicated previously, also testified, she called Ms. Foster over for her assistance. The witnesses admitted lack of memory regarding the incident warrants the conclusion that her evidence is entitled to little or no weight.

The last witness to testify as to what transpired at the meeting is Margaret J. Crabtree, who is currently employed in the Data Processing Center, Pacific Fleet at the Naval Air Station, Alameda (Center); however, the same personnel department does the payroll work. Ms. Crabtree testified that she went to the payroll office to see Ms. Foster and when she arrived Ms. Foster was

> ... sitting at her desk, there were two men standing there, one of them was extremely angry and she was trying to explain to him that she told him he had signed a paper and that when he signed that, it was out of her hands and there was nothing more that she could do about it and he would have to contact another department or something. I wan't paying that much attention to who they were to contact. [sic] The other gentleman that was with him seemed to try to calm him down and get him away from the desk

because he was being very loud and they walked over nearer to where I was standing and he was explaining to him that he signed the papers and that there wasn't anything more she could do. (Tr. p. 72)

Ms. Crabtree further testified that she was there only for a very short period of time but during her presence of only two to three minutes she heard no mention of the union. She did overhear the men state to one another "Come on, we better get out of here or she will call security." (Tr. p. 73) Ms. Crabtree indicated she was very close to the site of the conversation and could overhear all that was spoken but she did not hear Ms. Foster say anything about calling security.

Discussion and Conclusions

Section 203.15 of the Regulations imposes upon the Complainant the burden of proving the allegations of the Complainant by a preponderance of the evidence. The Complainant has failed in this endeavor.

The circumstances surrounding the September 20, 1976, meeting indicated a frustration on the part of Mr. Salter to understand the intricacies of his dual-pay status. Mr. Salter admitted that he lost his temper when he testified that Mr. Gums told him "to just cool off." (Tr. p. 29) The finding that Mr. Salter lost his temper leads to the crediting of Ms. Foster's testimony that Mr. Salter did make a personal comment to her to the effect that she should have children of her own. That the personal attack took place was not denied by either Messrs. Gums or Salter, Complainant's sole witnesses.

The personal verbal attack caused Ms. Foster to become upset. I find she did threaten to call a security guard, based on the testimony of Messrs. Gums and Salter. Margaret Crabtree also stated she overheard either Gums or Salter say "Come on, we better get out of here or she will call security." (Tr. p. 73). However, it is found that the threat occurred after both Ms. Gay and Ms. Foster attempted to explain why Mr. Salter was in a dual-pay status. This conclusion is repeatedly supported by the testimony of record. Then they apparently left.

Messrs. Gums and Salter admitted that Ms. Gay attempted for five to ten minutes to resolve the problem

and that Mr. Salter became upset when Ms. Foster offered to explain the problem to Mr. Gums. This testimony refutes any allegation that there was a refusal to provide information. Furthermore, this testimony lends credence to Ms. Foster's statement that she "tried very hard to tell him [Mr. Salter], to explain to him, and he did not seem to understand so I asked Mr. Gums to come over in back of Joy's [Mr. Gay] desk ... and explain to him and if he could help me explain to Mr. Salter ...." (Tr. p. 44)

It appears that it was at this point in the discussions that Mr. Salter became upset and stated he wanted the matter clarified to him also, not just Mr. Gums. It also appears it was at this juncture that Mr. Salter made the personal verbal attack upon Ms. Foster. (Tr. p. 46)

If the hostilities commenced immediately after the meeting began or immediately upon Ms. Foster's arrival at Ms. Gay's desk, rather than after the admitted repeated attempts to give the requested information, then some foundation for the claimed union animous could be found. However, based upon the preceding recitation of the sequence of events that transpired during the September 30, 1976, meeting, it cannot be found that Ms. Foster's threat to call the security guard was based on union animous. Rather, it is apparent that the discussion included several attempts to explain the situation but devolved into a verbal altercation which was terminated with a request to leave accompanied by a threat to call a security guard if that request was not met. Ms. Foster, whose testimony I credit on this point, determined that further discussions at that time would not be fruitful. That tempers were short at that time was substantiated by Ms. Crabtree's testimony. The need to meet with employees and union representatives does not require that meetings be unending or that altercations be extended ad infinitum.

Approximately six days after the September 30, 1976, incident, another meeting was held in which Ms. Foster's behavior was characterized as very acceptable to Messrs. Gums and Salter. Ms. Foster testified that at the time of the second meeting she was not aware that a complaint had been filed. Ms. Foster's testimony is credited inasmuch as Complainant failed to clearly establish that the complaint was filed prior to the second meeting or that Ms. Foster had knowledge that the complaint was to be filed or was actually filed. The Complainant's

described change in attitude can only be attributed to the need for a cooling off period. Ms. Foster did fail to sign Messrs. Salter's and Gum's passes, but this is found to have been an oversight due to her agitation. Ms. Foster did take the pass back to her desk and put the date in the place designated for her signature. There was no showing of an outright refusal to sign the pass.

The final factor which could support a finding of union animous was the alleged statements by Ms. Foster describing Mr. Salter as a troublemaker and referring to Mr. Gums' status as a union representative. As Mr. Salter testified, he does not remember at what point in the meeting the statements were made. The probable explanation for the characterization of Mr. Salter as a troublemaker was his comment to Ms. Foster regarding her need to have children of her own. It is clear that these statements were made after several attempts to explain Mr. Salter's dual-pay status to both Messrs. Salter and Gums. Furthermore, after making the statements about Mr. Gums being a union representative, Ms. Foster offered to explain the problem to Mr. Gums, an offer that would not have been made if the alleged union animous was the cause of the hostilities. (Tr. p. 29)

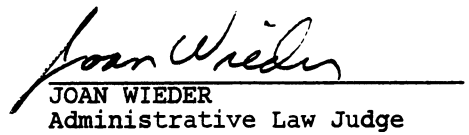
The evidence demonstrates that Ms. Foster's actions recognized Mr. Gums as a union representative acting in the course of his responsibilities and, in fact, her attempt to explain the problem to him was to enable him to clarify the matter for Mr. Salter. There was no by-passing of the exclusive representative to deal directly with an employee.

In conclusion, the evidence of record fails to demonstrate any union animous or action which threatened to deprive an employee of the rights guaranteed under the Order. There were several attempts during the meeting to provide the requested explanation as to why Mr. Salter was in a dual-pay status. There was no evidence that Ms. Foster's actions interfered with, restrained, or coerced Mr. Salter's or any other employees. Accordingly, under the facts developed in this proceeding, I find no violation of section 19(a)(1) of the Order.

RECOMMENDATION

In view of the foregoing, I hereby recommend to the Assistant Secretary that the complaint be dismissed in its entirety.

Dated and signed this 9th day of September 1977, in San Francisco, California.



JOAN WIEDER
Administrative Law Judge

December 30, 1977

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 MISSILE MATERIEL
READINESS COMMAND,
REDSTONE ARSENAL, ALABAMA
AND
U.S. ARMY MISSILE RESEARCH
AND DEVELOPMENT COMMAND,
REDSTONE ARSENAL, ALABAMA
A/SLMR No. 956

This case involved petitions for clarification of unit (CU) filed by the U.S. Army Missile Materiel Readiness Command (MIRCOM) and the U.S. Army Missile Research and Development Command (MIRADCOM), both located at Redstone Arsenal, Alabama, seeking to clarify existing bargaining units represented exclusively by the American Federation of Government Employees, Local 1858, AFL-CIO (AFGE). The record revealed that the AFGE was certified as the exclusive representative in separate units of professional and nonprofessional employees in the U.S. Army Missile Command which was subsequently disestablished and reorganized into two separate commands, MIRCOM and MIRADCOM. By the subject petitions, each Command was seeking to divide the two bargaining units into four units, i.e., two separate units of professional employees and two separate units of nonprofessional employees to conform with the reorganization. The AFGE initially took the position that the proposed clarifications would fragment its existing units, but subsequently concurred with the petitions and the parties submitted a joint stipulation in support of the proposed unit clarifications.

The Assistant Secretary found that the certified units continued, after the reorganization, to remain appropriate for the purpose of exclusive recognition. In this regard, it was noted that the reorganization did not result in significant changes in the day-to-day terms and conditions of employment of the employees involved and that the employees continued to perform the same type of work, for the most part, under the same immediate supervision. Additionally, the Assistant Secretary found that altering the units involved in the manner sought by the Activity-Petitioners, where a history of collective bargaining existed, would tend to promote fragmentation and inhibit effective dealings and efficiency of agency operations, particularly since both Commands continued to report to the same organizational Command, and were serviced by the same Civilian Personnel Office.

Accordingly, the Assistant Secretary ordered that the petitions be dismissed.

A/SLMR No. 956

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

U.S. ARMY MISSILE MATERIEL
READINESS COMMAND (MIRCOM),
REDSTONE ARSENAL, ALABAMA

Activity-Petitioner

and Case No. 40-7893(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1858, AFL-CIO

Labor Organization

U.S. ARMY MISSILE RESEARCH AND
DEVELOPMENT COMMAND (MIRADCOM),
REDSTONE ARSENAL, ALABAMA

Activity-Petitioner

and Case No. 40-7894(CU)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1858, AFL-CIO

Labor Organization

DECISION AND ORDER

Upon petitions duly filed under Section 6 of Executive Order 11491, as amended, a consolidated 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 the subject cases, the Assistant Secretary finds:

The American Federation of Government Employees, Local 1858, AFL-CIO, herein called AFGE, was certified as the exclusive representative in separate units of professional and nonprofessional employees of the U.S. Army Missile Command (MICOM). 1/ A three-year negotiated agreement covering nonprofessional employees was entered into by MICOM and the

1/ The record reveals that the AFGE was granted exclusive recognition in the nonprofessional unit in March 1967, under the provisions of Executive Order 10988, and that this recognition was subsequently amended in June 1975. The AFGE was certified as the exclusive representative in the professional unit in September 1976.

AFGE on March 6, 1975. Pending the outcome of the instant petitions, the parties are continuing the application of this agreement to all nonprofessional employees within its coverage. 2/

Effective January 31, 1977, pursuant to a reorganization, MICOM was disestablished and two separate commands were created: the U.S. Army Missile Materiel Readiness Command (MIRCOM) and the U.S. Army Missile Research and Development Command (MIRADCOM). By their petitions herein each of these Commands is seeking to divide the two bargaining units currently represented by the AFGE into two separate units of nonprofessional employees and two separate units of professional employees, to conform with the reorganization. In this regard, the Activity-Petitioners contend that the reorganization resulted in the creation of two separate commands, each having a separate mission, separate functions, and policies, and subject to separate components of the U.S. Army Materiel Development and Readiness Command (DARCOM). The AFGE initially took the position that the Activity-Petitioners' proposals would fragment its existing units, but subsequently agreed with the Activity-Petitioners and the parties submitted a stipulation in support of the proposed unit clarifications.

Prior to the reorganization, MICOM, under the authority of the DARCOM, encompassed two major program areas, missile project research and development, and missile project readiness. A study completed by higher agency authority disclosed weaknesses in the research and development area and it was determined that by establishing separate commands, problem areas could be identified and measures taken to ameliorate the situation.

Thus, subsequent to the reorganization, the Deputy Commander of MICOM assumed the position of Commander of MIRADCOM, while the Commander of MICOM became the Commander of MIRCOM. The various missile projects in MICOM were divided between MIRCOM and MIRADCOM depending upon the stage of the project's life cycle. Those in the research and development stage went to MIRADCOM, while those which had progressed through research and development and were in the readiness stage went to MIRCOM.

The record reveals that as a project moves through its life cycle, it will shift from MIRADCOM to MIRCOM, though the shift will be limited to the project itself and not to the employees working on it. As a result of the reorganization, other organizational components were divided depending upon the nature of their functions. A few components went outside both MIRCOM and MIRADCOM into completely different commands and still other components, for example, the comptroller and the systems analysis offices, were split so that these functions now appear in both Commands. Each Command supplies a variety of services to the other and,

2/ The parties never consummated a negotiated agreement covering the professional employees.

in this connection, the record reveals that services such as finance and accounting, legal and safety support, Equal Employment Opportunity support and the Civilian Personnel Office (CPO), while organizationally located in MIRCOM, provide services to MIRADCOM and other commands located at Redstone Arsenal. Both MIRCOM and MIRADCOM continue to report to DARCOM, but through separate DARCOM Deputy Commanders.

The record reveals that most of the employees in the existing units are performing the same type of work under the same immediate supervision under the two Commands as they did prior to MICOM's disestablishment. In some cases, employees have moved to a different physical location and there are some buildings on the Activity-Petitioners' premises which house components of both Commands. As was the situation prior to the reorganization, the record reveals that there is limited interaction between employees of the two Commands.

The Commanders of both MIRCOM and MIRADCOM have the authority to develop and implement personnel policies, including hiring, firing, training and recruitment, and to enter into negotiations with the exclusive representative of their employees. However, the record reveals that both Commanders, as well as those of other commands located at Redstone Arsenal, have authorized the same CPO to handle personnel matters and, when performing such duties, the CPO becomes responsible to the commander it is serving rather than to the Commander of MIRCOM wherein the CPO is organizationally located.

There are separate areas of consideration for the two Commands in reduction-in-force proceedings. The area of consideration in filling vacancies varies and is dependent upon the anticipated number of qualified applicants for any given position. Each Command develops its own budget which is submitted to higher agency authority. However, actual disbursements for purchases made by each of the Commands are made by the Finance and Accounting Division located in MIRCOM. This office also handles pay for both Commands and the processing and payment of travel vouchers.

Under all the above circumstances, I find that the certified units continue, after the reorganization, to remain appropriate for the purpose of exclusive recognition. 3/ In this regard, noted particularly was the fact that the reorganization did not result in significant changes in the day-to-day terms and conditions of employment of the employees involved in that they continue to perform the same type of work, for the most part, under the same immediate supervision. Moreover, in view of the history of collective bargaining in the units involved, and the fact that such units remain generally intact following the reorganization, to alter them in the manner sought herein by the Activity-Petitioners clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations. Rather,

3/ Cf. Naval Aerospace and Regional Medical Center, Pensacola, Florida, et al., 6 A/SLMR 47, A/SLMR No. 603 (1976), affirmed, FLRC No. 76A-18.

the result sought by the Activity-Petitioners, i.e., the establishment of four bargaining units, under the circumstances herein, would, in my judgment, tend to promote fragmentation and inhibit effective dealings and efficiency of agency operations. In this latter regard, it was noted particularly that both Commands continue to report to the same organizational command, DARCOM, and are serviced by the same CPO. Based on the foregoing considerations, I shall order that the petitions herein be dismissed.

ORDER

IT IS HEREBY ORDERED that the petitions in Case Nos. 40-7893(CU) and 40-7894(CU) be, and they hereby are, dismissed.

Dated, Washington, D.C.
December 30, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

December 30, 1977

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, BRSI,
NORTHEASTERN PROGRAM SERVICE CENTER
A/SLMR No. 957

This case involved an unfair labor practice complaint filed by the American Federation of Government Employees, AFL-CIO, Local 1760 (AFGE) alleging that the Respondent violated Section 19(a)(1) and (6) of the Order by refusing to meet and confer regarding downgradings of unit employees. It was also alleged that the Respondent committed an independent violation of Section 19(a)(1) by ejecting a union representative from a meeting where questions were raised regarding potential downgradings in such a manner as to undermine the status of the AFGE.

The Administrative Law Judge recommended that the complaint be dismissed. He found that the fact that questions regarding potential downgradings were posed during the course of a meeting called for an unrelated purpose did not transform the meeting into a formal discussion within the meaning of Section 10(e) because the Respondent neither raised the issue of proposed downgradings nor sought to discuss the issues raised by employees and, for the most part, abstained from discussing the issues since the Respondent's representative was unable to answer the employees' queries. The Administrative Law Judge also found that the evidence did not support the allegation that the ouster of the AFGE's representative undermined the AFGE's status.

The Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 957

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,
SOCIAL SECURITY ADMINISTRATION, BRSI,
NORTHEASTERN PROGRAM SERVICE CENTER

Respondent

and Case No. 30-07248(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 1760

Complainant

DECISION AND ORDER

On September 15, 1977, Administrative Law Judge William Naimark issued his Recommended Decision and Order 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 Recommended Decision and Order and the Respondent filed a response 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 Recommended Decision and Order and the entire record in the subject case, including the Complainant's exceptions and supporting brief and the Respondent's response thereto, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 30-07248(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 30, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	
DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL SECURITY ADMINISTRATION, BRSI, NORTHEASTERN PROGRAM SERVICE CENTER Respondent	Case No. 30-7248(CA)
and	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1760 Complainant	

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Corona-Elmhurst, NY 11373
For the Complainant

Before: WILLIAM NAIMARK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a Notice of Hearing on Complaint issued on March 16, 1977 by the Regional Administrator for Labor Management Services Administration, U.S. Department of Labor, New York Region, a hearing was held before the undersigned on April 21, 1977 at Flushing, New York.

The proceeding was initiated under Executive Order 11491, as amended (herein called the Order). It was based on an amended complaint filed on August 25, 1976 by American Federation of Government Employees, AFL-CIO, Local 1760 (herein called the Complainant) against Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center (herein called the Respondent). It was alleged in the amended complaint that Respondent violated Sections 19(a)(1) and (6) of the Order by refusing to meet and confer with Complainant regarding downgradings and by ejecting James Armet, acting president of the union, from a formal discussion. A response to the amended complaint was filed by Respondent on September 10, 1976 wherein it denied having violated the Order. 1/

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, briefs were filed with the undersigned which have been duly considered.

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 material herein Complainant has been, and still is, the exclusive bargaining representative of Respondent's non-supervisory employees.

2. In early May 1976 three members of the Quality Appraisal staff at the Northeastern Program Service Center, Etta Burke, Sandra Robbins (analysts) and Karen Augenbaum (reviewer), were sent to different district offices in the New England area to attend meetings re orientation on the quality appraisal study system. At these meetings the managers made suggestions concerning the feedback forms known as the "DO Feedback Report".

1/ Respondent also moved to dismiss the amended complaint on procedural grounds. No disposition thereon appears in the formal papers. In light of the subsequent issuance of a Notice of Hearing the motion is deemed denied.

This form was sent from the service center to the District Managers, and it contained findings of the Quality Appraisal section as to social security cases reviewed with mention being made of incorrect action taken thereon. The form was utilized to prevent recurrence of incorrect actions taken in respect to cases handled. At the meetings suggestions were made re the improvement of the form through more comprehensive explanation of the problems involved as well as modification of the form itself.

3. In order to acquaint the Quality Appraisal staff with the suggestions made at the District meetings, Harry Bagon, Respondent's Assistant Director of Quality Appraisal, called a special purpose technical meeting 2/ on May 19, 1976. This meeting, which commenced at 4:00 p.m., was attended by nearly all of the Quality Appraisal staff, which consisted of about 23 case reviewers and 5 analysts. Both Etta Burke and Karen Augenbaum gave an oral report to the group concerning the discussions at the New England meetings.

4. During the aforesaid meeting questions were asked by the employees regarding the teletype received from Baltimore about the survey made at the Philadelphia Program Center involving grade structures and the possible downgrading of jobs. Concern was manifested as to what might happen to both the jobs at Northeastern and the pay received by the job holders. Whereupon Bogan read relevant portions of the teletype to the staff. He advised the employees that they should remain calm; that BRSI was looking into the matter; and that he had no answer but the technical staff would answer the questions as to the effect of the survey upon the Northeastern Center. 3/

5. On May 19, 1976 4/, at about 4:15 p.m., Jack Katzker, an employee and also vice-president of Complainant notified James Armet, a benefit authorizer and vice-

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2/ Frances Buser, analyst, testifed the meeting was called to discuss a rumor of downgrading at the Philadelphia Program Service Center at the request of another analyst. There is insufficient probative evidence to establish that the meeting was so prompted or called for said purpose.

3/ No jobs at the Center were, in fact, downgraded thereafter.

4/ All dates are in 1976 unless otherwise indicated.

president of Complainant, that a meeting was being conducted by Bagon in Quality Appraisal re the downgrading in the Philadelphia Program Center. Armet agreed to look into it, and he walked from the union office to the meeting. When Armet arrived at the meeting Bagon was reading the teletype to the staff. Armet remained in the back of the room and listened to the questions from the employees and the replies given by the management official. He then called James O'Leary, vice-president of Complainant for grievances, and advised him of what he heard at the meeting. O'Leary told Armet to return and participate in the meeting as a union representative.

Whereupon Armet went back to the meeting and advanced to the front of the room. Ruth Finkelstein, Acting Chief Officer, approached Armet and asked what he was doing there. The latter said he was the union representative and was entitled to be there since the subject under discussion involved personnel policies and general working conditions. When Finkelstein reported back to Bagon, the assistant director stated that Armet should leave since he was not invited to attend the meeting. Armet protested and stated he had a right to be there as a representative of the Complainant. Bagon insisted that Armet was not entitled to be there, and the union representative then left under protest.

Conclusions

It is contended by Complainant that Respondent violated 19(a)(1) and (6) of the Order by not affording it, as the bargaining representative of the employees, an opportunity to be present at the meeting on May 19. The union insists that it should have received proper notification thereof, and that the meeting itself was a formal discussion involving working conditions under Section 10(e) of the Order, which entitles Complainant to be present and represent the employees thereat. Moreover, in addition to having acted in derogation of the union, the Respondent's actions constituted a denigration of the labor organization before the employees.

It is provided in Section 10(e) of the Order that a labor organization, which is the exclusive bargaining agent, shall be given the opportunity to be represented at formal discussions between management and employees re grievances, personnel policies and practices, or

other matters affecting general working conditions of unit employees. Whether or not a discussion is "formal" or not depends on the circumstances of each case. On the basis of the record herein, I am persuaded that the meeting held on May 19 cannot be properly characterized as a formal discussion within the meaning of 10(e). The purpose of said meeting was to render reports to the Quality Appraisal group concerning the feedback forms which were sent to the district office. It was a special technical meeting called by Bagon to permit the staff representatives, who attended the sessions in New England, to report back the suggestions made by the management officials in respect to improving said forms. The discussion focused on that subject, and consideration was given to the recommendations made at the New England conferences. No evidence supports the view that Respondent convened the analysts and reviewers on May 19 to discuss conditions of employment.

Complainant urges that, since there ensued a discussion re downgrading of employees, the meeting then dealt with working conditions and became a "formal discussion" under 10(e) of the Order. I do not agree. The fact that questions were posed, during the meeting, regarding the teletype received from the Philadelphia Service Center and possible downgrading of the unit employees did not transform the meeting into a formal discussion regarding working conditions. Management neither raised the issues of downgrading or pay, nor attempted to deal with employees regarding same. In this posture, I consider the circumstances quite dissimilar from situations where an employer summons employees to obtain input and thereby confers with the latter in derogation of the bargaining representative. Cf. FAA, Springfield Tower, Springfield, Missouri, A/SLMR No. 843. Moreover, there is no indication that Respondent even sought to discuss the issues raised by the employees of the Quality Appraisal unit on May 19. For the most part, Bagon abstained from discussing the issues since he was unable to answer their queries.

Complainant deems the communications with the group re downgrading and the possible effect upon the employees as being in derogation of its status as bargaining agent. But the Order does not outlaw all communication with employees relating to the collective bargaining relationship. There must be an attempt by the agency to by-pass the representative and negotiate directly with employees.

See Department of the Navy, Naval Air Station, Fallon, Nevada, FLRC No. 74A-80, (October 24, 1975). Despite the fact that management herein read the telegram to the employees re the action taken at the Philadelphia Program Center, I do not construe that conduct as tantamount to by-passing the union. It was an attempt to respond to a question raised by the employees as to the telegram and was, in my opinion, nowise an attempt to negotiate with the group re the downgrading or other working conditions. Under those circumstances there was no obligation to either notify the Complainant, or bargain with it, regarding the subject matter raised during the May 19 meeting. Accordingly, the exclusion of Armet from the meeting, based on his not belonging to the Quality Appraisal group, was proper and within the prerogative of management.

Moreover, I find no merit in Complainant's argument that the ouster of Armet from said meeting either undermined or denigrated the union. Bagon made no disparaging remarks about the bargaining representative, nor did he refer to the latter with disdain. He merely stated that Armet had no right to attend the meeting and asked him to leave. Such conduct is scarcely akin to utterances which indicate to employees that management views the bargaining agent with contempt so as to constitute interference under 19(a)(1) of the Order. Cf. Vandenberg Air Force Base, California, A/SLMR No. 383; and Army Training Center, Infantry, Laundry Facility, Ft. Jackson, S.C., A/SLMR No. 242.

Accordingly, and in view of the foregoing I conclude that Respondent neither engaged in a formal discussion with employees re working conditions in intravention of 10(e), nor by-passed the union representative in an effort to deal with employees as to such matters. Further, I am constrained to conclude the ouster of union agent Arnet from the meeting on May 19 was not, under the circumstances, an act of interference, restraint, or coercion under the Order. Therefore, I find Respondent did not violate 19(a)(1) and (6) of the Order.

RECOMMENDATION

It having been found that Respondent engaged in a conduct violative of Section 19(a)(1) or (6) of the Order, it is recommended that the complaint herein be dismissed in its entirety.

WILLIAM NAIMARK
Administrative Law Judge

Dated: 15 SEP 1977
Washington, D.C.

WN:mjm

December 30, 1977

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 LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, LOS ANGELES
A/SLMR No. 958

This case involved a twice amended unfair labor practice complaint filed by Paul Yampolsky (Complainant) alleging that the Respondent violated Section 19(a)(1) and (2) of the Order by giving the Complainant a performance rating based on his activities as a labor union representative, rather than as an employee of the Respondent.

At the hearing, the Complainant requested a continuance of the hearing on the following grounds: (1) The evidence adduced at the hearing could have had an impact upon a statutory appeal hearing scheduled for later in the month concerning his removal from the Federal service; and (2) his appointed representative was not present at the instant hearing due to a personal emergency of an unknown nature. The Respondent opposed the motion, contending, in part, that the Union official present at the hearing was qualified to represent the Complainant in the absence of his appointed representative. The Administrative Law Judge denied the Complainant's motion for a continuance as, in his view, neither the fact that another proceeding was pending, nor the unsupported statement that the Complainant's appointed representative had a personal emergency, was a showing of good cause. Moreover, in the view of the Administrative Law Judge, the Complainant failed to establish that the Union official present at the hearing was not capable of representing the Complainant. Thereafter, the Complainant refused to proceed.

Finding that the Complainant had failed to sustain his burden of proof in establishing that Respondent had violated the Order as alleged in the complaint, the Administrative Law Judge recommended that the complaint be dismissed.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge and ordered that the complaint be dismissed in its entirety.

A/SLMR No. 958

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEFENSE LOGISTICS AGENCY,
DEFENSE CONTRACT ADMINISTRATION
SERVICES REGION, LOS ANGELES

Respondent

and

Case No. 72-6650(CA)

PAUL YAMPOLSKY

Complainant

DECISION AND ORDER

On September 19, 1977, Administrative Law Judge Edward C. Burch issued his Recommended Decision and Order in the above-entitled proceeding, recommending that the complaint be dismissed in its entirety based on the Complainant's refusal to go forward with proof to substantiate his charges. No exceptions were filed to the Administrative Law Judge's Recommended Decision and 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 Recommended Decision and Order and the entire record in the subject case, and noting particularly the absence of exceptions, I hereby adopt the Administrative Law Judge's findings, conclusions, and recommendation. 1/

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 72-6650(CA) be, and it hereby is, dismissed.

Dated, Washington, D.C.
December 30, 1977

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ On page 3 of his Recommended Decision and Order, the Administrative Law Judge inadvertently cited Section 203.19(b)(3) of the Assistant Secretary's Regulations as Section 203.19(3). This inadvertence is hereby corrected.

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In the Matter of

DEFENSE LOGISTICS AGENCY
DEFENSE CONTRACTS ADMINISTRATION
SERVICES REGION, LOS ANGELES
Respondent

and

PAUL YAMPOLSKY
Complainant

CASE NO. 72-6650(CA)

D. William Jenkins
David Ringnell
Office of Civilian Personnel
Defense Contracts Administration
Services Region
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For the Respondent

Thomas O'Leary
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Redondo Beach, California 90277
For the Complainant

Before: EDWARD C. BURCH
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a second amended complaint filed June 6, 1977, alleging the Defense Logistics Agency, Defense Contracts Administration Services Region, Los Angeles ("Respondent") violated sections 19(a)(1) and (2) of Executive Order 11491, as amended, the Regional Administrator, San Francisco Region, June 20, 1977, issued a notice scheduling a formal hearing for July 11, 1977. At the request of Mr. Paul Yampolsky, complainant, an order rescheduling the hearing for August 3, 1977, was sent July 7, 1977.

The complaint alleged Mr. Yampolsky was given a performance rating as a labor union representative rather than as an employee of the agency.

Findings of Fact and Conclusions

August 3, 1977, respondent appeared through its counsel, ready to proceed, with numerous witnesses present. Mr. Yampolsky appeared with his representative, Mr. Thomas O'Leary. The hearing was opened, and several documents were received into evidence. A recess was then taken while the parties attempted to settle the matter. The settlement discussion was not fruitful.

During the recess Mr. Yampolsky talked to his attorney by telephone. It was reported the attorney advised him to request a continuance for the reason evidence adduced at the hearing could have an impact upon another hearing scheduled for August 24, 1977, which was an appeal of his removal from federal service. A second ground for the requested continuance was that Mr. Bill Shoats was complainant's usual representative, and Mr. Shoats could not be present due to a personal emergency of an unknown nature.

The motion for continuance was denied as not only untimely, but for the reasons there was an inadequate showing concerning absence of the usual representative and the mere pendancy of another hearing was an inadequate basis for continuance.

A one and one-half hour recess was taken to enable Mr. Yampolsky to present a greater showing of emergency.

Following the recess, no greater showing of emergency was made. Except for a delay to await the appearance of a witness, the motion for continuance was denied.

Then, using as a reason the possible effect of testimony on the scheduled removal hearing, Mr. Yampolsky refused to go forward with any evidence.

Respondent then moved for dismissal of the charges of complainant.

The Administrative Law Judge has the authority to rule upon a request for continuance. 29 C.F.R. §§ 203.16(j) and 203.19(3). As in any proceeding, a continuance should be granted only upon a showing of good cause. Prejudice must be shown to justify a continuance, and the judge's decision may not be arbitrary or capricious. Treasury Department, Bureau of Customs, Region IV, A/SLMR No. 152.

The mere fact another proceeding is pending is not a showing of good cause. Neither was there a showing Mr. O'Leary was not capable of representing the complainant. And, the unsupported statement that the usual representative had a personal emergency is not good cause.

When complainant refused to go forward with proof to substantiate his charges, he failed in his burden of proof as required by 29 C.F.R. § 203.15.1/ See 4500 Air Base Wing, Langley Air Force Base, Virginia, A/SLMR No. 760, where the Assistant Secretary adopted the Administrative Law Judge's recommendation that respondent's motion to dismiss be granted for failure of complainant to proceed with the hearing.

Recommended Order

Having found complainant has failed to prove tne allegations of the complaint, I recommend that the complaint herein be dismissed in its entirety.

EDWARD C. BURCH
Administrative Law Judge

Dated: September 19, 1977
San Francisco, California

ECB:cyy

1/ "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 OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

SOUTHERN REGION,
NATIONAL WEATHER SERVICE
A/SLMR No. 959

This case involved an unfair labor practice complaint filed by an individual (Complainant) alleging that the Respondent violated Section 19(a)(1) of the Order by dealing with the exclusive representative, rather than the Complainant as an individual, in processing the Complainant's prior unfair labor practice charge.

The Administrative Law Judge concluded that the Respondent had not engaged in conduct violative of the Order. He noted that the Respondent, at worst, had mistakenly, for a brief time, dealt with the wrong party to resolve the complaint and that the Respondent, once advised of the mistake, attempted to deal with the Complainant within the prescribed 30 day period. Accordingly, the Administrative Law Judge recommended that the complaint be dismissed.

Noting particularly the absence of exceptions, the Assistant Secretary adopted the findings, conclusions and recommendations of the Administrative Law Judge and ordered that the complaint be dismissed.

A/SLMR No. 959

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

SOUTHERN REGION,
NATIONAL WEATHER SERVICE

Respondent

and

Case No. 63-7107(CA)

ORVIL ROBINSON

Complainant

DECISION AND ORDER

On October 26, 1977, Administrative Law Judge Edward C. Burch issued his Recommended Decision and Order 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 Recommended Decision and 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. 1/ The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in this case, and noting particularly that no exceptions were filed, I hereby adopt the Administrative Law Judge's findings, 2/ conclusions and recommendations.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-7107(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
December 30, 1977

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

1/ At the hearing, the Administrative Law Judge overruled the Respondent's objection to his determination that the record herein would remain open for ten days subsequent to closing of the hearing, so that a witness of the Complainant could be allowed to testify by affidavit. Subsequent to adjournment, a statement was received into evidence by the Administrative Law Judge. In view of the fact that no apparent weight was given to the statement by the Administrative Law Judge, and that no exceptions were filed herein, I find that no prejudice was suffered by the Respondent as a result of the Administrative Law Judge's ruling. Cf. National Weather Service, A/SLMR No. 847, at footnote 1 (1977).

2/ In reaching my conclusion herein, I specifically do not adopt the Administrative Law Judge's interpretation of the decision in Veterans Administration Hospital, Charleston, South Carolina, 1 A/SLMR 400, A/SLMR No. 87 (1971) that the dilatory processing of an unfair labor practice complaint is a violation of the Order. In this regard, I note particularly that the violative conduct found in the above cited decision pertained specifically to the Respondent Activity's dilatory tactics in the processing of a grievance under the negotiated grievance procedure.

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In the Matter of

SOUTHERN REGION
NATIONAL WEATHER SERVICE
Respondent

and

ORVIL ROBINSON
Complainant

Case No. 63-7107(CA)

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For the Respondent

Before: EDWARD C. BURCH
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Statement of the Case

Pursuant to a complaint filed November 26, 1976, under Executive Order 11491, as amended ("The Order") by Orvil Robinson against the Southern Region, National Weather Service, a Notice of Hearing on Complaint was issued by the Regional Administrator for the Kansas City Region on June 29, 1977. The Complaint alleged that by letter dated August 4, 1976, mailed to Carl Tyozandlak, Acting Chairman, Southern Region Council of Locals, NAGE, respondent did interfere, coerce and restrain complainant from exercising his right to file an Unfair Labor Complaint as guaranteed by the Order and in violation of section 19(a)(1) of that Order. The crux of the complaint is that respondent allegedly refused to deal directly with Mr. Robinson and instead attempted to deal with the union, thus hindering Mr. Robinson in his desire to prosecute this complaint. A hearing was held in El Paso, Texas, August 9, 1977, at which time exhibits were received and witnesses examined.

Following the hearing the unsworn statement of Alan J. Whitney, entitled "Affidavit" was received. It has been marked and received as Complainant's Exhibit No. 7(C-7). In addition, the complaint has been marked and received as ALJ Exhibit No. 1.

Upon the basis of the entire record the following findings of fact, conclusions and recommendations are made.

Findings of Fact and Conclusions

Two complaints have been filed by complainant alleging Unfair Labor Practices, of which this is the second. This complaint alleges a violation occurred in the way the first complaint was handled.

It is contended respondent "actively pursued a course during the processing of the (first) pre-complaint charge filed by Mr. Robinson which necessarily had a chilling effect on Mr. Robinson...."

Complainant alleges respondent's tactics were dilatory and were intended to interfere, restrain, and coerce complainant in violation of section 19(a)(1) of the Order.

The regulations, 29 C.F.R. § 203.1 "Who May File Complaint," provide:

> "A complaint that an activity, agency or labor organization has engaged in an act prohibited under section 19 of the Order or has failed to take any action required by the Order, may be filed by an employee, an activity, agency, or a labor organization."

Hence, it is clear a complaint may be filed by an individual, and it is clear that individual need not file through a labor organization.

July 18, 1976, complainant sent the first pre-complaint letter (C-1). The letter read as follows:

> "This is an Unfair Labor Practice charge against the National Weather Service for violation of Executive Order 11491 §§ 19(a)(4) and 19(a)(2).
>
> On or about July 13, 1976, at 1:10 p.m. in the National Weather Service office, El Paso, Texas, Robert Orton, meteriologist in charge, handed me a written admonishment for the record in order to discriminate against me for my union activities. Orvil Robinson"

Complainant, at the time, was the grievance coordinator and the president of the National Weather Service local.

The letter that gives rise to the complaint in question (Exhibit C-5) was dated August 4, 1976, was from B. B. Boatman, Labor Management Relations Specialist for the southern region of the National Weather Service, and was directed to Mr. Carl V. Tyozandlak, Acting Chairman for the Southern Region Council of Locals, NAGE, a carbon copy was sent to complainant, and it contained a copy of complainant's letter of July 18, 1976.

It is to be noted that the day complainant sent his letter of July 18, 1976, he went on leave and was not available until August 4, 1976. It is to be further noted that under the agreement between the respondent and the union exclusive recognition was at the regional level.

Mr. Boatman testified that he was aware complainant was both the grievance coordinator and the local union

president when the letter of July 18, 1976 was sent. Mr. Boatman believed complainant was filing a union, and not an individual, complaint. Mr. Boatman further testified he had received an indication Mr. Tyozandlak was working with Mr. Robinson in preparing an unfair labor practice complaint. The basis of this belief was a letter from Mr. Tyozandlak to complainant dated July 12, 1976, (Exhibit R-3). It was for these reasons Mr. Boatman wrote the letter of August 4, 1977. I found Mr. Boatman to be a believable and forthright witness, and I credit his testimony.

It was during an August 9, 1976, telephone conversation between Mr. Tyozandlak and Mr. Boatman that the latter was advised that the former believed the complaint to be an individual complaint and not a union complaint. Mr. Boatman thereafter treated the complaint of Mr. Robinson as an individual complaint and not as one made by a union official. Thereafter correspondence was direct with Mr. Robinson.

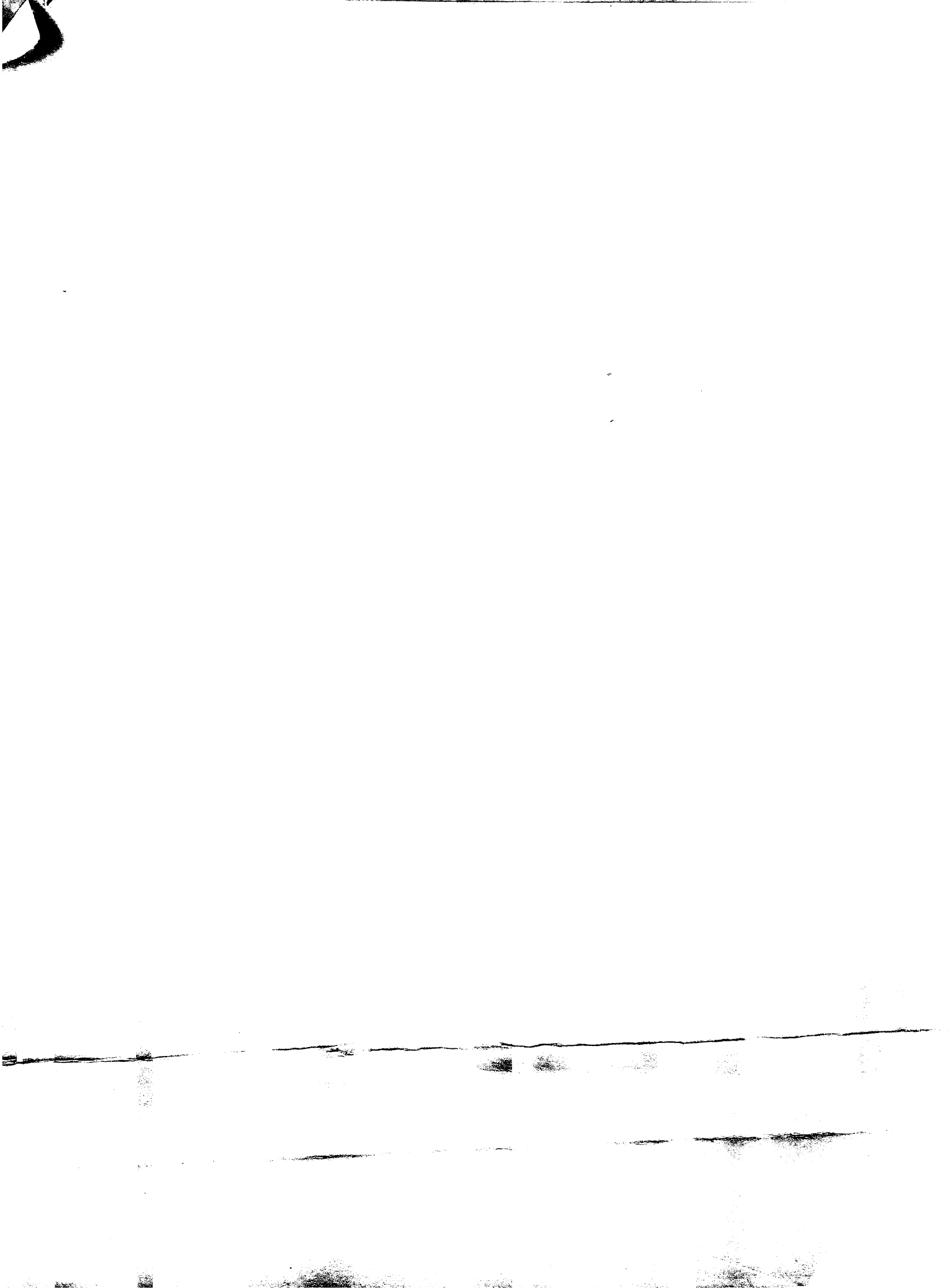
August 11, 1976, Mr. McCutcheon, personnel officer for the Southern Region of the National Weather Service, wrote to Mr. Robinson and suggested resolution under the informal agency grievance procedures.

29 C.F.R. § 203.3 provides as follows:

> "A party desiring to file a complaint alleging an Unfair Labor Practice under section 19 of the Order ... must take the following action first: ...
>
> "(b)(1) if the parties are unable to dispose informally of the charge within thirty days the charging party may file a complaint...."

Thus, complainant was unable to file a formal complaint until August 18, 1977. Long before that date Respondent was dealing with complainant individually. And, as noted previously, it was not possible to deal with complainant until he returned from leave after August 4, 1976.

Of course, dilatory processing of an Unfair Labor Practice complaint is a violation of the Order. Veterans Administration Hospital, Charleston, A/SLMR No. 87. As pointed out by the Assistant Secretary at page 404 of that decision, however, "a test of reasonableness must be



applied on a case by case basis."

So viewing the instant case not only do the actions of respondent appear reasonable, but I do not believe they had a "chilling effect" upon the complainant.

The worst that can be said of respondent is that respondent mistakenly, for a brief time, dealt with the wrong party in an attempt to resolve the complaint. In U. S. Department of the Army, U. S. Army Missle Command, Huntsville, Alabama, A/SLMR 367, a similar situation arose. Respondent there questioned that the union representative was the correct agent with whom respondent was to negotiate. Upon being advised the agent was indeed the correct person, respondent then met and attempted informal resolution within the prescribed thirty-day period. The Assistant Secreatary there concluded:

> "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 charge."

The facts of this case warrant a similar result.

Recommendation

Having found that respondent has not engaged in conduct violative of section 19(a)(1) of the Order, I recommend that the complaint herein be dismissed in its entirety.

EDWARD C. BURCH
Administrative Law Judge

Date: October 26, 1977
San Francisco, California

ECB:tl

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